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CASES

DECIDED IN

THE COURT OF SESSION,

COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM JULY 29, 1895, TO JULY 27, 1896.

REPORTED BY

MIDDLETON RETTIE, HUGH J. E. FRASER,
GEORGE L. MACFARLANE, AND JOHN BOYD,
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OF THE

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DURING THE PERIOD OF THESE REPORTS.

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Lord M'LAREN.
Lord KINNEAR.

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* Lord Rutherfurd Clark resigned office at the end of the Winter Session, and was succeeded in the Second Division by Lord Moncreiff.

† Lord Moncreiff was succeeded in the Outer-House by Lord Pearson.

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WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE PERIOD OF THESE REPORTS.

Lord Chancellor, LORD HALSBURY.

Lords WATSON, HERSCHELL, ASHBOURNE, MACNAGHTEN, MORRIS, SHAND, and DAVEY.

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ERRATA.

P. 17, line 1 from foot, *for* "(H. L.) 90" *read* "(H. L.) 40."
P. 556, line 22, *for* "announce" *read* "pronounce."
P. 581, footnote, line 26, *for* "Addison" *read* "Anson."
P. 738, line 14 from foot, *for* "M'GAIRGAN" *read* "M'GAVIGAN."
P. 885, line 20 of rubric, *for* "pursuer" *read* "defender."
Justiciary, p. 17, line 26, *for* "refute" *read* "repeal."

CASES

DECIDED IN

THE HOUSE OF LORDS.

1895-96.

HENRY SMITH & COMPANY (Defenders), Appellants.—*Cohen, Q.C.—Aitken.*

BEDOUIN STEAM NAVIGATION COMPANY (Pursuers), Respondents.—*Bigham, Q.C.—Boyd—Alexr. Robertson.*

No. 1.

Nov. 26, 1895.
Smith & Co. v. Bedouin Steam Navigation Co., Limited.

Ship—Bill of Lading—Short Delivery—Proof—Onus.—In an action by a shipowner for payment of freight the defenders claimed to retain the value of twelve bales of jute short delivered of the quantity specified in the bills of lading. The pursuer in reply stated that he had delivered the whole quantity received on board the vessel, and denied further liability.

A proof shewed that the cargo of jute had been put on board the vessel from boats in the River Hooghly; that the bales were checked by tallymen engaged by the shipowner as they were put on board; that on each boat-load being discharged the chief officer compared the tally-book with the shipper's boat note, and granted a mate's receipt; that the bills of lading were made up from the mate's receipts. These documents were produced along with the bills of lading. The shipowner led evidence tending to shew that the bales of jute, which were each 400 lbs. in weight, could not have been removed from the ship after being put on board.

Held (*rev.* judgment of Second Division) that having regard to the way in which the delivery of the goods had been checked by the ship's officers, and the receipt acknowledged in the bill of lading, the evidence led by the shipowner was not sufficient to shew that the twelve bales had not been put on board the vessel, and that he was responsible for the quantity specified in the bills of lading.

(IN the Court of Session, Feb. 5, 1895, 22 R. 350.)

Ld. Chancellor (Halsbury). Lord Watson. Lord Shand. Lord Davey.

In March 1894 the Bedouin Steam Navigation Company, Limited, of Liverpool, owners of the steamship "Emir," brought an action against Henry Smith & Company, jute spinners, Dundee, for payment of £35, 7s. 2d., as the balance of freight alleged to be due to them for the conveyance by the "Emir" of 500 bales of jute from Calcutta to Dundee.

In defence Smith & Company stated that two parcels of jute of 500 bales each (the markings of which they set forth and which closely resembled each other) were shipped on board the "Emir," at Calcutta, by Ernsthausen & Company, and by the Arracan Company, Limited, respectively; that the master of the "Emir" granted bills of lading for each of these lots of 500 bales; that the defenders as onerous indorsees and holders of the bills of lading took delivery of the jute at Dundee, but that the pursuers failed to deliver twelve bales of the total 1000; and that the value of these twelve bales was £35, 7s. 2d.

The defenders pleaded;—(2) The pursuers having failed to deliver to the defenders the whole of the jute contained in the said bills of lading, and the defenders being entitled to set off the value of the

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short delivery against the claim for freight, the defenders ought to be assoilzied, with expenses. (3) The pursuers having failed to deliver the whole bales received on board by them, and for which the said bills of lading were granted, the defenders are entitled to deduct the value of the bales short delivered from the freight.

The pursuers, in reply, alleged that they had delivered the whole quantity of jute put on board the vessel.

A proof was allowed.

It appeared that the total cargo of the "Emir" was 25,483 bales of jute, according to the bills of lading, and the total short delivery was 79 bales. The bales averaged about five to the ton. The evidence of the ship's officer who superintended the loading of the vessel is given in the Court of Session report, 22 R. 351, foot-note.

The pursuers' evidence went to shew that it was highly improbable that bales could have been removed from the vessel during the loading or afterwards.

The Lord Ordinary (Kyllachy) assoilzied the defenders.

The Second Division recalled the Lord Ordinary's judgment, and gave decree for the pursuers.

The defenders appealed.

LORD CHANCELLOR.—In this case it appears to me that the question which your Lordships are called upon to determine is a pure question of fact. I think there are no circumstances in this case which would justify one in laying down any general proposition from which the conclusion can be deduced. The conclusion which we ought to arrive at is one that arises from the facts in proof in this case; and I myself rather protest, when one is dealing with questions of fact, against laying down any rules that are not applicable to the particular case as it comes before us. Each case in turn differs in its circumstances, and there is no doubt that from time to time in the course of a cause the burden of proof may shift from one side to the other many times.

In this case, undoubtedly, there was evidence that these goods which are now in dispute had been shipped on board this vessel. When I say there was evidence, I am not certain that one gets to any more definite idea of what the proposition is by calling it *prima facie* evidence, or by calling it by any other name which appears to diminish the value and the cogency of the evidence itself. *Prima facie* evidence may be very weak, or *prima facie* evidence in the ordinary sense of the words may be very strong. I think it is a proposition which is attributed to Lord Wensleydale, although I have not been able to verify it, that a man cutting a tree in a field was *prima facie* evidence that he was seised in the fee-simple of the land. That puts, I suppose, in the strongest point of view, what may be said to be the logical conclusion from the circumstances which are presented in evidence, and in the extreme case that Lord Wensleydale gave I suppose it would be very easy to displace that *prima facie* evidence, if it is *prima facie* evidence, by other circumstances shewing that it was not in the exercise of his own right that he was cutting down the tree, but in the exercise of somebody else's right. In the particular case with which your Lordships have to deal there is a receipt—I am using now popular words, because I do not think the particular form in which this question arises ought to

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weigh much upon one's attention; it is a receipt for goods—that is what it amounts to—given by the person who was authorised to give the receipt for the goods for the express purpose of making evidence against the person who received them. Whether it is a receipt for goods, or whether it is a receipt for money, or whether it is a receipt for anything else, I suppose no one can doubt that, without explanation and without shewing that there was some mistake made in the receipt, or that the receipt was given under a mistake, or that it was induced by fraud, the conclusion to which any tribunal having that question before it must necessarily come is that unless displaced by evidence, unless some such topic as that is suggested, the ordinary result follows that the thing which was done as an acknowledgment of the receipt must have its due effect given to it. In truth, if that were not so, it would be impossible to conduct business at all. It is true that in the case of this class of mercantile documents, which has a force and effect of its own and involves the rights of other people, it is more important to assert what I have been suggesting than in the case of other documents; but in truth it is, when you come back to it, a mere question of fact, Were those goods received on board or not? To my mind, no evidence has been given by the other side—no evidence at all—leading to any such conclusion as should upset the value, or the force, or the effect of the document so given. In saying that, I do not deny that everybody on board—I am overstating the case on that side, because some of them were not called—may have given evidence perfectly *bona fide* in the belief that their vigilance was not eluded. But what then? It is not the first time in my experience that I have heard a whole body of evidence given from which, if you believed it, the logical conclusion would be that the goods were not lost at all, and yet they were lost, and this fact must be accounted for.

Now, my Lords, it appears to me that this being the merest question of fact, there is no evidence to displace the evidence of the document to which I have referred—the bill of lading. In speaking of the document I have used, as I said, popular terms, because I quite agree that one must trace up the bill of lading to its source—the mate's receipt and the tallymen's books; but all these things ultimately concur in producing the document which is the subject-matter of the controversy. It appears to me beyond all reasonable doubt that there is evidence of a cogent character, not displaced by any other evidence, not shaken in its effect or value by what has taken place before the Courts below. Under these circumstances, it seems to me that the only logical course which your Lordships can pursue is to give effect to the evidence that has been given, and refuse to act on mere conjecture or guesswork as to how these goods may have been lost if in truth they got on board. To my mind, the cardinal fact is that the person properly appointed for the purpose of checking the receipt of the goods has given a receipt in which he has acknowledged, on behalf of the person by whom he was employed, that those goods were received. If that fact is once established, it becomes the duty of those who attempt to get rid of the effect of that fact to give some evidence from which your Lordships should infer that the goods never were on board at all. Under those circumstances, no such evidence having been given, I move your Lordships that this judgment be reversed, and the judgment of the Lord Ordinary be restored.

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LORD WATSON.—The rule of law applicable to this case appears to me to be settled beyond dispute. The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel; but, when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can shew that the whole or some part of it was in fact not shipped. If the owner is able to satisfy that *onus*, by proving a short shipment, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading, even in a question with an onerous holder.

The facts of the present case which are not in controversy are that the master of the steamship "Emir," owned by the respondents, received in the River Hooghly, for conveyance to the port of Dundee, two parcels of jute, and signed two bills of lading, each for 500 bales, which were purchased by the appellants. The bales in each parcel were marked in the same way. The respondents have made delivery of 988 bales, and they allege and have led evidence with the view of proving that the remaining twelve bales were not shipped. The Lord Ordinary (Lord Kyllachy) found that they had failed to substantiate their allegation, but his decision was reversed by the learned Judges of the Second Division, who held it to be established that the twelve bales in question had not been put on board the "Emir." In these circumstances, although the issue raised is purely one of fact, your Lordships must determine which of these conflicting decisions ought to be sustained.

When evidence has been adduced for the purpose of instructing short shipment, I do not think it is of any advantage to examine critically the principle upon which his master's acknowledgment is held to bind the shipmaster when it is not contradicted by proof. Whether, when it is uncontradicted, the acknowledgment ought to be regarded as affording *prima facie* evidence, or as giving rise to a presumption that the goods were actually shipped, or in any other light, is not to my mind of materiality in the circumstances of this case. After inquiry such acknowledgment simply becomes part of the proof; its value must be tested with reference to the rest of the evidence; and the fact of shipment or non-shipment must be determined according to the import of the evidence taken as a whole. The importance of the bill of lading, as an adminicle of proof, is generally due to the fact that the statement of quantity which it contains, although not within the personal knowledge of the master, is made by him on the faith of information derived from his mate, and from servants of the ship who are employed for the express purpose of noting and checking the amount of cargo actually put on board. If there be no direct proof that, on the occasion when the disputed cargo was noted by the tallyman as having been shipped, there was a departure from or violation of the usual system of check followed by the ship, that circumstance is calculated to enhance the weight of the master's acknowledgment, because it tends to the reasonable inference (not necessarily conclusive) that the information conveyed to the master was correct.

I have fully considered the whole evidence in this case, both oral and documentary, with the result that I prefer the conclusion of the Lord Ordinary to that of the Second Division. After the observations made by the Lord Chancellor I do not think it necessary to enter into a detailed criticism of the proof. There is no evidence tending to shew directly that, at the

time when the two parcels of jute were loaded, there was an error committed to the extent of twelve bales in the quantities noted, whether in consequence of fraud or of any other cause. That being so, the respondents' case must fail unless the other circumstances disclosed by the evidence are sufficient to warrant the inference that such error was actually committed. In my opinion they are not sufficient for that purpose, and I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD SHAND.—I am of the same opinion. The matter in controversy is one simply of fact to be determined on the evidence; and the question to be decided is, whether the respondents have proved that there was a short shipment of twelve bales of jute—that is, of twelve bales less than the captain, by the terms of the bill of lading, acknowledged to have been received. The *onus* is clearly on the respondents to prove the alleged short shipment, not only because of the bill of lading, but because it has been proved that the quantity of bales there acknowledged was fixed after the number and marks on the bales shipped had been carefully checked by tallymen employed by the shipowners under the superintendence of the chief mate, and after the mate had himself granted receipts to the lightermen representing the shippers corresponding as to quantities with the tallymen's notes. These detailed notes—the mate's receipts and the bills of lading—all evidence of acts by servants of the shipowners, form a strong and consistent body of proof that the shipment acknowledged under the captain's hand was actually made, and impose a heavy *onus* on the shipowner who alleges that nevertheless there was a deficiency, through non-shipment, in the quantity of goods shipped. What is the extent of this *onus?* Proof must be met by counter proof, and that counter proof will be insufficient if it be not strong enough to displace the consistent and clear evidence of the acts of the shipowners' own servants or employees. It will not be sufficient to shew that fraud may have been committed, or to suggest that the tallymen may have made errors or mistakes, in order to meet a case of positive proof on the other side. It must be shewn that there was in point of fact a short shipment—that is, the evidence must be sufficient to lead to the inference not merely that the goods may possibly not have been shipped, but that in point of fact they were not shipped. Any proposition short of this would appear to me to give less effect to the evidence of the shippers than that evidence ought to have, and unwarrantably to diminish the *onus* which that evidence has thrown on the shipowner.

Tried by this standard, I am of opinion with your Lordships that the judgment of the Lord Ordinary was right and ought not to have been disturbed. It is said that there is a body of proof, not as to fraud or error to the extent of twelve bales in regard to the particular quantities shipped and checked in detail, but generally that the whole quantities of jute (whatever these were) shipped on board at Calcutta were carried to Dundee and delivered there. For my part, I cannot at all place such reliance on general evidence of this class as on proof of detailed and careful checking of goods as they came on board followed by the mate's receipts and the bills of lading. To do so would very much destroy the value of bills of lading even where, as here, these are supported by proof that the materials

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on which the bills of lading proceeded were obtained after much care and pains taken to ensure correctness of quantities; whereas if the shipowner be held to be bound or affected by the acts of his own servants, this will only tend to make them all the more careful in the discharge of their duties, and especially careful to avoid giving bills of lading for goods not actually delivered to their custody.

It may be quite true that the fair inference from the whole evidence here is that there was no opportunity for the abstraction of bales at the ports at which the vessel called on her homeward voyage or on her arrival at Dundee, and that such cargo as was once put into the hold remained there till the end of the voyage. But proof of all this is not sufficient for the shipowners' case. The evidence does not make it quite clear that bales to the number of twelve may not have been removed from the ship's deck after being placed there and taken away by the lighters, particularly during work carried on in the evenings after dark. The use of the steam winch and tackle would not have been necessary for this purpose. It is said this suggestion is a speculative one only; and if the *onus* lay on the shippers the observation would be a very weighty one. No one can say that there is proof that such abstraction did take place. But it is for the shipowners to displace the shippers' evidence furnished by the acts of their own servants. It appears to me they do not do so by proof which does not exclude the possibility that the bales in question might have been abstracted from the ship's deck, or which does not make this so highly improbable that such a suggestion must be entirely thrown aside; for if this might have taken place they have failed to discharge the *onus* which lies on them of adducing such evidence as is sufficient to satisfy the Court that there was actual short shipment.

On these grounds, I concur in thinking that the judgment complained of should be reversed, and the judgment of the Lord Ordinary restored.

Lord Davey.—I concur with your Lordships that the bill of lading founded on the other documents which have been brought before us was *prima facie* evidence in favour of the appellants, which threw upon the respondents the *onus* of displacing it by evidence that the full quantity of the goods was not in fact shipped; and, without saying that there was no evidence, I concur with your Lordships in thinking that the burden has not been discharged by the respondents.

Judgment appealed from reversed, judgment of the Lord Ordinary restored, respondents to pay costs of the action in the Court of Session and of the appeal.

Downing, Holman, & Co.—Boyd, Jameson, & Kelly, W.S.—W. A. Crump & Son—Lindsay & Wallace, W.S.

No. 2.

Feb. 17, 1896. Johnstone v. Haviland.

Henrietta Maria Johnstone and Others (Johnstone's Testamentary Trustees) (Defenders), Appellants.—*Johnston—C. K. Mackenzie.*
John Haviland and Others (Strachey's Marriage-Contract Trustees) (Pursuers), Respondents.—*Sol.-Gen. Murray—Dickinson—Sym.*

Succession—Marriage-contract Provision—Legacy—Satisfaction—Debitor non præsumitur donare—Proof—Extrinsic Evidence.—In an antenuptial

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marriage-settlement between S. and C., his intended wife, J., a stranger, covenanted to pay, at his death, to the marriage-contract trustees £4000 free of duty, with interest at 4 per cent from that date till payment, to be held for C. and her husband, or survivor, in liferent, and their children in fee, and failing children, to be held for J. absolutely. By the marriage-contract C. was bound to assign *acquirenda* to her marriage-contract trustees to be held in trust for behoof of herself and her children, and failing children, her executors. By his trust-disposition and settlement J. directed his trustees to pay "a legacy" of £4000 to C., providing that she should be allowed 5 per cent interest so long as she should allow it to remain "as part of the share of the Indigo Concern." *Held* (1) (*aff.* judgment of Second Division) that this legacy was not in satisfaction of the marriage-contract provision, and that J.'s trustees were bound to pay both sums; and (2) that J.'s trustees were not entitled to lead evidence to shew that J. used the word "legacy" as meaning "provision."

(In the Court of Session, Feb. 22, 1895, 22 R. 397.)

Mr Johnstone's trustees appealed.

The appellants asked for a remit to allow evidence to be led to shew that Mr Johnstone believed that in making the legacy he was implementing his obligation in the marriage-contract.[1]

Ld. Chancellor (Halsbury).
Lord Watson.
Ld. Herschel.
Lord Macnaghten.
Lord Morris.
Lord Shand.

Lord Chancellor.—In this case the question is susceptible of a very short solution. Had the English rule of law prevailed, I am not quite certain that we should not have been involved in this case in a good many difficulties; what the ultimate decision might have been it is immaterial to inquire. The English law, of course, is now established, as Lord Wensleydale said in *Kippen* v. *Darley*,[2]—"The rule is now by a long course of decisions firmly and fully established, and cannot be disputed." He adds, what I entirely concur with, "and any comment upon it would now be worse than useless." But after the decision of *Kippen* v. *Darley*[2] it is no longer competent to your Lordships to assume that the rule of law—the presumption arising from what are called double portions—is applicable to the law of Scotland. That was a decision upon that very question in this House, and we are therefore remitted to the simple question as it arises under Scottish jurisprudence.

Now, although the two sets of provisions are very different, both in their application and in the decisions upon them, there is one observation which was made by Sir John Leach with reference to the English rule which is, to my mind, applicable to the Scottish rule. Sir John Leach said in *Weall* v. *Rice*[3],—"It is not possible to define what are to be considered as slight differences between two provisions." "Slight differences," he adds—and one cannot help observing that after the learned Judge had said it is not possible to define, he begins with something like a definition—"are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature; and every Judge must decide that question"—of what are slight differences—"for himself." My Lords, I believe that to be perfectly true as applicable to the construction of the instrument now under your Lordships' consideration, and although I propose to mention one or two

[1] *Ex parte* Pye, 2 Wh. and T., 5th edn. 377, 6th edn. 401; Booker v. Allen, 2 Russ. & My. 270.

[2] 3 Macq. 258, 30 Scot. Jur. 567.

[3] 2 Russ. & My. at p. 268.

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differences between the two provisions, I protest against anybody hereafter arguing from the particular provisions to which I refer that I am laying down, or affecting to lay down, any general proposition which governs other instruments. I am speaking of this instrument with all its circumstances, with all its conditions, and the language which I find therein. There is no greater source of error than, where you have been dealing with one instrument, and dealing with it upon what are general principles of construction, and pointing to the particular provisions of it as exhibiting the necessity of applying those general principles of construction, to apply any observations made with regard to the particular language used, or the particular circumstances in which the language is used, as amounting to a general canon of construction which is applicable to all other instruments whatsoever, though the language may be different, though the collocation may be different, and though the circumstances with which the instrument is dealing may be entirely different. I am therefore only endeavouring to construe this particular instrument; and when I look at the two instruments in this case, it appears to me that they differ in very material particulars. There is in the one instrument the language of gift. There is in the other instrument the language of obligation. And I find that where the two things are dealt with they are dealt with differently. In the first deed the obligation is an obligation to the trustees; whereas in the second deed the gift is a gift to the lady herself. And although it may be perfectly true that the gift to the trustees was for the benefit of the lady herself, I am endeavouring to find out from the language of the instrument itself what was in the mind of the testator at the time when he wrote those words; and I cannot doubt that the person who writes these words has in his mind the fact that the provision he has already made for the trustees is a different thing from giving to the lady herself. And although it will, indeed, by a circuitous process, perhaps, come round to the trustees, yet it is not the same thing. Therefore, when I am asked to say whether these two are to be read as one, and the one is to be in substitution for the other, I cannot entertain the smallest doubt that the person who wrote these words was under the impression that he was doing what he said he was doing—making a gift, and not implementing the obligation into which he had already entered.

For these reasons—and they are very short and simple ones—it appears to me that we must affirm the judgment of the Court below; and I confess it seems to me that it would be very difficult, getting rid as I say of the confusion that has arisen in some of the English cases from a different rule of law, to suggest that anybody can read these two documents and suppose that the one was intended to be in substitution for the other. That seems to me to be enough to say on the principal argument addressed to us, long as that argument lasted.

With regard to the question of interest, I entirely decline to deal with that. I neither understand that any such question was properly raised in the Court below, nor that there are any materials upon which your Lordships could properly entertain the question again. The fact that interest of some sort or other was admitted to be due, or was not contested to be due, is conclusive against the point as to there being any right to recover it; and

if it comes to be a mere question of the amount of interest which ought to be allowed, I have neither the materials nor does there appear to be any ground for altering what the Court has already done.

For these reasons I submit to your Lordships that the proper judgment is, that the interlocutor should be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—I agree with the Lord Chancellor in thinking that there is according to the law of Scotland no presumption which necessarily governs the decision of the present case. The Court have to consider together the obligatory provision made in favour of Mrs Strachey by her marriage-contract, and the voluntary provision which is made in her favour by the will of the late Mr Johnstone; and to determine whether the testator meant to substitute the second of these provisions for the first of them. I think the only materials to which we can legitimately refer in deciding that question are, first, the terms of the marriage-contract, and in the second place, the terms of the settlement, which must be read in the light of a known maxim of Scottish law, *Debitor non presumitur donare*. But that maxim will only prevail in cases where, according to the opinion of the Court upon the terms of the documents, the construction of the will favours the substitution of a new and substantially similar provision for the onerous provision which had been previously made in the marriage-contract.

With regard to this case, having indicated the view which ought to be taken in considering it, I have only to add that I agree in the conclusion which has been expressed by the Lord Chancellor. *Prima facie* there is the gift as a legacy. I do not say that is sufficient by itself, but in this case it is coupled with such differences in the character of the two provisions that the one cannot in my estimation be held to be in substitution for the other.

With regard to the tender of evidence made by the pursuer at the Bar, whatever authority there may be for the admission of such evidence in the law of England, it is contrary to the rules of the law of Scotland. The other points pleaded by the learned counsel were very technical, and are open to this objection, that they are not pleaded on the record, and were not considered by the Court below.

LORD HERSCHELL.—I am of the same opinion. I think the maxim which has been so often referred to is a maxim which embodies common sense; it is only this, that a debtor is not presumed to make a gift. That is, of course, very far from implying that he may not perfectly well make a gift. I take it to mean this, and this only, that where a debtor makes a disposition of his property in favour of his creditor under circumstances such that a gift would be presumed in the case of a person who was not his creditor, it will not be presumed in the case of a person who is; it will then be regarded as a discharge of his obligation. But if there are circumstances which indicate that he did not intend it to be a mere discharge of his obligation, but intended to benefit the creditor and so make that person an object of his bounty, then it is just as effectual as though no such relationship existed between them. It comes then to be a question of fact to be determined in each case, whether there is enough to shew that he did not intend the disposition to be in satisfaction of his obligation, but did intend it to be a gift.

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I agree with my noble and learned friends who have preceded me that there is ample to shew this in the present case. I am not going over the circumstances again beyond stating that my mind is influenced not by one thing alone but by a combination of things—by the fact that it is described as a "legacy," by the circumstance that it is given to the lady and not to the trustees to whom the obligation was; and if it be said in answer that the testator would know that giving it to her was the same thing as giving it to the trustees because of the covenant she had come under, then I say, in reply to that, you must again take into account the fact that he gives it coupled with a benefit or privilege which she could not enjoy if those trusts were carried out. Taking all those considerations together, I am satisfied that it was intended to be a gift, and not in satisfaction of an obligation.

LORD MACNAGHTEN.—I am of the same opinion. I do not think effect could be given to the argument on behalf of the appellants without overruling, directly or indirectly, the judgment of this House in *Kippen* v. *Darley*.[1] Once it has been established that the rule against double portions does not obtain in Scotland, it appears to me there is no substantial ground on which it can be contended that the obligation of the marriage settlement has been extinguished by the will.

LORD MORRIS.—I concur.

LORD SHAND.—I am also of the same opinion. I think there can be no doubt that, according to the law of Scotland in a case of this class, the maxim *Debitor non præsumitur donare* has a direct application in the first instance. The testator had three years before he made his will come under an obligation to pay a sum of £4000 to marriage-contract trustees for behoof of Mrs Strachey and any children of the marriage. When we find that three years afterwards when he made his will he gives the lady the same sum, I think the presumption is against donation. Accordingly, if there had been here a mere direction to the trustees to pay the money to the marriage-contract trustees or even to herself, and nothing beyond that, or if the words used were not to be held by implication to go further, the maxim would have received effect. But, my Lords, the language of the will, I think, shews that he did not intend merely to discharge a debt, but to confer an additional benefit. Your Lordships have referred to most of the circumstances which lead to this inference, and I shall not enlarge upon them, but they are mainly these:—In the first place, there is the use of the word "legacy." As to that I agree with what was said by Lord Moncreiff in the *Balfour* case,[2] which has been referred to, that though that is not necessarily conclusive, it must be held to be of great weight in a case of this kind. It rather implies gift than payment of debt. But in addition to this we have, as has been pointed out, the circumstance that the two sums are payable to different persons, namely, the provision to the trustees of the marriage-contract, and the legacy to Mrs Strachey herself. Then what seems to me to be much more material is the further fact, that in giving this legacy there are two benefits or advantages given to Mrs

[1] 3 Macq. 203, 30 Scot. Jur. 563.
[2] Balfour v. Balfour's Trustees, March 10, 1842, 4 D. 1044.

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Strachey which she never could have had under the marriage-contract. The first of these is that the legacy when given by her to the marriage-contract trustees under her obligation to transfer *acquirenda* to them is to be held on a different destination from that of the marriage-contract provision. The ultimate destination under the marriage-contract in case of the failure of issue is that the sum provided is to revert to Mr Johnstone's heirs; while the destination under the will would, failing children, leave the legacy at the disposal of Mrs Strachey herself. In addition to that, as has been pointed out, the testator has expressly altered the rate of interest in the two cases. Under the marriage-contract 4 per cent is fixed as the limit, while under the will Mrs Strachey has a right to have 5 per cent by leaving the money bequeathed to her in the indigo business. Under these circumstances I am of opinion that it is a matter of direct inference that the testator intended to confer, and has given, an additional benefit by his will.

It has been said that there are other provisions in the same clause which tend to shew that the testator was only providing for the fulfilment of his obligation under the marriage-contract. In the same clause which provides for the legacy to Mrs Strachey there is a direction to pay an annuity of £300 to a lady to whom he was under an obligation by a bond of annuity for that amount. The appellants' counsel maintains that in the case of this annuity there is clearly no duplication, but a provision only for fulfilment of the testator's obligation, and for the purpose of the argument this may be assumed to be so. There are obviously considerations which support the view that the legacy to Mrs Strachey is an additional benefit which do not apply in the case of the annuity in the use of the word "legacy," and the other circumstances to which I have specially referred. But whatever may be said of the direction as to the annuity, there is in the same clause also a provision in favour of the testator's widow, which, like the legacy to Mrs Strachey, gives her additional benefits beyond those for which he was under obligation to grant. I have only to add that I think there has been no sufficient ground shewn for disturbing the judgment of the Court with regard to the rate of interest.

I entirely concur with what has been said by my noble and learned friend Lord Watson that such evidence as was proposed to be led could not be admitted under the law of evidence in Scotland. It is said that the evidence is not proposed for the purpose of shewing the intention of the testator—we are to gather that from the deed—but for the purpose of shewing that he used the word "legacy" in a sense that was not its ordinary sense, and I think that evidence for such a purpose,—that is for the purpose of substituting the word "provision" for the word "legacy" used by the testator,—is clearly inadmissible.

On these grounds I am of opinion with your Lordships that the judgment appealed against should be affirmed.

ORDERED AND ADJUDGED, that the interlocutor of 22d February 1895 complained of be affirmed: Further ordered, that the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal.

PRESTON, STOW, & PRESTON—J. C. & A. STEUART—JANSON, COBB, PEARSON, & CO.—J. & J. ROSS, W.S.

No. 3.

JAMES WILLIAM LITTLE (Pursuer), Appellant.—*Joseph Walton, Q.C.—Leck.*

Mar. 19, 1896. Little v. Stevenson & Co.

STEVENSON & COMPANY (Defenders), Respondents.—*Bigham, Q.C.—Boyd—J. J. Cook.*

Ship—Charter-party—Delay in providing cargo—Appeal—Findings in fact.—A charter-party provided that the s.s. "River Ettrick" should proceed to Bo'ness and receive a cargo, to be brought alongside within sixty running hours, and that demurrage should be paid at a specified rate, "lay-days to count from the time the master has got ship reported berthed and ready to receive or deliver cargo, and given notice of the same in writing to charterers or their agents during business hours."

On 17th October the shipowner wrote to the charterers that the "River Ettrick" had left for Bo'ness, and asked them to supply a cargo for the 19th. The "River Ettrick" arrived in Bo'ness Roads on the 19th, but in consequence of the crowded state of the dock she was not allowed to enter. On the 21st October a loading berth became vacant, as cargoes were not ready for certain vessels which had arrived before the "River Ettrick." If a cargo had been ready for the "River Ettrick," she would have been allowed to enter the dock and would have got this berth, but as no cargo was ready she was not allowed to enter the dock. She was docked on the 26th, berthed for loading on the 27th, and sailed on the 28th October.

The shipowners sued the charterers for demurrage or damages, alleging that a delay of ninety-four hours had been caused by the fault of the defenders, in not having a cargo ready on 21st October.

The Second Division *assoilzied* the defenders, finding "that the vessel arrived in Bo'ness Roads on 19th October, but was not able, and was not allowed, to enter the dock on account of the crowded state of the dock until the 26th October. . . . that the 'River Ettrick' did not arrive at her charter port of shipment, and that the lay-days did not begin to run until the said 26th October, when the 'River Ettrick' got into dock," and that the defenders were not liable in demurrage. There was no finding in fact that there was a berth vacant on 21st October, and that the vessel would have been allowed to enter the dock on that day if a cargo had been ready, but it was mentioned in the opinion of the Court in delivering judgment.

In an appeal brought by the pursuer he contended that as the Court had not in their findings given all the facts proved material to his claim for damages, there should be a remit to have the defect supplied.

Held, without determining whether the findings in fact excluded a remit, that there was no rule of law requiring a shipper in every port and in all circumstances to have a cargo ready to meet the unexpected contingency of a berth being open to a vessel out of its regular turn, and therefore that the fact founded on was not material, and judgment *affirmed*.

Per Lord Herschell,—"I think it would be extremely desirable that in the case of these appeals from the Sheriff Court all the facts material to the contentions of either of the parties, even though not material to the point on which the judgment proceeds, should be found in the interlocutor."

(IN the Court of Session, June 26, 1895, 22 R. 796.)

The pursuer appealed.

Ld. Chancellor (Halsbury). Ld. Herschell. Lord Macnaghten. Lord Morris.

The pursuer contended that his claim was not for demurrage, but for damages caused by the defenders failing to provide a cargo on 21st October. If a cargo had then been ready the vessel would have been admitted into the dock and obtained a berth. This fact was not found in the interlocutor appealed against, but it was stated in the opinion of the Court delivered by Lord Trayner. When the Court of Session had

not exhausted the issue raised upon record by findings of fact upon points which were material to the case, a remit should be made to have findings upon these points.*

The respondents in reply contended that the finding in the interlocutor that the vessel was unable and was not allowed to enter the dock "on account of the crowded state of the dock until 26th October" excluded the fact founded on by the appellant, and the House could not go beyond the finding.†

LORD CHANCELLOR.—I confess that I myself am under a very strong impression that it is not open to the appellant here to raise the argument which has principally occupied your Lordships' attention. I think the language of 6 Geo. IV. c. 120, sec. 40, is very material indeed, which is—(His Lordship quoted the section).†

I confess I cannot read those words as allowing the possibility of placing in the interlocutor as found a new set of facts which may make the language ambiguous. As they stand they are supposed to be exhaustively disposing

* The interlocutor was in these terms:—"Sustain the appeal, and recall the interlocutor appealed against: Recall also the interlocutor of the Sheriff-substitute dated 1st August 1894: Find that by charter-party, dated 5th October 1893, the defenders chartered from the pursuer the steamship 'River Ettrick' to carry a cargo of coal from Bo'ness to King's Lynn: Find that the coals were to be brought alongside in forty-eight, or, as was afterwards arranged, sixty running hours, and if longer detained, demurrage to be paid at 12s. 6d. per hour, unless detention arose from certain specified causes: Find that it was further provided that lay-days were to count from the time the master had got the ship reported berthed and ready to receive or deliver cargo, and given notice of the same in writing to the charterers or their agents during business hours, say between 9 A.M. and 5 P.M.: Find that the vessel arrived in Bo'ness roads on the 19th day of October, but was not able and was not allowed to enter said dock on account of the crowded state of the dock until the 26th of October, which day she was docked at 2.30 P.M.: Find that the loading of the vessel was completed on 28th October at 4 P.M.: Find that the 'River Ettrick' did not arrive at her charter port of shipment, and that the lay-days did not begin to run, until the said 26th day of October, when the 'River Ettrick' got into the dock: Find further that no notice was given in terms of the said charter-party to the defenders that the vessel was reported berthed and ready to receive cargo: Find that the defenders are not liable to the pursuer in any sum in name of demurrage: Therefore assoilzie the defenders from the conclusions of the summons, and decern: Find them entitled to expenses in this and in the inferior Court."

† 6 Geo. IV. c. 120, sec. 40,—"That when in causes commenced in any of the Courts of the Sheriffs or of the magistrates of burghs or other inferior Courts matter of fact shall be disputed and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

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of the facts. It appears to me that the interlocutor is absolutely inconsistent with the argument as presented to your Lordships on behalf of the appellant. It may not, however, be necessary to determine that question, because I am not certain that we are all agreed upon this subject, but on the argument presented before us I cannot understand there being any doubt at all.

This action is not raised upon any specific provision in the charter-party at all. The contract relations between the persons who entered into that contract do not specifically apply to the case now suggested to be open to the appellant to argue. What is suggested is this—not that the provision in respect of demurrage ever in fact arose, because it certainly did not arise, but that inasmuch as there was a default on the part of the shippers to provide coal, which default by a series of causes prevented the vessel obtaining her berth, therefore the default was in the shippers, and accordingly the shipowners have made good this claim.

Now, when one comes to examine the series of propositions which establish that cause of action it comes to this—it is true that the provision for demurrage in the charter-party itself never arose. The ship got to Bo'ness on the 19th in the roads. As a matter of fact she never got into the dock, and never got into a berth ready for loading, until October 26. But the harbourmaster gave evidence that if there had been a cargo ready she might have got in sooner. A vessel had forfeited her right to continue at her berth according to the harbourmaster's views because she had not completed her loading, and therefore he sent her away from the berth at which she was lying. If all this had been known to the parties, and if the harbourmaster had in his discretion allowed the "River Ettrick" to come, as I understand he says he would have allowed her to come in, then this vessel might have got in on the 21st.

That is the proposition of fact. The proposition of law is that a merchant must be always ready with his cargo at all times and in all places and under all circumstances to take advantage of any such contingency if it should arise. There is not a fragment of authority for any such proposition. And I can imagine it would be a most serious thing if such a proposition were supposed to be laid down to regulate the mercantile community, because it might very seriously imperil the conduct of merchants in their business if it were to be supposed that all those twenty or thirty ships (for it is said there were twenty or thirty ships there) were guilty of a breach of an implied duty (the charter-party being in the ordinary form) in not having all their cargoes ready. I think I am entitled to say that no such case has ever been suggested in the Courts. I therefore move your Lordships that this appeal should be dismissed, with costs.

Lord Herschell.—I am of the same opinion. The question which the appellant seeks to raise at the bar is not raised by any finding of fact in the interlocutor. The utmost that could be done under any circumstances would be to remit the case with the view of having the facts which raised the point, if they were facts that had been really found in the appellant's favour in the Court below, inserted in the interlocutor. If the findings in the interlocutor are at variance with and contradict the facts which it is

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sought to have found, then, of course, there would be no ground for sending the case back. This House would be bound by the findings in the interlocutor. I cannot help saying this, that being very desirous of not in any way departing from the spirit of the statute which prevents appeals to this House except upon facts found in the interlocutor, I think it would be extremely desirable that in the case of these appeals from the Sheriff Court all the facts material to the contentions of either of the parties, even though not material to the point on which the judgment proceeds, should be found in the interlocutor.

Now, in this case, the facts raising one point of law, which was discussed and debated, and upon which a decision was pronounced in the Court of Session, are not found in the interlocutor at all. Whatever may be the true construction of the later words, and even if, looking at them alone, they are inconsistent with those facts, it is obvious, and no one can read the judgment without seeing, that they were not intended to be inconsistent with them; and that in truth the facts relating to this point are not found at all. It is true that the Court below decided the question against the appellant on another and a different ground altogether; but it seems to me that that was no reason for abstaining from finding in the interlocutor those facts upon which not only a point of law depended, but a point of law which was decided in favour of the appellant. I think they should have been stated, because although, for reasons which I will give in a moment, I do not think they would have been sufficient, differing as I do from what was said by Lord Trayner, to entitle the appellant to judgment, yet at the same time it was a matter for discussion here, and a different view might have been taken of the point on appeal.

It is not necessary to say whether the finding as worded in the latter part of the interlocutor is inconsistent with those facts or not, because I am of opinion that, even supposing all the facts upon which the learned counsel for the appellant rely were stated, there would be no case made out for disturbing the judgment of the Court below. The case suggested on behalf of the appellant is this: By the charter-party the ship was to proceed to Bo'ness, and she was to load at a berth to be selected by the charterer, and the lay-days were to count from the time when she was berthed and notice was given to the charterer. Undoubtedly that would impose by implication upon the charterer the duty of doing any act that was necessary on his part, according to the custom of the port, to enable her to get a berth. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth, when she was not there because the charterer himself had failed in his duty to do some act on his part to enable her to get there. The appellant's case, therefore, is put in this way. It is said, although she did not get into a berth until October 26th, she might have got into a berth on the 21st if the respondents had done an act which they failed to do, namely, had a cargo ready there. That arises in this way: in ordinary turn she could not have been berthed until the 26th, but, owing to a vessel which was in berth not having her cargo there, the harbourmaster would have put the "River Ettrick" into that berth if her cargo had been ready to be immediately put on board. The question is whether on these mere facts there was an obligation on the

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part of the charterer to have the cargo on the quay so that the vessel might have been berthed on the 21st. It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be in short, that was an obligation always resting upon the shipper.

No authority has been cited for that proposition, and I am of opinion that such a construction of the shipper's obligation would be altogether unreasonable. I do not for a moment deny that he is bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the earliest period that is reasonably possible; and it may be that in certain circumstances, owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there to enable the vessel to obtain an earlier berthing than would otherwise have been obtained. All that, I say, may be the case; but no such facts are found in the present case; and the appeal can only be decided in favour of the appellant by holding that at all ports and under all circumstances, however remote and improbable might be the contingency, the duty lay upon the charterer to have cargo there. That is a proposition to which I am unable to give my assent. For these reasons I agree in thinking that the appeal must be dismissed.

LORD MACNAGHTEN.—I agree.

LORD MORRIS.—I concur.

ORDERED that the appeal be dismissed, with costs.

LOWLESS & CO.—WILSON & SON—BOYD, JAMESON, & KELLY, W.S.

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Mar. 26, 1896.
Ogston v. Stewart.

ALEXANDER M. OGSTON (Pursuer), Appellant.—*Sol.-Gen. Murray—Haldane, Q.C.—Abel.*
DAVID STEWART AND ANOTHER (Stewart's Trustees) (Defenders), Respondents.—*D.-F. Asher, Q.C.—D. Dundas.*

Fishings—Salmon-fishings—Glebe—Designation—Kirk Lands—Prescription.—The estates of Ardoe and Banchory, on the south bank of the River Dee, marched inland, but at the river side were separated by the glebe of Banchory-Devenick, which extended along the river for 350 yards. No right of salmon-fishing attached to the glebe.

In 1892 the proprietor of Ardoe, the western property, raised an action against the proprietor of Banchory for declarator that under his title to the lands and salmon-fishings of Ardoe he had an exclusive right to the salmon-fishings *ex adverso* of that part of the glebe which extended along the river from the eastern march of Ardoe to a point 130 yards eastwards where the drain from the manse offices entered the river, alleging that this part of the glebe had been designated from Ardoe.

The defender, who was proprietor of the barony of Banchory and of the Kirkton of Banchory, alleged that the whole glebe had been designated from Kirkton.

The titles to Ardoe included a right to the salmon-fishings which had

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been recognised by the Crown. They shewed that the lands had belonged to the abbot and convent of Arbroath, and had been feued by them.

The lands forming the barony of Banchory had also been feued by the abbot and convent of Arbroath. Kirkton belonged to the see of Old Machar until 1571, when it was feued by the Bishop. In 1618 it was acquired by the proprietor of the barony.

It appeared that the glebe was designated by the Presbytery in 1602, but there was no evidence to shew from what lands it had been designated, or that Kirkton had a riparian boundary. At that date the Act 1593, c. 165, was in force, which provided that in cases where there was no glebe, or a glebe of less than four acres, the designation of a glebe should be made "of the parson, vicar, abbot, or prior lands, and failing thereof, out of the bishop's lands, friar's lands, or any other kirk land lying within the bounds of the said parish."

The proof shewed that the right of fishing in dispute was of little value, and could only be exercised by rod and line, and that the pursuer had possessed in this way for more than the prescriptive period. A lease of the salmon-fishings of Banchory had been granted in 1850, subject to conditions of let which stated that "the western boundary is at the manse offices." The tenant under this lease, and renewals thereof for thirty-seven years, stated as a witness that he had never tried to fish further west than the manse offices.

The First Division held that the pursuer had failed to prove that any part of the glebe had been taken from Ardoe, and sustained a plea by the defender that "the pursuer has no title or right to the salmon-fishings in question."

In an appeal, *held (rev.* the judgment) (1) that in the absence of direct evidence as to the lands from which the glebe had been designated in 1602, it was to be inferred that the glebe had been taken from the abbot's lands of Banchory and Ardoe, and not from the bishop's lands of Kirkton; (2) that the pursuer's possession was sufficient, and that the possession by both parties shewed that the drain was the boundary between the salmon-fishings of the barony of Banchory and Ardoe; and (3) that the pursuer had, in a question with the defender, right to the fishings in dispute.

Prescription—Salmon-fishings.—A right of salmon-fishing is an estate in land in the sense of the Conveyancing Act, 1874, and the possession of salmon-fishings for twenty years is prescriptive possession.

(In the Court of Session, Nov. 28, 1893, 21 R. 282.)

The pursuer appealed.

Ld. Chancellor (Halsbury).
Lord Watson.
Lord Macnaghten.
Lord Davey.

Lord Watson.—The appellant is proprietor of the lands of Ardoe, whilst the respondent is proprietor of the lands of Banchory and others, both estates being in the parish of Banchory-Devenick and county of Kincardine, and bounded on the north by the River Dee. The parochial glebe of Banchory-Devenick, which also has the river for its northern boundary, is situated between these properties, marching at the river-side with Ardoe on the west and with Banchory on the east. In this action the appellant concludes for declarator that he has the exclusive right of fishing for salmon *ex adverso* of the westmost portion of the glebe lands between the march with Ardoe and a drain which leads from the manse offices to the river. The claim thus asserted relates to a stretch of water about 135 yards in length, which, according to the evidence, is incapable of being profitably fished with the net, and is of little value for angling purposes.

It is not matter of dispute in this case that the salmon-fishings of the glebe lands, to the east of these 135 yards, belong to and have been possessed from time immemorial by the respondent and his predecessors in title, along with the fishings to the east of the glebe. Each of the parties

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avers that the fishings in dispute are within the ambit of his title from the Crown; and also that he has had continuous and exclusive possession during and beyond the period of prescription, which, in the case of rights such as that of salmon-fishing, has been reduced from forty to twenty years by sec. 34 of the Conveyancing and Land Transfer Act of 1874 (37 and 38 Vict. c. 94). On record, the respondent maintains alternatively that he has a joint right to the fishings with the appellant. Accordingly, the only issue raised by the pleadings is whether the fishings in dispute belong to the appellant or to the respondent, or to both of them. Upon that footing a proof was allowed, and was led before the Lord Ordinary (Moncreiff), who gave judgment for the appellant.

When the case was heard before the First Division the respondent was allowed to add a plea to the effect that the appellant "has no title or right to the salmon-fishings in question," which was sustained by the Court upon the ground that the appellant had not established such an amount of possession as would be sufficient, in a question with the Crown, either to sustain a prescriptive right, or to shew that the fishings were within his title. The learned Judges therefore recalled the interlocutor of the Lord Ordinary, assoilzied the respondent, and found the appellant liable in expenses. In the view which they took, it appears to me that the course which their Lordships ought to have followed was, not to grant absolvitor, but to direct intimation to be made to the Crown authorities, so as to give them an opportunity of appearing in this process, or of bringing a separate action, the present suit being stayed in order to await the result of these proceedings. It might have been more satisfactory if that course had been adopted; but, after hearing the argument upon this appeal, I can find no reason why your Lordships should not dispose of it upon its merits, and put an end to this litigation. The question presented for decision upon the record and evidence is substantially one of boundary between two neighbouring proprietors; and, in my opinion, there are no elements in the proof which naturally or necessarily suggest that the Crown has a *prima facie* claim to the fishings in question. If the Crown should have a well-founded claim, it cannot be prejudiced by a decision between the parties to this appeal.

Before referring to the evidence I shall notice the titles under which the parties respectively contend that they have an express grant of the fishings in question from the Crown.

The estate of Ardoe, as now vested in the appellant, was originally the property of the Church. It belonged to the abbot and convent of Arbroath, by whom it was disponed in feu to laymen, about the end of the fifteenth century, in two separate parcels, described as the "Sunny" and "Shadowy" halves. In both cases the disposition was with the salmon-fishings in the Dee adjacent to the half conveyed; and that right has all along been recognised by the Crown, and continued in the subsequent progress of the appellant's titles.

The respondent's estate of Banchory is made up of two parcels, which have been held by the same proprietor since the year 1618, but anciently belonged to two different ecclesiastical bodies. The lands and barony of Banchory, with their salmon-fishings in the river of Dee, were, in the thirteenth century, feued out by the abbot and convent of Arbroath to the

Justiciar of Scotland, and have since been held by laymen. The Kirkton of Banchory belonged to the see of Old Machar until 1571, when it was feued by the bishop, with the consent of the dean and chapter. It was acquired by Alexander Gardyne of Banchory in the year 1618. Down to that date the Kirkton titles contained no grant of salmon-fishing. In November 1743, a successor of Alexander Gardyne, by the same deed, disponed the lands and barony of Banchory and also the Kirkton to Alexander Thomson, "with the whole salmon-fishing in the water of Dee belonging to the said whole lands"; and in May 1744 the disponee, under the procuratory contained in that disposition, expede a crown charter of resignation, in which these lands are granted "cum integra salmonum piscatione super aquam de Dee ad dictas terras spectante."

The proof led by the parties, which I do not think it necessary to examine in detail, is chiefly directed to two matters, the first of these being the extent of possession of the disputed fishings which has been exercised by the parties respectively within and beyond the years of prescription; and the second, the point which has been reputed to be, and has been recognised as, the boundary between their fishings.

The evidence of possession, as might well have been anticipated in a case of this kind, cannot with propriety be described as full and satisfactory. But, having regard to the barren nature of the subject which forms the stake in this action, the possession of the appellant and his predecessors, and others in their right, exercised by rod and line, which was the only suitable method, appears to me to have been as extensive as might have been expected of a single proprietor who had a clear title from the Crown. There is no doubt a certain degree of complication arising from the fact that there is evidence of persons from the Banchory estate having angled in the disputed water. When, however, the evidence as to the boundary observed during the time when these incursions were made is taken into account, as in my opinion it ought to be, I cannot regard them as acts intentionally adverse to, and, therefore, as neutralising the effect of the possession proved by the appellant.

The evidence, in so far as it bears upon the second point, the question of fishing boundary, appears to me, as it did to the Lord Ordinary, to be in favour of the appellant. In arriving at that conclusion, I do not rely upon the respondent's admission, in a letter of July 16, 1889, to the effect that the fishing boundary now claimed by the appellant "had never been disputed by anyone." The respondent has retracted that admission, and has explained in his testimony that the letter was written under a misapprehension, upon information received by him from one Mackie, now in America, who was at that time, and had for many years previously been, ground officer on the estate of Banchory. It is, however, impossible to discard the fact that the information was given to him by his own servant, who presumably had the best means of knowing the truth, and Mackie's information is, in my opinion, corroborated by the proof. In November 1850 the whole of the Banchory salmon-fishings, including those *ex adverso* of the glebe, were offered on lease, and were taken by Robert Clark for three seasons, commencing on February 1, 1851. The conditions of let prepared by the proprietor and accepted by the tenant state that "the

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western boundary is at the manse offices." Clark from time to time renewed his tenancy upon the same terms, until he obtained a lease for nineteen years from Martinmas 1868 of a farm upon the estate of Banchory, "along with the salmon-fishing on the Dee presently occupied by him." Clark was examined as a witness, and stated that during his occupation under these leases, covering a period of thirty-seven years, he "never tried to fish further west than the manse offices of Banchory-Devenick." In the face of that evidence, which is practically uncontradicted, I am unable to regard an occasional cast in the disputed water by persons coming from the estate of Banchory as an assertion of their right to it by the proprietors of that estate.

Assuming the appellant to have made out his case, in so far as concerns possession by rod-fishing and the recognised boundary between his fishings and those of the respondent, these facts will not avail him unless he is able to shew that his possession, or right of fishing, can be reasonably ascribed to his title as proprietor of Ardoe. The respondent alleges, on record, that the glebe was designed "out of the church lands of the Kirkton of Banchory," and consequently that, after its designation, "the right to the salmon-fishings *ex adverso* of the glebe remained in the proprietors of Banchory," and if these statements were substantiated, the appellant would not be in a position to ask decree in terms of his summons. There is no direct evidence in support of the allegation that the glebe was designed out of the lands of the Kirkton; it rests upon mere conjecture, and, in my opinion, there are various considerations which strongly point to a different conclusion.

It appears from the minute-book of the Presbytery of Aberdeen that the glebe was designated by them in March 1602. The difficulties which beset this part of the case have arisen from the fact that the presbytery-clerk, though he left a blank space for the purpose, has omitted to enter the formal act of designation, which, if it had been extant, would have shewn the particular lands which were taken from their owners, or given up by them, in order to constitute the glebe of the parish. There seems no reason to doubt that the glebe as then designated, with the exception of some immaterial alterations of boundary which were made about the year 1837, has ever since been possessed by Mr Robert Mercer, the incumbent of 1602, and his successors in the benefice. The parsonage of Banchory-Devenick was anciently held by a prebend of Old Machar, who had his residence in Aberdeen, the cure being served by a vicar, who in all likelihood had a residence at Banchory-Devenick. It is, however, obvious that in 1602 the minister's demand for a glebe and the lands assigned to him included a much larger area than had previously been occupied by the vicar.

The statutes from which, in the year 1602, the authority of presbyteries to allocate glebes for the reformed clergy was derived were 1563, c. 72, 1572, c. 48, 1592, c. 118, and 1593, c. 165. By these Acts the powers of the presbytery had been gradually increased, but they did not as yet extend beyond church lands, *i.e.*, lands which either were or had at one time been the property of the Church. The Act of 1593 (Thomson's Acts, vol. iv. p. 17) provided that, in cases where there was no glebe, or where the old glebe was less than four acres, the designation was to be made "of the parson, vicar, abbot, or prior lands, and failing thereof, out of the bishop's lands, friar's lands, or any other kirk land lying within the bounds of the said parish."

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Banchory, Kirkton of Banchory, and Ardoe, were all of them church lands within the meaning of these Acts, but there was this material difference between them. Banchory and Ardoe were abbot's lands, having originally belonged to the abbot and convent of Arbroath; whereas the lands of Kirkton were bishop's lands, and therefore not liable to be designated as glebe until Banchory and Ardoe had been exhausted. I have failed to discover, and the respondent did not suggest, any reason why the presbytery, in assigning a glebe to the minister of Banchory-Devenick, should have entirely disregarded the order of designation prescribed by the Act of 1593. The Kirkton of Banchory was not acquired by the proprietor of Banchory until 1618, and it cannot be presumed that its then owner consented to part of it being designated in 1602, in order to protect Banchory and Ardoe from designation.

There are other considerations which, to my mind, enhance the improbability of any part of the Kirkton of Banchory having been included in the designation of 1602. There is nothing to shew that any of the lands of Kirkton were riparian. The terms of the crown charter of 1744 do not appear to me necessarily to indicate that they were so. It was not a charter containing any fresh grant, but was merely a renewal of the rights already held by the predecessors of the grantee in and connected with the lands of Banchory and Kirkton, the latter having admittedly no right of salmon-fishing attached to them. It was revised and passed by the Scottish Court of Exchequer, as then constituted under 6 Anne, c. 26, who had no power to add to the rights previously granted out by the Crown. According to Mr Erskine (Inst. i. 3, 32),—"When the signature contains no more than was contained in the vassal's former charter, the barons may pass it; but when it imports a conveyance of any new subject not formerly granted by the Crown, it must be first superscribed by the King himself; for if it pass of course in Exchequer, it is not effectual to the grantee in so far as relates to such new right." If, therefore, part of Kirkton was riparian, the grant of its salmon-fishings was *ultra vires* of the Court, and could not bind the Crown. If not, the charter did nothing more than continue the former investitures. I do not think it ought to be assumed that the Court of Exchequer either neglected its duty or exceeded its powers.

In these circumstances I am of opinion that it is matter of reasonable inference from the title-deeds of the litigants, and from the facts disclosed in the proof, that the glebe of Banchory-Devenick, as designated, did not include any part of Kirkton, and that it did include portions both of Banchory and Ardoe. It being beyond the power of the presbytery to assign salmon-fishings to the minister, the disputed fishings would, in that case, remain with Ardoe, and the other fishings of the glebe with Banchory.

I would, therefore, advise your Lordships to reverse the judgment appealed from, to restore the Lord Ordinary's interlocutor of 8th February 1893, and to declare that the respondent must pay to the appellant the expenses incurred by him in the Court of Session after the date of that interlocutor, and also his costs of this appeal.

I have been requested by Lord Shand, who is unable to be present today, to state that he has examined and concurs in the opinion which I have expressed.

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LORD CHANCELLOR.—I concur in the judgment which has been moved by my noble and learned friend, and with the grounds on which he has rested it.

LORD MACNAGHTEN.—I have had an opportunity of reading the opinion of my noble and learned friend opposite (Lord Watson), and I entirely concur in it.

LORD DAVEY.—I also have had an opportunity of reading the judgment which has just been delivered, and entirely concur in it.

INTERLOCUTOR appealed from reversed, and the interlocutor of the Lord Ordinary of 8th February 1893 restored: The respondent to pay the appellant the expenses incurred by him in the Court of Session since the date of the Lord Ordinary's interlocutor, and also the appellant's costs of the appeal.

GRAHAMES, CURREY, & SPENS—AULD & MACDONALD, W.S.—A. & W. BEVERIDGE—T. J. GORDON & FALCONER, W.S.

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THE CLYDESDALE BANK, LIMITED, AND ANOTHER (Defenders), Appellants.—*Lord-Adv. Murray—Ure—King.*
JOHN PATON AND ANOTHER (Pursuers), Respondents.—*Balfour, Q.C.—Sir Robert Reid, Q.C.—Robertson, Q.C.*

Cautioner — Fraudulent Misrepresentation — Mercantile Law (Scotland) Amendment Act, 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 6.—The Mercantile Law (Scotland) Amendment Act, 1856 (19 and 20 Vict. cap. 60), section 6, enacts,—"From and after the passing of this Act all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, &c., postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

In an action of damages against a bank and against S., the agent at one of its branches, the pursuers averred that S., knowing that D. R. & Company, customers of the bank, were largely indebted to the bank, and were insolvent, or at least were in great financial difficulties, conceived, along with a partner of D. R. & Company, a fraudulent design of obtaining the pursuers' acceptances in favour of D. R. & Company in order to apply them *pro tanto* in reducing D. R. & Company's debt to the bank. That in pursuance of this scheme D. R. & Company applied to the pursuers for accommodation and referred them to S., who falsely assured them (1) that D. R. & Company were in a thoroughly sound condition financially, and only required temporary accommodation; (2) that the sum due to the bank was very trifling; (3) that D. R. & Company had made up certain losses which it was known they had incurred; and (4) that no portion of the proceeds of any acceptances by the pursuers would be applied in extinction of the bank's debt, or of any obligation to the bank. [The pursuers did not aver that these representations were made in writing.] That in reliance on these assurances the pursuers granted acceptances to D. R. & Company. The pursuers further averred that the proceeds of these acceptances were placed to the credit of D. R. & Company's overdrawn account, and that if they had not been so applied

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the bank's ultimate loss would have been so much the greater. That D. R. & Company were sequestrated, and the pursuers, as the bills fell due, paid them under protest.

Held (*rev.* judgment of Second Division) that the action was not relevant, in respect (1) that the pursuers were not entitled to rely on the oral representations 1, 2, and 3 as to the credit of D. R. & Company, section 6 of the Mercantile Law Amendment Act making such oral representations of no effect; and (2) as regarded the 4th alleged representation, that the pursuers had not alleged that the bank did not give credit to D. R. & Company after the date when it received the proceeds of the bills.

(IN the Court of Session, 23d October 1895, reported in the present volume, p. 38.)

Ld. Chancellor (Halsbury). Lord Watson. Ld. Herschell. Lord Davey.

The defenders appealed.

After hearing counsel,

The Lord Chancellor called the attention of the respondents' counsel to article 11 of the condescendence, where it was stated that "the acceptances were placed to the credit of Douglas, Reid, & Company's overdrawn account-current with the Clydesdale Bank," and that "the defenders the Clydesdale Bank were thus *lucrati* to the extent of the proceeds of said acceptances," and pointed out that it was not stated whether the bank did or did not give credit to Douglas, Reid, & Company after the bills were paid in.

The respondents subsequently proposed to amend article 11 as follows (the amendments are printed in italics):—(Cond. 11) "Notwithstanding the foresaid statements and assurances of the said Alexander Scott, the pursuers have now ascertained, and the fact is, that their said acceptances were all placed to the credit of the said Douglas, Reid, & Company's overdrawn account-current with the Clydesdale Bank, at the several dates when the pursuers' said acceptances respectively were obtained as aforesaid, *and were applied in extinction pro tanto of the bank's debt, contrary to the assurances given as aforesaid. If the said acceptances had not been granted and applied as aforesaid, the bank's ultimate loss would have been larger by the amount of the said bills, namely, £4000 and interest thereon.* The defenders, the Clydesdale Bank, were thus *lucrati* to the extent of the proceeds of said acceptances. *The result was that the bank obtained and the pursuers lost the said sum of £4000 and interest.* . . . The said Douglas, Reid, & Company were creditors on the bankrupt estate of Lipman & Company to the amount of £10,891, 8s. 8d. or thereby, on bills all held by the said Clydesdale Bank."

At delivering judgment,—

LORD CHANCELLOR.—It appears to me that whatever doubt might have been entertained upon the original argument of this case, no doubt can now be entertained as regards that which appeared at first sight perhaps to be an insufficient and inadequate statement of the causes of action, but which might possibly, upon a certain construction, shew that there had been a cause of action sufficiently set forth upon the pleadings on the record. No doubt can now be entertained that the pleader (with the facts before him, and with a knowledge of the discussion which has taken place in this House pointing out that, taking the most favourable view for the pleader, the allegations were ambiguous, although time has been allowed for the purpose of amending that ambiguity) has done all that he possibly could do, consistently with being able to prove the facts at the trial, to avoid stating in

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express terms what, if it were true, he could have stated, namely, the non-performance of the promise by the bank to give additional credit to the firm which it was proposed to assist.

The matter seems to me to be very clear, and to use the language of English pleading, facts are set out from which it would appear that there has been (I will assume in favour of that view) a combination to induce the respondents to advance a further sum of money under circumstances in which it was to the advantage of the bank and to the advantage of those who persuaded the respondents to allow the debtor, who was in some difficulties which might lead to his sudden bankruptcy, to continue carrying on his business. If the allegations with which I am about to deal had been to the effect that in pursuance of that combination the bills had been signed, and that the bank by that combination had managed to get their own debt paid, in pursuance, as I say, of that combination, and that the person who signed the bills had been induced to sign them by the false representation that it was intended to enable the debtor to carry on his business so as perhaps to recover himself, but that in lieu of that the bank had appropriated the whole of the new advances to pay off their own past debt, I am of opinion that there would have been a good cause of action shewn upon the face of this record. But after the discussion which has taken place, and after what has been pointed out as to the ambiguous language used in the pleadings, it is manifest to me that no such thing can be averred; and it is perfectly consistent with every allegation on this record that the bank did what they were expected to do, and that on receiving these new advances they did apply them to the credit of the debtor. Although in a certain sense it may be that at the end the bank was less a loser than it would otherwise have been, by reason of this advance, yet the only thing which makes it properly a cause of action is omitted from this condescendence.

The language of an English pleader would be, that whatever was the contract intended to be entered into, and entered into in fact, there was no breach upon the face of this record properly averred. There is nothing which shews that the thing that was to be done by the bank was not done and done perfectly *bona fide*, and with the intention of helping the person who was in difficulties as he was helped, and that he was helped accordingly. That, as I have said, might have been a slip on the part of the pleader originally, and I myself should have been reluctant to have given judgment against the pursuer in this case upon that view if it had rested upon what might be only the ambiguous language of pleading. But after more than a week's delay, and seeing the amendments which are now proposed, it seems to me that, with great astuteness and skill in the use of language, the pleader has repeated exactly the same thing in different words, and has expressly avoided doing that which would, as I say, have set out a complete cause of action. Under these circumstances it appears to me that all your Lordships can do is to allow the appeal and remit the action to the Court below to assoilzie the defenders, and find the respondents liable in expenses.

The only difficulty I have had has been in looking through the different pleadings and seeing what has been sufficiently averred; and as we have

from time to time made international reflections as to our different systems of pleading, I cannot help saying, and I say it with regret, that had this occurred in an English action, and had a statement of claim been the subject of controversy instead of these Scottish pleadings, I believe it would have been impossible for your Lordships to disentangle the allegations made, and to pronounce the judgment we are now proposing to pronounce, and to prevent the possibility of a considerable amount of costs being wantonly thrown away. By the precision of the Scottish pleading there is still a necessity to set out the real cause of action, which is capable of definite and precise statement, which I regret to say is no longer the case in English pleadings. I therefore speak with some degree of envy when I say that at all events the Scottish jurisprudence has preserved something like a system in which a definite and precise allegation of the cause of action is required to be set out before a litigant is allowed to incur considerable expense in proving what may after all turn out to be no cause of action at all.

For these reasons I move your Lordships that the judgment be reversed.

LORD WATSON.—The main question involved in this appeal is new to the law of Scotland, although it arises upon the terms of a statute which was passed in 1856. Section 6 of the Mercantile Law (Scotland) Amendment Act of that year enacts that "all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person making such representations and assurances, or by some person duly authorised by him, otherwise the same shall have no effect." These enactments are in substance the same as the provisions of section 6 of 9 Geo. IV. cap. 14, commonly known as Lord Tenterden's Act, which applies to England and Ireland. There is this difference of expression between the two clauses, that in the earlier statute it is declared, not that the representations and assurances shall be of no effect, but that no action shall be maintainable upon them when they are not contained in a writing duly subscribed.

This was an action of damages brought by the respondents founded upon representations alleged to have been falsely and fraudulently made to them by the appellant Scott, who was agent in Dundee for the appellant bank, for the purpose and with the effect of inducing them to sign bills of exchange to the amount of £4000 for the accommodation of the firm of Douglas, Reid, & Company. It is also alleged that the main object which Scott had in view in making these representations was to enable the bank to apply the bills so procured in reduction of a large over-draft which was then due to it by the firm accommodated. It is not asserted that the directors, or any official of the bank other than Scott, were in the knowledge of his fraudulent proceedings, but it is averred that the representations made by him were within the scope of his employment as agent, and there are also averments which are said to mean that the bank did in fact receive the proceeds of the bills and apply the same in extinction of the debt due to it from Douglas, Reid, & Company.

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It is admitted by the respondents that all the representations upon which they rely were made by Scott verbally. These representations were—(1) that Douglas, Reid, & Company were in a sound condition financially, and only required temporary accommodation; (2) that the sum due by them to the bank was very trifling; (3) that Douglas, Reid, & Company had made up the losses which they had previously sustained through the failure of the firm of Lipman & Company by fortunate speculations in jute; and (4) that no portion of the proceeds of any acceptance by the respondents would be applied in extinction of the bank's debt, or of any obligation to the bank.

In their defences the appellants pleaded that these representations, being neither in writing nor subscribed as the Act of 1856 requires, were of no effect, and could not be admitted to proof. The plea was overruled by the Lord Ordinary (Low), who allowed the parties, before answer, a proof of their respective averments. It appears to have escaped his Lordship's notice that there are statements in the condescendence with respect to the appellant Scott's relations to one Hassberger, which are simply irrelevant and scandalous, and ought to have been deleted before the record was closed. The Second Division of the Court recalled the interlocutor of the Lord Ordinary, and instead of a proof before answer, appointed issues to be lodged for the trial of the cause.

All the learned Judges in the Courts below were of opinion that the circumstances of the case, as disclosed in the condescendence, took these representations out of the statute of 1856. The Lord Justice-Clerk held it to be sufficient for that purpose that the representations were made in pursuance of a fraudulent scheme, by means of which the bills were obtained, on the assurances of its agent, for the purposes of the bank. The same view was more clearly indicated by Lords Young and Trayner, who were of opinion with the Lord Ordinary that the representations would have been within the statute if they had been made for the sole purpose of inducing the respondents to accept the bills, but that they were excluded from its operation, because they were made for an ulterior purpose which is not mentioned in the statute, namely, in order that the bank might be enabled to obtain payment of its claims against Douglas, Reid, & Company.

The fourth representation does not appear to me to involve the construction of the statute. If differs from those which precede it in this respect, that it does not contain any assurance relating to Douglas, Reid, & Company, or to their credit, ability, or trade. In my opinion it does not possess the character of a representation to which the statute applies. In the view of the law which was adopted by the Courts below, the distinction between the fourth and the first three of the representations libelled on was immaterial.

The provisions of section 6 are expressed in terms as comprehensive as they are imperative. They enact that no verbal representations, being of the character and made for the purpose and with the intent specified in the clause, shall be of any legal effect as giving a remedy to the person who may be misled by them to his detriment. They in substance provide that no person to whom such verbal representations are made for such a purpose shall have any right to rely upon them, and that if he does choose to act

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upon them, he must bear the consequences of his own credulity. It is also, in my opinion, obvious that these provisions were not intended to meet the case of truthful and honest representations, and that they necessarily include all representations of the character, and made with the purpose specified, however false and however fraudulent.

In the present case it has hardly been controverted, and it does not appear to me to admit of serious dispute, that the first three of the representations upon which the action is laid answer precisely both in character and in their immediate object to the description contained in section 6. But it has been argued (and the argument found favour with the learned Judges of the Court of Session) that these three representations are not within the incidence of section 6, because they are alleged to have been made, not merely with the immediate purpose of inducing the respondents to sign accommodation bills, but with the further and fraudulent purpose of enabling the bank to appropriate the bills, when granted, to the payment of its debt. I do not think that the argument has any solid foundation in fact. The main, if not the only cause of action disclosed by the condescendence is the fraudulent procuring of the respondents' acceptance of the bills in question by means of these representations. But I am of opinion that, even if it be warranted by the facts, the argument is without foundation in law. It seeks to limit the generality of the enactments of section 6 by introducing a proviso to the effect that they shall not apply in cases where the person making the representations has in view some ulterior and illegitimate purpose beyond inducing the person to whom they are made to give credit or money to a third party. There is no warrant for such a limitation to be found in the words of the clause, which, in my opinion, declare explicitly that any verbal representation to which they apply shall be absolutely inefficacious, no matter what may be the further and fraudulent design of the person who made it.

It was maintained for the respondents that the competency of proving these representations by parole has been established by section 100 of the Bills of Exchange Act, 1882, which provides that "in any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence." It may well be doubted whether the present action does raise any question of liability upon the respondents' accommodation bills, but it is an obvious answer to the argument that in the present and similar cases such verbal representations have since the Act of 1856 ceased to be relevant facts.

It is possible that the fourth representation might be founded on, either as being a fraudulent inducement to sign bills for the accommodation of Douglas, Reid, & Company, or as constituting a promise or agreement binding the bank to abstain from imputing any part of the proceeds of these bills towards payment of its debt. But in neither of these aspects do I find any relevant allegation in the condescendence. It is not averred that the bank has failed to fulfil the representation said to have been made by its agent. The only averment upon this point, which occurs in the 11th article of the condescendence, is that the respondents' acceptances "were all placed to the credit of the said Douglas, Reid, & Company's overdrawn

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account-current with the Clydesdale Bank at the several dates when the pursuers' said acceptances were obtained as aforesaid. The defenders, the Clydesdale Bank, were thus *lucrati* to the extent of the said acceptances." These allegations are quite consistent with the possibility that the whole of the sums so credited were drawn out by Douglas, Reid, & Company, and by them applied to their own purposes, and are therefore irrelevant.

Your Lordships delayed the consideration of this appeal in order that the respondents might have an opportunity of submitting any amendment shewing that the bank had applied the proceeds of these acceptances in reduction of the balance due to it by Douglas, Reid, & Company. The respondents have proposed to add two new averments, the first being that the acceptances were "applied in extinction *pro tanto* of the bank's debt," and the second, that "if the said acceptances had not been granted and applied as aforesaid, the bank's ultimate loss would have been larger by the amount of the said bills, viz., £4000 and interest thereon." I see no reason to doubt that these amendments have been very properly framed with a strict regard to the limits of truth, but, in my opinion, they come far short of relevancy. So far from negativing, they appear to me rather to suggest that the appellants' bank not only allowed to Douglas, Reid, & Company the free use of the proceeds of the respondents' acceptances, but made new advances to that firm out of its own funds.

I have only to observe further, that if the fourth representation were relied on as a promise which the bank had failed to fulfil, the respondents would have no title to raise the question. The only person having a title to complain of a breach of that promise would in that case be the trustee in Douglas, Reid, & Company's sequestration.

For these reasons I am of opinion that the interlocutors appealed from must be reversed, with costs; and that the action ought to be remitted to the Second Division of the Court of Session, with directions to assoilzie the appellants from its conclusions, with expenses in both Courts below.

My noble and learned friend Lord Morris, who is judicially engaged elsewhere to-day, has requested me to state that he concurs in the opinion I have just read.

Lord Herschell.—The action is founded upon four matters, the statement of which is contained in the fifth article of the condescendence. It cannot be doubted that the first three complaints referred to statements made, and are founded upon statements made by the appellants' agent with reference to the "character, conduct, credit, ability, trade, or dealings" of Douglas, Reid, & Company. Apart from the provisions of the Mercantile Law Amendment Act of 1856 no doubt can be entertained that the condescendence discloses relevant facts establishing a cause of action against the appellants. The objection taken on their behalf to the relevancy of the condescendence is founded upon the provisions of that enactment. The respondents seek to avoid the operation of the statute so far as they are concerned in the present case, and have succeeded in obtaining judgment in their favour on the ground that the representations made were part of a scheme fraudulently devised by the appellants and Douglas, Reid, & Company for the purpose of benefiting the bank at the expense of the respon-

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dents. In my opinion the operation of the statute cannot be so avoided. Assuming that the respondents could establish that the representations were made for the purpose of giving effect to such a fraudulent scheme, I am of opinion that the enactment positively forbids any effect being given to those representations. It is impossible to conceive of an enactment in more general or unambiguous terms,—"all representations and assurances" of the nature described, unless in writing, are to have no effect. The action of the respondents, if it is to be maintained, requires as its foundation that effect should be given to those representations which the statute has said shall have no effect. I do not see how it is open to question that the representations were of a kind within the words of the statute, because the statute applies to all such representations made or granted to the effect or "for the purpose of enabling such person to obtain credit, money, goods," &c. Now, the very framework of the respondents' case is that the representations had the effect of rendering them liable upon certain bills of exchange, which resulted in money being paid to the bank for the accommodation of Douglas, Reid, & Company. How then it can be said that they were not made or granted to the effect of enabling those persons to obtain credit or money it is difficult to see, and if the statute in terms applies, how is it possible to avoid its operation by proving that the design of the bank and of Douglas, Reid, & Company in making the representations and so procuring the credit was an ulterior benefit to the bank?

The respondents also maintain that the 100th section of the Bills of Exchange Act of 1882 dispenses in such a case as this, inasmuch as obligations on bills of exchange come in question, with the necessity of the writing which is required by the Mercantile Law Amendment Act. I think it is an argument which it is difficult to treat seriously. It is impossible to conceive that the 100th section of the Bills of Exchange Act can have repealed *pro tanto* the Mercantile Law Amendment Act whenever obligations upon bills of exchange have been obtained by representations as to conduct, credit, or character. That disposes of the case so far as regards the first three of the allegations contained in the condescendence. The fourth allegation is quite independent of the statute; it is "that the appellants represented that no portion of the proceeds of any acceptance by the pursuers would be applied in extinction of the bank's debt." I think that allegation is only relevant if it can be maintained as a representation made by the bank to the respondents, upon which they acted, being a false and fraudulent representation. If it is a promise only it would not be relevant, because the respondents would have no title to sue in respect of its breach. But no doubt that which is in form a promise may be in another aspect a representation, and I think that the fourth averment of the fifth article of the condescendence may be treated as relating to a representation by the bank which is alleged to be false and fraudulent.

Taking it to be so, I do not think that, when you take the whole of the condescendence together, it is shewn that the bank did make a false and fraudulent representation of an intention which they never meant to carry out, because that is, of course, what it must amount to. So far as appears, the bank, if they indicated an intention that it should not be used in extinction of the debt, carried out that intention. There is no allegation

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that they did not give full effect to that which they alleged to be the intention. It was open perhaps to some argument, as the case stood, whether the allegations in the subsequent articles of the condescendence had not been from want of care so framed as to be consistent with that intention either being carried out or not being carried out. Accordingly an opportunity was given to the respondents to suggest any amendment which they would desire to make with a view of clearing up the doubt which might be said to exist. Having had ample opportunity of considering what averments they could add, they have failed to suggest to your Lordships any averments as capable of proof by them which would shew that the bank did not intend that the money should not be applied in extinction of their debt, looking at the substance of the matter and not at the form, and that the alleged intention was not given effect to.

For these reasons I think that the action altogether fails, and I entirely concur in the judgment which has been proposed.

LORD DAVEY.—I also concur in the judgment which your Lordships propose to give in this appeal, and also in the reasons which have been assigned for that judgment.

The fifth article of the condescendence, which contains the representations alleged to have been made by or on behalf of the bank, commences with the averment that those representations were made on the occasion of Douglas, Reid, & Company requiring temporary accommodation. It then avers that Mr Paton, one of the pursuers, saw Mr Scott, the manager of the bank, who made the four representations relied upon; those have been read, and I will not repeat them. We have it then that those representations were made upon the occasion of Douglas, Reid, & Company requiring temporary accommodation from the pursuers' firm, and one of the pursuers accordingly seeing the manager of the bank.

Now, it cannot be disputed, I think, that the three first of these representations contained in the fifth article of the condescendence are "representations and assurances as to the character, conduct, credit, ability, trade, or dealings" of the firm of Douglas, Reid, and Company; and the Lord Ordinary holds, and to my mind it is obvious, that they were made for the purpose of enabling the firm of Douglas, Reid, & Company to obtain credit or money from the pursuers. If so, they would seem *prima facie* to fall within the 6th section of the Mercantile Law (Scotland) Amendment Act, 1856.

But it is said, that although they were made for that purpose, there was an ulterior purpose or motive for obtaining the credit for Douglas, Reid, & Company from the pursuers which was of a fraudulent character and takes the case out of the statute. Now, my Lords, I entirely concur in the observation that has been made, that if it was intended to except representations made with a fraudulent motive, or representations of a fraudulent character, from that statute, the exception to that effect would have been introduced into the statute. Indeed, it appears to me that if you introduce such an exception into the Scottish statute, or into the English statute which has been referred to and is known by the name of Lord Tenterden's Act, you will, to a large extent, I should say almost entirely, nullify the beneficial operation of that statute, because what are the cases in which the

statute comes into play? The class of representation in which the question which was intended to be dealt with by those two statutes occurs are usually and for the most part fraudulent representations, or it is sufficient to say that they may be, and if you excluded representations of a fraudulent character, or representations made fraudulently or with a fraudulent purpose, from those statutes, you would, in the majority of cases, fritter away the beneficial provisions of the statutes.

Therefore, my Lords, I think it is no answer to the plea of the defenders that the case falls within the words of the 6th section of the Mercantile Law (Scotland) Amendment Act, to reply that these representations were made with a fraudulent motive, or were of a fraudulent character; consequently I am of opinion that, having regard to the language of the 6th section of the Act, the present action is not maintainable upon these three first averments or representations by the defenders.

With regard to the fourth representation, I will assume that it may be read as a representation of a fact. I have myself considerable doubt whether in the form in which it is alleged, being an allegation of an intention and not of a fact, it is not giving too benevolent a construction to the pleadings so to read it, but for the present purpose I will assume that it is an allegation of a fact, and that it is a representation of the purpose for which the acceptances were required from the pursuers. Treating it so, it would not, I agree, be within the 6th section of the Mercantile Law (Scotland) Amendment Act; it would be outside that statute. But then in order to make it actionable you would require allegations, not only that that representation was made fraudulently, which you have, but also that it was acted upon, and that the defenders suffered damage by such acting. Now, my Lords, it was agreed on all hands by your Lordships that the allegation in the condescendence as it stands (the 11th article of the condescendence) was wholly insufficient to allege any such damage, because it merely alleged that the £4000 were paid to the overdrawn account of Douglas, Reid, & Company with the Clydesdale Bank, and that "the Clydesdale Bank were thus *lucrati* to the extent of the proceeds of the said acceptances," leaving it perfectly open and perfectly uncertain whether the Clydesdale Bank, although they immediately got the benefit of the £4000, did not afterwards allow Douglas, Reid, & Company to draw to that extent for the purposes of their business, so that the £4000 really and in substance would go in the manner in which it was averred it was intended to go. Your Lordships have given the respondents an opportunity of amending their condescendence in case what I conceive to be the obvious meaning of it was only a slip. Possibly, if the amendment which they propose had been in the condescendence in the first instance, it might have been considered sufficient, but I am bound to say that, after the respondents had heard what had been said by your Lordships, and had known exactly where the shoe pinched, and where the averment was insufficient, if they had been able to aver that Messrs Douglas, Reid, & Company were not allowed to draw £4000 after the bills had been paid into the bank for the purposes of their business, I cannot conceive that the respondents would not have said so. Instead of that they propose to insert an allegation which is to my mind perfectly consistent with the fact that Douglas, Reid, & Company

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were allowed to draw, and did in fact draw out £4000 after having placed it to their credit with the bank; because what they say is, that "the bank's ultimate loss would have been larger by the amount of the said bills, namely, £4000, and interest thereon." My Lords, that is perfectly susceptible of the construction, and I am bound to say I think it is the true construction, that it means the ultimate loss of the bank, having regard to further advances made against the £4000. No doubt if they allowed Douglas, Reid, & Company to draw out the £4000 there would have been £4000 added to Douglas, Reid, & Company's debt if you did not give the bank the benefit of the £4000 paid to the credit of the account. It is sufficient to say that in my opinion the proposed amendment fails to meet the requirements which it was pointed out to the respondents by your Lordships should be met in any amendment which they proposed to make of their pleadings.

Under these circumstances I think it would be a waste of expense to allow the defenders to go to trial upon the fourth representation contained in the 5th article of the condescendence.

LORD CHANCELLOR.—My Lords, before putting the question, I should wish to say that my noble and learned friend Lord Macnaghten, as well as Lord Morris, concur in the judgment which your Lordships are delivering. And for myself I wish to add that, if I only dealt with the fourth allegation in the condescendence in the opinion which I have just expressed to your Lordships, it was because I really, with all respect to those learned persons who have looked into the matter, thought that the question with regard to the statute was too plain for argument. But, as my silence upon that question might be supposed to indicate some difference of opinion, I wish to say that I entirely concur in the construction of the statute which has been placed upon it by my noble and learned friends.

INTERLOCUTORS appealed from reversed: Further ordered, that the cause be remitted to the Court of Session, with directions to assoilzie the appellants from the conclusions of the action, and to find the respondents liable in expenses, &c.

MURRAY, HUTCHINS, STIRLING, & MURRAY—RONALD & RITCHIE, S.S.C.—WILLIAM ROBERTSON & CO.—J. SMITH CLARK, S.S.C.

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May 15, 1896. Mackenzie v. Duke of Devonshire.

LADY CONSTANCE MACKENZIE (Third Party), Appellant.—*Balfour, Q.C.—D. Dundas—John Craigie.*
COUNTESS OF CROMARTIE (Second Party), Respondent.—*Lord-Adv. Murray—Macphail.*
THE DUKE OF DEVONSHIRE AND OTHERS (The Duke of Sutherland's Trustees) (First Parties), Respondents.—*R. L. Blackburn.*

Succession—Trust-disposition—Construction—"Heirs-female."—A truster, "in order to make and secure additional provision for" his second son "and the other heirs of entail succeeding him in the lands and estates of Cromartie . . . to enable them to support the dignity and title of Earl of Cromartie," conveyed to trustees certain securities, and directed them, after his death, to pay the free proceeds thereof to his second son and the heirs-male of his body, whom failing to certain substitutes, "whom failing to the heirs-female of the body" of the said second son. The second

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son, the Earl of Cromartie, died leaving only two daughters, of whom the elder succeeded her father in the title and estates of Cromartie.

Held (rev. judgment of Second Division) that the direction to the trustees to pay the income to the "heirs-female" of the body of the second son being unambiguous, must receive effect, and that, as the two daughters were heirs-portioners, each was entitled to one half of the income of the trust funds.

(IN the Court of Session, July 2, 1895, 22 R. 839.)

Ld. Chancellor (Halsbury.)
Lord Watson.
Ld. Herschell.
Lord Shand.
Lord Davey.

On 23d July 1862 the Duke of Sutherland executed the following trust-deed:—"I, George Granville William, Duke and Earl of Sutherland, in order to make and secure additional provision for Francis Sutherland Leveson-Gower, commonly called Lord Macleod, my second surviving son, and the other heirs of entail succeeding to him in the lands and estate of Cromartie, such heirs being descendants of the marriage between me and Anne Hay Mackenzie, Duchess of Sutherland and Countess of Cromartie, my wife, to enable them to support the dignity and title of Earl of Cromartie,—therefore I," &c. His Grace then conveyed to trustees therein named certain bonds, policies of insurance, and other securities, for, *inter alia*, the following purposes:—"(Fourth) That my said trustees shall, on my death, if the said Francis Sutherland Leveson-Gower, commonly called Lord Macleod, be then in minority, out of the free proceeds of the trust funds, apply such amount as shall be requisite for his maintenance and education, and thereafter accumulate any balance which may remain, and invest the same in the purchase of Government stock, or in any of the securities above mentioned; and upon the said Francis Sutherland Leveson-Gower, commonly called Lord Macleod, attaining the age of twenty-one years complete, my said trustees shall then pay the free proceeds of the trust funds, including the accumulated sum as aforesaid, to him and the heirs-male of his body; whom failing, to any son or sons to be hereafter born of my present marriage, in the order of seniority, and the heirs-male of his or their bodies; whom failing, to the heirs-female of the body of the said Francis Sutherland Leveson-Gower, commonly called Lord Macleod; whom failing," &c.

The Duke of Sutherland died on 22d September 1892, and the income of the trust funds was paid to Francis, Earl of Cromartie (described in the trust-deed as Lord Macleod, afterwards Lord Tarbat), until his death on 24th November 1893. Lord Cromartie, who had no younger brother, left no male issue, but was survived by two daughters—viz., Lady Sibell Lilian Mackenzie and Lady Constance Mackenzie.

Lady Sibell Lilian Mackenzie in terms of the entail of 1878 succeeded her father in the Cromartie estates, and to the earldom.

A question having arisen as to the younger daughter's right to a share of the income of the trust funds, a special case was presented by (1) the trustees, (2) the Countess of Cromartie, and (3) Lady Constance Mackenzie.

The case asked the opinion and judgment of the Court upon, *inter alia*, the following question:—"Is the whole free income of the trust funds payable to Sibell Lilian, Countess of Cromartie?"

The Second Division answered the question in the affirmative.

Lady Constance Mackenzie appealed.

LORD CHANCELLOR.—It appears to me that this case is susceptible of a very short solution. I simply look at the deed itself and I find that the provisions for the beneficiaries intended by this deed are satisfied by the

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persons claiming now as heirs-female. I really have great difficulty in saying more than that, because if the language of the instrument itself is sufficiently clear as to the beneficiaries pointed to, as I think it is, and if the trust purposes are set forth in the paragraph of the deed which is appropriate to such purposes, it seems to me to be absolutely unarguable that the true meaning of those words, and the purposes of the trust so set forth, can be in any way controlled, qualified, or modified by the initial statement of what the motive of the author of the deed was. It would to my mind be disastrous to introduce such a system of construing a deed. One has known the language of a will somewhat perverted to perform the function which it was assumed the testator intended to be performed, but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made. I should say that, even if there were some contradiction between what was done and the supposed purpose. But here it is very obvious to remark that the purpose or the motive which the maker of the deed prescribes to himself is to some extent satisfied by what he does, and I can only say, speaking with the utmost respect of the learned Judges who expressed a different view, that I am unable to comprehend how that purpose could alter the natural and ordinary effect of the words used in the instrument.

I move your Lordships that the judgment of the Court below be reversed, and that this appeal be allowed.

Lord Watson.—I have come without difficulty to the same conclusion.

These ladies are heirs-female, and they are also heirs-portioners. Heirs-portioners who are heirs-female take, according to the law of Scotland, as a class. The destination or gift to them contained in this trust-deed, if it were a destination or a gift of land, would be effectual to give them a *pro indiviso* right in the land, each taking an equal share; and I have heard nothing suggested to the effect that when there is a gift of moveable property to the same class in plain and unambiguous terms it should have a different effect. There can be no reason for its receiving a different effect in such a case, unless it be upon a principle which is unknown to the law of Scotland—that in dealing with money you require to use language more precise than when you are dealing with a land right.

The ground upon which the judgment of the Court below proceeds really comes to this, that to read the words in the sense in which I think they ought to be read would be at variance with the main purpose of the deed as declared in the narrative of it. My Lords, I think that is carrying the principle of construction by intention too far. I can quite understand that where words are capable of being modified or qualified in the context in which they occur it may be legitimate to ascertain how far one reading or another would best promote the intention of the maker of the deed; but I fail to see that the words at the commencement of the deed which have been referred to as imperative come to anything more than a statement that the deed was made because the truster entertained benevolent intentions towards certain persons who are included in the deed, and who are benefited

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by it. But it does not bring about any contradiction between his intention and the words of the deed, if you find there that besides the persons whom he intended to benefit, and whom he has benefited, some benefit is given to others. I think that it is a very dangerous canon of construction to admit what may be a partial statement of intention, quite consistent with other objects, to control the whole of the other language of the deed with the effect of striking out beneficiaries whom the truster may have intended to benefit. The narrative words come to no more than this: "My intention is to do" so and so, and you may add this, "and I have accomplished that purpose by the provisions which follow." In such a case the safer and only legitimate course is to look to the provisions which follow, and to read them according to their natural and just construction.

LORD HERSCHELL.—I am of the same opinion.

LORD SHAND.—If the truster in this case had contemplated the case that has actually occurred, it may very well be supposed he would have made a provision giving effect to the view which the Court below has taken. While saying at the outset of the deed that his purpose was to enable the beneficiaries "to support the dignity and title of the Earl of Cromartie," he might have thought it would better secure that purpose where heirs-portioners did succeed as females that the eldest heir-portioner should have the income. I can only say that if he had any such intention it is not expressed. The deed in its operative provision contains very distinct directions to the trustees. The trustees are expressly directed to give the income to the heirs-female, and it is conceded by the learned Judges in their opinions that the ordinary meaning of those words is that there shall be a distribution of the fund amongst all the heirs-female. I fail to see any room for the suggestion that there is ambiguity in that provision. Although it might appear that there was a failure to fulfil the intention of the truster, I should still give effect to the operative words of the deed, because his directions are given in distinct terms. But, as has been observed by the Lord Chancellor and by my noble and learned friend who has already spoken (Lord Watson), he does not fail to carry out that intention, for in any view that may be taken of the deed the eldest heir-female succeeding to the estate of Cromartie does get material benefits, although she has no right to the whole income.

Under these circumstances I am of opinion that the decision of the Court below in this case must be reversed.

LORD DAVEY.—I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention. Now, in this case Lord Trayner says in his judgment that "if these words are to be construed literally then the destination must be read as conveying the proceeds of the trust funds to the second and third parties equally, who are the heirs-female of Lord Tarbat." In that I agree, and that being so, I concur in the judgment proposed.

ORDERED, that the interlocutor of July 2, 1895, so far as complained of, be reversed: Further ordered, that the whole free

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income of the funds held in trust by the respondents, the parties of the first part, is payable in equal shares to and between the respondent, Sibell Lilian, Countess of Cromartie, the party of the second part, and the appellant, the Right Honourable Lady Constance Mackenzie, the party of the third part: Further ordered, that the costs of all parties to the appeal be paid out of the trust funds held by the respondents the trustees.

ROBINS, HAY, WATERS, & LUCAS—J. C. COUPER, W.S.—GADSDEN & TREHERNE—MACKENZIE & BLACK, W.S.—CURREY, HOLLAND, & Co.

No. 7.

May 15, 1896. Blair v. Assets Co.

JOHN BLAIR AND OTHERS (Defenders), Appellants.—*Lord-Adv. Murray—Ure—J. Wilson—A. W. Watson.* ASSETS COMPANY, LIMITED (Pursuers), Respondents.—*Balfour, Q.C.—Cozens Hardy, Q.C.—Charles D. Murray.*

Writ—Testing Clause.—Held that words inserted in the testing clause of a deed can have no effect in altering or adding to its provisions.

Smith v. *Chambers*, 5 R. 97, and 5 R. (H. L.) 151, *approved.*

Dunlop v. *Greenlees*, 3 Macph. (H. L.) 46, *commented on.*

Agent and Client—Agent's responsibility for advice to a client.—Observations on a law-agent's responsibility for advice given to a client.

Ld. Chancellor (Halsbury). Lord Watson. Ld. Herschell. Lord Shand. Lord Davey.

THE CITY OF GLASGOW BANK went into liquidation on 22d October 1878, and the liquidation was subsequently continued under supervision of the Court (First Division).

By the City of Glasgow Bank (Liquidation) Act, 1882, and relative discharge by the liquidators in favour of the Assets Company, Limited, recorded on 30th December 1882, the assets* of the bank were vested in the company at that date.

In December 1894 an action was raised by the Assets Company against John Blair, W.S., and John William Young, W.S., who were in 1878 and 1879 partners of the dissolved firm of Davidson & Syme, the law-agents in the liquidation. The summons concluded for payment of £7560 as damage alleged to have been sustained by the bank and its liquidators through negligent failure of duty or want of reasonable skill on the part of Davidson & Syme as their law-agents.

The pursuers' averments were to the following effect:—

In December 1878 the Reverend John Robert Campbell, minister of the parish of Monzievaird, was on the list of contributories as holder of £200 of the stock of the bank, and was liable for calls amounting to £5500. Mr Campbell represented to the liquidators that he was unable to pay the calls, and offered to pay £1000 in full of all claims. Mr Campbell made a declaration as to his property in which, *inter alia*, he made this statement:—"My income is

* By section 1 of the Act the assets were defined to mean "all lands and heritages, debts, bonds, mortgages, securities, moneys, effects, choses in action, claims, and demands whatsoever, including claims for unpaid calls, and in general all property, real or personal, heritable or moveable, whether situate in the United Kingdom or elsewhere, belonging to or vested in the bank or the liquidators, or which the bank has power to acquire, or which are or is held in trust for or to be realised solely for account of the bank at the date of vesting hereinafter mentioned, but shall not comprise the liability of any contributory to calls, except such as have been made by the liquidators before the passing of this Act."

derived from three sources—(1) stipend . . . £254; in addition, there is manse and glebe valued at £40; (2) income derived from stocks and shares above mentioned; (3) my wife has a separate estate, the income of which for last year was £315; I enclose copy of our marriage-contract." (Cond. 4) "Upon receiving the said declaration and relative copy of marriage-contract, the liquidators forwarded them to Messrs Davidson & Syme, on or about the 10th January 1879, and employed them, *inter alia*,—(1) to advise the liquidators as to the terms on which it would be advisable to settle with the said John Robert Campbell; (2) to satisfy themselves that the whole means possessed by the said John Robert Campbell at 2d October 1878 had been disclosed; and (3) to report on what terms they would recommend the liquidators to grant a discharge."

Messrs Davidson & Syme wrote to the liquidators giving their opinion that a payment of £2068 should be required for a discharge, and subsequently after the proportion of stipend to be exacted had been considered by the liquidators with the defenders the sum to be required for a discharge was adjusted at £1250.

The liquidators, in reliance on the advice of their law-agents, agreed to grant a discharge on payment of this sum subject to their obtaining the sanction of the Court to the compromise. In May 1879 the liquidators received payment of £1250 from Mr Campbell, and thereupon employed Davidson & Syme to submit the compromise to the Court for consideration and sanction. The Court subsequently sanctioned the compromise, and the discharge was granted.

Davidson & Syme in fixing the basis of compromise failed to take into account Mr Campbell's right under the marriage-contract to the income of his wife's estate, which amounted to £315, and had at the date of the compromise an actuarial value of £4250.

(Cond. 7) " . . . By the said contract of marriage, as originally prepared, the said John Robert Campbell renounced and discharged his *jus mariti* and right of administration over the whole estate then belonging to his intended wife, the said Jane Campbell, or which she might acquire or succeed to *stante matrimonio*. This exclusion might have been construed as an exclusion of the *jus mariti* from the income of the estate of the said Jane Campbell, which would have been contrary to the intention of the parties to the contract. Accordingly, before the said contract was signed, the said John Robert Campbell insisted, as a condition of signing the said contract, upon a clause being inserted in the following terms:—'It being hereby declared before signing,'" &c., as inserted in the testing clause quoted in footnote.* "The said Jane Campbell consented to and

* The marriage-contract which was produced bore that Mr Campbell "hereby renounces and discharges his *jus mariti* and right of administration over the whole estate presently belonging to" his intended wife, "or which she may acquire or succeed to *stante matrimonio*." The testing clause was as follows:—"In witness whereof these presents, consisting of this and two preceding pages, and written on stamped paper down to and including the words 'in witness whereof' by Thomas Finlayson, clerk to J. & J. Miller, solicitors, Perth, and from thence to the end by David Sinclair Manson, also clerk to the said J. & J. Miller, are subscribed by the said Jane Campbell at Moulin Manse on the 31st day of May 1862, before these witnesses, John Scott, smith, Moulin, and Henry Duff, wright, Moulin; and by the said Reverend John Robert Campbell at Perth on the 2d day of June 1862 before these witnesses, James Dick Miller and John Miller

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authorised the insertion of the said clause, and it was thereupon added to and made to form a part of the said contract, which was thereafter signed and completed.* The said contract, completed as aforesaid, was registered in the Books of Council and Session on 5th June 1862. In reliance upon the said completed contract, the parties were married on 3d June 1862. An extract from the Register of Marriages is herewith produced and referred to. The said contract has been adopted and acted on by both parties for upwards of thirty years, Mr Campbell having during that period regularly uplifted and applied to his own uses the income of his wife's estate."

(Cond. 8) " . . . The pursuers believe and aver that the said defenders culpably and negligeutly failed to read the whole of the said marriage-contract, and in particular failed to read the clause therein above quoted. If they did read the whole contract, including the said clause, they acted with want of reasonable skill in advising the liquidators in the manner foresaid. Even on the assumption that they did read the said clause, and had formed an opinion to the effect that it was not valid or effectual to qualify the other provisions in

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Miller, both solicitors in Perth: It being hereby declared before signing that while the *jus mariti* and right of administration of the said John Robert Campbell are renounced and excluded, such renunciation and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and shall not extend or apply to the annual produce or interest of her said estate, the said John Robert Campbell being entitled to draw the said annual produce or interest." Here followed the signatures of the parties and of the witnesses.

* The following letters were produced by the pursuers when the case was before the Second Division:—"Messrs J. & J. Miller, W.S., Perth, to Miss Campbell, Moulin Manse, with note by her appended. —2d June 1862.—Dear Madam,—Mr Campbell has informed us that it is your desire that he shall have the full control of the annual proceeds of your property of every description, and in consequence an alteration is necessary in the contract signed by you. This we propose doing by inserting a declaration that Mr Campbell's *jus mariti* and right of administration is only to be excluded in so far as regards the capital or principal of your estate, and this inserted will give him the absolute power of such annual proceeds. We confess we think this is going rather far in the circumstances, but if such is your deliberate wish, we must give up our opinion in the hope that no circumstances may ever occur to render the want of the additional precautions we consider proper to be a matter of regret.—We are, &c."

"Moulin Manse, 3d June 1862.—1.30 p.m.—I approve of the proposed alteration on the contract. JANE CAMPBELL."

"Messrs Miller to Rev. J. R. Campbell of Ardoch.—Perth, 2d June 1862.—10 p.m.—Dear Sir,—You have now subscribed the contract of marriage with Miss Jane Campbell on the understanding that a declaration of the following effect is to be inserted in the testing clause, and which you assure us is in accordance with Miss Campbell's desire, viz., it being hereby declared before signing that while the *jus mariti* and right of administration of the said Rev. John Robert Campbell is renounced and excluded, such renunciation and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and not extend or apply to the annual produce or interest of her said estate, the said Rev. J. R. Campbell being entitled to draw the said annual produce or interest. And on receiving a letter from Miss Campbell that such is her wish, we undertake that such clause shall be so inserted in said marriage-contract.—We are, your ob. serv."

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the said marriage-contract, it was their duty to bring its terms under the notice of the liquidators, and to obtain their special instructions as to the mode in which the matter was to be dealt with. This they culpably and negligently failed to do."

The pursuers further averred that the defenders had failed in their duty in failing to call the attention of the Court to the terms of the clause in the marriage-contract.

The pursuers further stated that if the liquidators had been made aware of the clause they would not have agreed to the compromise, and instead of being "hopelessly insolvent, as represented to the liquidators and to the Court, the estate of the said John Robert Campbell was at said date quite able to meet the whole balance of the calls then remaining unpaid, amounting, after deduction of said sum of £1250, to the sum of £4250."

The pursuers pleaded;—(1) The City of Glasgow Bank and its liquidators having sustained loss and damage to the amount condescended on, in consequence of the culpable and negligent failure of duty, or want of reasonable skill on the part of Messrs Davidson & Syme as their law-agents, and in consequence of their misrepresentation of the facts to the Court, all as condescended on, decree should be pronounced as concluded for.

The defenders pleaded;—(1) No title to sue. (2) The pursuers' statements are irrelevant, and insufficient to support their pleas.

On 18th June 1895 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Repels the first plea in law for the defenders; sustains their second plea in law, and assoilzies them from the conclusions of the libel, and decerns." *

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* "OPINION.—(His Lordship after giving a summary of the pursuers' averments as to Mr Campbell's declaration and the advice given by the defenders and the compromise following thereon, continued):—Now the pursuers aver that this advice given by Davidson & Syme proceeded on this error, that they failed to discover and to include or take into account a very important part of Mr Campbell's estate, viz., the income of his wife's estate, amounting to £315 per annum, and of an actuarial value of £4250; and I understand the pursuers' case to be that, if this life interest had been ascertained to be and had been treated as part of Mr Campbell's estate, the estate would have sufficed to pay the full amount of the calls, and no compromise would have been necessary or permissible; and they undertake to prove that in consequence the liquidators suffered damage to the extent of the sum sued for, which includes interest.

"The pursuers' contention that the annual interest of Mrs Campbell's estate formed part of Mr Campbell's estate is rested on the marriage-contract, an extract of which has been produced, the principal deed not having been before me. The marriage-contract is not a trust-deed. It bears that 'the said Reverend John Campbell hereby renounces and discharges his *jus mariti* and right of administration over the whole estate presently belonging to her' (Mrs Campbell), 'or which she may acquire or succeed to *ante matrimonio*.' But it is contended that this provision is qualified by a declaration in the testing clause, which is expressed in these very peculiar terms."—(His Lordship here quoted the testing clause, *supra*, p. 37, note.)

"The signatures of the parties follow this testing clause in the usual way. There is a very singular peculiarity in this testing clause which may here be noticed. It mentions the signature of Mrs Campbell on 31st May and of Mr Campbell on 2d June, and presumably therefore it was not written until on or after 2d of June, and therefore after the signature of Mrs Campbell on 31st May; and yet it bears that the declaration about the

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The pursuers reclaimed.

LORD JUSTICE-CLERK.—The Court are of opinion that this case cannot be satisfactorily disposed of without inquiry, and we give no opinion upon the matter dealt with by the Lord Ordinary, but his interlocutor will be recalled and a remit made to him to allow parties a proof of their averments before answer, the proof to be comprehensive of the whole questions between the parties, including any facts bearing on the question of damages, so that it may be exhaustively dealt with after the proof has been taken.

LORD YOUNG and LORD TRAYNER concurred.

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exclusion of the *jus mariti* was 'hereby declared' before signing. This may possibly be susceptible of explanation, but apparently there is here in the testing clause a glaring inconsistency. It appears to be self-contradictory.

"The pursuers maintain that this declaration had the effect of conferring on Mr Campbell a right to the annual interest of his wife's estate, and they aver that in reliance on the marriage-contract as thus completed, the marriage took place on 3d June 1862, that the deed was recorded on 5th June, and that, in accordance with the declaration, Mr Campbell thereafter drew and applied to his own purposes the income of his wife's estate. The pursuers put their case thus: they aver that it was the duty of Davidson & Syme to have called the attention of the liquidators to this provision in the testing clause, to have informed them that this liferent interest formed a part of Mr Campbell's estate or might fairly be claimed as such, and to have advised them that no settlement should be concluded with Mr Campbell except on condition of receiving from him the actuarial value of that life interest, and that it was also their duty to lay that information before the Court. They aver that Davidson & Syme did not call the attention of the liquidators to the provision in question, and advised them to settle with Mr Campbell on the footing that he had no such right, and that the marriage-contract was not laid before the Court at all, and that the attention of the Court was not called to the provision introduced into the testing clause. They aver that, if Davidson & Syme had fulfilled their duty, the liquidators would not have made the compromise, and that, if they did, the Court would not have sanctioned it; and they aver that loss arose to the liquidators in consequence.

"It is to be observed that the pursuers do not, and I think cannot, say that the liquidators would, if properly advised, have made a better compromise, for they do not, and I suppose cannot, say that Mr Campbell would have agreed to a compromise on any terms more unfavourable to him. Their case is, and must be, that there would have been no compromise, and that they would have recovered the amount of the calls by an action in which they would have succeeded in establishing that the annual interest of Mrs Campbell's estate formed an item of Mr Campbell's estate. I think it manifest that it is essential to the success of the pursuers' case to be able to shew that the declaration in the testing clause was effectual to restrict the clause in the body of the deed, by which the husband's *jus mariti* and right of administration were renounced to the fee of the wife's estate. It is clearly not enough to shew that, at the date of the settlement, that was a doubtful point, but it is essential to shew that, as the law stood at that time, it was a sound legal proposition. Otherwise there would have been no loss.

"Now, the pursuers put their charge of failure in professional duty against Messrs Davidson & Syme in an alternative form, which they were quite entitled to do, but which I have found somewhat embarrassing. They say that either Davidson & Syme failed to notice the testing clause altogether, through negligence; or that they read it and failed, through professional ignorance or mistake, to appreciate the legal effect of it.

"I take the second view first, and assume that Davidson & Syme read the

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This interlocutor was pronounced:—"Recall the interlocutor reclaimed against: Remit to the Lord Ordinary to allow the parties before answer a proof of their averments, and the pursuers a conjunct probation, reserving all questions of expenses."

The defenders appealed.

LORD CHANCELLOR.—This is an action brought by the Assets Company, whose title to sue I will assume, against the partners in a firm of Writers to the Signet, in consequence, as the pursuers allege, of loss sustained by reason of the negligence of the defenders. It appears that the firm in question were retained by the liquidators to advise them in respect of certain compositions which were being negotiated between themselves and the share-

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clause. It is then said that they were bound (1) to call the attention of the liquidators to it; (2) to have advised them not to compromise except on the footing that the life interest was part of the shareholder's estate; and (3) that they were bound to have brought the marriage-contract under the notice of the Court, and to have directed attention to its peculiarities.

"Now, I think that to the case as thus put, and as it appears on the record, and without further inquiry, the defenders have a sufficient answer.

"Their instructions were, as they are averred by the pursuers, to satisfy themselves as to the facts, and to advise the liquidators as to the terms on which they ought to settle. They were not instructed to inform the liquidators about the facts which the liquidators might be presumed to know, nor were they instructed to give their reasons for their advice, but only to advise the liquidators as to the terms of settlement.

"Admittedly they advised them on the footing that the life interest of Mrs Campbell's estate was not a part of her husband's estate, and if that view could not be taken without gross ignorance of law on their part, they may be liable for the consequent loss; otherwise not.

"Now, it is well settled that a law-agent does not guarantee the correctness of every advice he may give, and does not incur liability in consequence of every error into which he may fall, but is only liable in damages if his mistake be gross and inexcusable, and amounts to *crassa ignorantia*. The cases are conclusive on that point: *Purves* v. *Landell*, 1845, 4 Bell's Appeals, 46; *Cooke* v. *Falconer*, 20th Nov. 1850, 13 D. 157; *Hamilton* v. *Emslie*, 27th Nov. 1868, 7 Macph. 173. Now, if Messrs Davidson & Syme formed the opinion that the provision in the testing clause was ineffectual to restrict the provision in the body of the deed, it is hopeless to contend that that opinion indicated gross ignorance; for it was, if not absolutely warranted, at least strongly supported by the unanimous judgment of the Court, in the then recent case of *Smith* v. *Chambers' Trustees*, 9th Nov. 1877, 5 R. 97. In that case a clause had been introduced into the testing clause of a testamentary settlement, purporting to restrict the rights conferred on beneficiaries by the deed; and it was held to be ineffectual, a point on which the Judges in the Inner-House were unanimous. That case was not exactly the same as this, because here there is an allegation that the provision under question had been acted on. But if all that could be ascribed to Davidson & Syme was an opinion as to this case substantially the same as that held by the Judges of the Inner-House in *Smith's* case, of course that did not indicate *crassa ignorantia*, whatever it might indicate. It is true that very serious doubts have been expressed as to the soundness of the judgment in that case. The judgment itself was recalled in the House of Lords on another ground, which rendered it unnecessary to decide the point as to the effect of the testing clause; but Lord Gordon expressed a distinct opinion to the effect that the judgment of the Court of Session on that point was inconsistent with a previous judgment in the House of Lords in *Dunlop* v. *Greenlees' Trustees*, 2d June 1865, 3 Macph. (H. L.) 46, and was erroneous;

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holders of the Glasgow Bank in liquidation. The particular shareholder, the Rev. John Campbell, was liable to the extent of upwards of £5000 for unpaid calls, and it became material for the pursuers to ascertain what was the extent of his property, in order to judge whether they would or would not accept the composition offered by him in respect of his liability.

The only question in debate was whether they, the defenders, ought to have reckoned as part of his estate the income of his wife's separate property. The pursuers contend that the marriage-settlement made that income part of Mr Campbell's own property, and therefore to be reckoned as one of the items to be taken into consideration in relation to the composi-

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and the other Judges reserved their opinions. So far as judgment went, it may be admitted that, at the date of the settlement, the point might be held to be open; but Davidson & Syme could not be held to be in gross fault if their judgment concurred with that of the Judges of the First Division.

"But it is said that it was their duty to tell the liquidators that the question was not closed, and that opposing opinions had been expressed about it. It might have been proper enough to do that; but I see no reason to think that it was their duty. It was their duty to form their own opinion, and to advise the liquidators accordingly. But it was not their duty, nor according to their instructions, to reason out the matter with the liquidators, to say whether their opinion was given with confidence or hesitation, or to quote their authorities.

"The defenders say that the contract of marriage was before the Court. If so, the Judges presumably read the testing clause. In any case, I greatly doubt whether they would have gone back to any extent on the judgment in *Smith* v. *Chambers' Trustees*. The Judges who decided that case were the very Judges before whom the compromises with the City of Glasgow Bank shareholders came. It would not have been unreasonable had Davidson & Syme thought it hopeless to raise the question again, and I doubt whether the Court would have disapproved of the proposed compromise, and compelled the liquidators to litigate a question on which they had unanimously pronounced an adverse judgment. Lord Gordon, in the House of Lords, proceeded on what he considered the disconformity of the judgment in *Smith* with that of the judgment in *Dunlop* v. *Greenlees' Trustees*. But that case had been very carefully considered by the Judges in Scotland in *Smith's* case, and they were of opinion that the two judgments did not conflict.

"I am unable to hold that the pursuers' averments, which proceed on the assumption that Davidson & Syme read the testing clause, amount to such a charge of gross ignorance as would subject them in damages; and, in this view of the case, I do not require to consider the further averments, viz., that the liquidators did not know of this clause, and would not, had they known it, have concluded the settlement which they made; and that the Court would not have sanctioned the compromise. The prospect of being able to prove these averments seems but distant. But, if they were proved, the liability of the defenders would not follow, because they were not chargeable with *crassa ignorantia*. Neither do I require to consider whether the view on which they are said to have acted was right or wrong—that is to say, whether *Smith* v. *Chambers' Trustees* was well decided.

"But then the pursuers have averred alternatively that Davidson & Syme failed to read the testing clause; and that, I cannot doubt, is an averment of such gross negligence as would support an action against them for such damage as might be proved to have resulted from it. But then I do not see that there is any relevant averment that any damage resulted from that. No doubt it is averred that if they had read it then it would have been their duty to have advised the liquidators in the manner averred, but that seems to be the same point which has been already considered. What the

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tion to be accepted. The appellants, the defenders, contend that the marriage-settlement made it irrevocably the property of the wife; and the contention on the other side as to the liability of the defenders depends very much upon what is to be called in strictness the marriage-settlement. There is no doubt that in one part of the parchment writing signed by the spouses (though at different times under circumstances I shall have to refer to hereafter) there appears in writing a declaration that the renunciation by Mr Campbell of his *jus mariti*, which was absolute and unqualified in the earlier part of the instrument, was only to apply "to the capital or principal of the estate of Jane Campbell," the wife.

An important part of the discussion (though for reasons to be given hereafter I think not a conclusive part) relates to the place and the date at which this renunciation was written on the original parchment. But for the technicalities and the usage of Scottish conveyancing I should myself

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pursuers have not averred and have not undertaken to prove is, that the defenders, if they had read the testing clause, would have formed the opinion that the provision in it was effectual, and that it was their duty to have advised the liquidators to that effect. Had the pursuers averred that, the case might have been different; but I suppose that such an averment would have been hopeless.

"I think, therefore, that there is no relevant averment that the defenders were guilty of such negligence or ignorance of law leading to loss as can make them liable for that loss.

"The defenders further argued that there could have been no loss, because the case of *Smith* v. *Chambers' Trustees* was rightly decided, and would have been followed had a litigation been raised, and that the provision in the testing clause would have been held ineffectual. The pursuers argued that the judgment in *Smith* v. *Chambers' Trustees* was wrong, and that the clause was effectual. I was thus called on to review the judgment of the First Division. I consider that it is not necessary for me to undertake that task. If that had appeared to be necessary, I think it would have been proper to have allowed a proof, in order to ascertain whether there was not a vital difference between that case and this. In *Smith's* case, as I understand it, the Court proceeded, not only on the opinion that the testing clause is a part of a deed, which may be held to be settled law, but also on the assumption that, in that case, it was added before the granters' signature, and was itself authenticated. But if it were shewn in this case that the clause was added a couple of days after Mrs Campbell signed the deed, as seems probable, that might differentiate the two cases.

"I have found it necessary to examine the nature of the case made against the defenders before considering the title of the pursuers, and, as I have come to the conclusion that there is no relevant case against the defenders, it is unnecessary to consider at any length the question of title, which seems attended with considerable difficulty. It is of course clear that the pursuers could have no claim or action unless the liquidators had. Now, suppose a case of gross negligence or gross ignorance made out against the defenders, it is not quite obvious that the liquidators would have had an action. It might perhaps have been argued that their functions were limited to the recovery of calls sufficient to pay the whole debts of the bank, and that if they paid the whole debts they could not possibly be losers.

"On the whole, I am, however, disposed to think that, at the date of the assignation to the Assets Company, when the debts of the bank were not fully paid, the liquidators would have had a right to sue the defenders to recover from them the amount of calls which, through their fault, had not been recovered, and that such a right is covered by the definition of assets in the statute. I am therefore not prepared to sustain the plea of 'no title to sue.'"

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have said that the words I have quoted as existing on the parchment writing formed no part of the deed at all; but apparently it has been the practice, sanctioned by decision, to consider the attestation clause a part of the deed, and so to comply with the ancient Scottish statutes, though I cannot but think in requiring the witnesses to be designed in the body of the deed these statutes contemplated an attestation of the deed and not in the deed. The designing of the witnesses was required apparently for the purpose of ascertaining beyond dispute who the witnesses were to be, that they should be named and described in the body of the deed itself. The very distinction "in the body of the deed" would seem to shew that this was what was originally contemplated.

The practice, however, appears to have grown up (probably for convenience's sake) that after the parties have attached their signatures to that which was in truth the bargain to which both the minds had assented, a space should be left between the end of what I call the deed and the signatures to enable the attesting clause to be added and so satisfy the words "in the body of the deed," and no limit appears to have been placed by Scottish law as to the interval which might elapse between the signature of the parties to what they had agreed to and the addition of the attesting clause. So that in one case thirty-two years have been held not too long an interval within which the attestation clause may be added. The very words by which the attesting clause begins, "In witness whereof," seem to shew what is the true construction of what the attesting clause must be,—We who are the witnesses hereto are putting our names to this written instrument to which the parties have agreed.

The contention before your Lordships apparently is that this attestation clause may legitimately be used for the purpose of introducing new stipulations, and even, as in this case, for qualifying, and even contradicting, the instrument which had previously been agreed upon and signed. In Scottish law, as in English, a deed is described as a solemn instrument, and with the same object in both countries. That is, it is intended to place what the agreement was beyond the doubts incident to any transaction where an infirm memory, not assisted by any written record of what has taken place at some distant interval, may fail to describe it accurately. The proof of deliberation and authenticity was to be secured in various ways,—sealing, at one time required in both countries, as it is now required in this, signature by various statutes, delivery, and so forth. These are various expedients to preserve the evidence of things agreed upon, equally against failure of memory as against the commission of fraud, or the conflict between the parties as to what has taken place. If, however, new stipulations can be introduced many years after the parties have come to their agreement, and can either qualify or contradict the agreement by putting into the form of attestation such qualifications or contradictions, what becomes of the finality of a deed?

It is nothing to the purpose to suggest that if challenged you must prove the assent of the parties to the new matter thus introduced by the attestation clause. You can only prove it by the very means which the existence of a deed at all was intended to prevent the necessity of having recourse to, and it is manifest that if you can alter or qualify a deed by the introduction of verbal evidence, its function as a deed is gone.

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The authority of the Court of Session itself had decided,[1] not very long before the transactions now in question, that such a provision in the attesting clause of a deed was ineffectual to restrict the operation of what I have called the deed itself; and I concur both in the decision itself and in the reasoning by which that decision was supported.

My Lords, I do not stay for the moment to comment on what might be the operation on the minds of the defenders here of that decision, because I propose to treat more at large the question of the alleged negligence. But, speaking of the matter of law only, I think that was the law of Scotland, and I think nothing has passed in your Lordships' House which can qualify or cut down that decision. In saying that I do not omit to consider the observations of Lord Gordon in *Smith* v. *Chambers*.[2] I think the noble and learned Lord was in error in supposing that there was any conflict between the judgment of your Lordships in *Dunlop* v. *Greenlees*[3] and the decision in *Smith* v. *Chambers*.[2] In the case referred to by Lord Gordon,[2] all that had to be proved was the wife's consent to a provision for herself, and she put her signature "in token of her consent to and approval of the foregoing settlement." It appears to me that, whether she signed that consent in the attesting clause or on the paper in which the deed was wrapped up, her consent was effectual. In a strict sense her signature of the deed, although it was written on the same parchment, and although included in what was described as an attesting clause, was no signature to the deed. She was no party to the deed. Her signature had no operation in the deed as a deed. Her signature only operated as a conclusive proof that she had assented to that provision for herself in the deed, and she might just as easily have established that consent by a separate and independent writing altogether.

It appears to me that the diligence of the learned counsel has failed to discover any authority which justifies the proposition now contended for. The only case[4] suggested to be in point is one in which, as my noble and learned friend Lord Watson pointed out, it would have been impossible for the parties, representing the interests they did, to urge the objection now insisted on.

But I will now assume that the question is more open to doubt than I think it is. Can it be gravely contended that a Writer to the Signet in Scotland can be made liable in an action for negligence because his opinion has coincided with the unanimous judgment of the Court of Session? As I have said, I think the judgment in *Smith* v. *Chambers*[1] on this point was perfectly right. But suppose for a moment that Lord Gordon's[2] observations should have made the defenders doubtful of the accuracy of the decision in *Smith* v. *Chambers*,[1] does it follow that they would be negligent for advising their clients to accept the composition? They might well and most prudently think it was better to accept the composition offered than to incur the risk of a law-suit to be carried to your Lordships' House in order to solve those doubts. That the same Court before which an approval of the composition in question was to come in the first instance would

[1] Smith v. Chambers, 5 R. 97.
[2] 5 R. (H. L.) 151.
[3] 3 Macph. (H. L.) 46, 37 Scot. Jur. 470.
[4] Brown v. Govan, Feb. 1, 1820, F. C.

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adhere to their own decision was tolerably certain, and therefore the proposition must be, that to accept a composition—which for the moment I will assume to be not all that could have been obtained—rather than incur the expense of an appeal to your Lordships' House, was negligence. That is too absurd, as it appears to me, to require more than the statement of the proposition. Besides negligence, the plaintiff in such an action is bound also to prove the loss or damage in consequence of the negligence. Is it susceptible of proof that, if Mr Campbell had been driven to extremities, more could have been obtained in any view of this case? I think not.

My Lords, I concur entirely with the very powerful reasoning of Lord Kincairney, and I only regret that the Judges of the Second Division did not deal with his judgment in such a way as to allow your Lordships to understand why they did not accept his reasoning.

(His Lordship then moved the order at the end of the report.)

Lord Watson.—(After stating the pursuers' averments)—In my opinion the relevancy of these averments entirely depends upon the proposition that the words so introduced into the testing clause form part of the deed, and must as such receive their full legal effect. If that proposition fails the other averments of the respondents amount to nothing more than this, that before marriage there was an informal agreement between the future spouses to alter the terms of their probative deed. As might have been expected, Mr Balfour did not maintain that such an agreement could *per se* prevail against the deed; but he argued at some length that the agreement was after marriage so validated *rei interventu* as to have that effect. Upon the general question as discussed by the learned counsel I do not find it necessary to express any opinion. His argument completely ignored the well-known rule of Scots law, which regards such acts of *rei interventus* by a wife after marriage, or even a formal ratification by her, as a *donatio inter virum et uxorem* which she can revoke at pleasure.

Two years before the date of the acts of negligence imputed to the appellants, the learned Judges of the First Division had unanimously decided in *Smith* v. *Chambers*,[1] that words similarly introduced into the testing clause of a trust-disposition and settlement, which materially qualified one of the directions previously given by the testator, were of no legal effect. Upon that point separate judgments were delivered by Lords Deas and Mure, and by my noble and learned friend opposite (Lord Shand), with the concurrence of the late Lord President Inglis. It does seem rather extravagant that a Scottish law-agent should be accused of negligence and want of skill because, in advising the liquidators as to the terms of a compromise, he accepted the law laid down by the same Judges who had the control of the liquidation, and whose sanction to the compromise was requisite.

If the judgment of the Court of Session in *Smith* v. *Chambers*[1] be according to law, it necessarily follows that the present action is groundless. That decision was accordingly strenuously impeached by the respondents' counsel, partly upon the authority of previous decisions with which it is said to conflict, and partly on the strength of observations made by my pre-

[1] Smith v. Chambers, 5 R. 97.

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decessor, Lord Gordon, in the case of *Smith* v. *Chambers*,[1] when it came by appeal to this House. The other noble and learned Lords who were present when the appeal was disposed of did not find it necessary to consider that part of the case which related to the testing clause of the deed, and expressed no opinion upon the point. In deciding *Smith* v. *Chambers*[1] the Judges of the First Division had, of course, no opportunity of considering the remarks subsequently made by Lord Gordon; but all the authorities cited to us in the course of the argument for the respondents, with the exception of *Brown* v. *Govan*,[2] which has been exhumed by the industry of their counsel, were carefully examined and discussed by Lord Deas, who also refers to a number of other authorities which have not been cited by the respondents' counsel, but are by no means favourable to the respondents' contention.

The testing clause of a probative deed, which is an anomalous feature of Scottish conveyancing, apparently owes its origin to 1681, c. 5, which enacts that "all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses," and also "that in all the said cases the witnesses be designed in the bodie of the writ, instrument, or execution respectively, otherwise the same shall be null and void, and make no faith in judgment, nor outwith." The Act appears to me to contemplate that these requisites shall be inserted in the body of the deed before it is executed by the subscriptions of the parties to it and of their attesting witnesses. That course might be possible in cases where there was only one party to the deed, or where several parties and their witnesses were all present for the purpose of its execution at the same time and at the same place. But it became a practical impossibility in cases where a deed was executed by several parties and their respective witnesses at different times and in different places. In order to meet the difficulty the practice was introduced, and sanctioned by decisions of the Court, of filling in the testing clause after the deed had been executed by all the parties and their witnesses at any time before the deed was recorded in a public register, or produced in judgment. Mr Bell (Principles, s. 2226) justly observes that it is "a very dangerous practice." In *Blair* v. *Earl of Galloway*[3] it was held that a testing clause might be lawfully inserted by the holder of the deed after the lapse of thirty-two years, one of the learned Judges observing,—"As to the defect in the execution of the deed, there is nothing in the law of Scotland requiring the testing clause to be filled up within a specified period, and I therefore consider the objection to be a great deal too critical."

Their admission of the practice which has just been noticed involved the Judges of the Court of Session in the unpleasant consequences which inevitably attend the affirmation of two propositions which are self-contradictory. On the one hand, it compelled them to hold, *fictione juris*, that the testing clause had actually been filled in before execution of the deed, and had been subscribed by the parties and their witnesses. On the other

[1] 5 R. (H. L.) 151.
[2] Feb. 1, 1820, F. C.
[3] Nov. 15, 1827, 6 Shaw, 51.

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hand, it equally compelled their recognition of the fact, that according to the practice which they themselves had sanctioned, and which was generally if not invariably followed, the testing clause formed no part of the deed at the time of its subscription, but was or might have been added after the deed had been formally authenticated by the signatures of the parties to it, and of the attesting witnesses. In these circumstances, it appears to me to be clear beyond doubt, that a testing clause which may have been, and probably was, inserted after subscription, ought not to contain, and cannot legitimately contain, any terms which would, if given effect to, cut down or modify the agreement which the parties had, in point of fact, executed. I am not prepared to go that length, unless constrained by clear and cogent authority, which I have been unable to find, either in the argument of the present respondents or elsewhere. It would be an extraordinary state of the law, if one of the parties to a deed, who had the custody of it, could, after the lapse of twenty or thirty years, and after the death of some or all of the parties to it, alter its whole tenor or effect by the insertion of a testing clause. But that is the logical result of the argument addressed to us for the respondents.

In my opinion, it is not immaterial to notice the facts and allegations which are before us in the present case, bearing upon the time at which the testing clause of the marriage-contract was written into the deed, which was executed by the wife on May 31, and by the husband on June 2, 1862. The insertion must have been made on or before June 5, because, on that day, the instrument, with the testing clause as it now stands, was duly recorded for preservation in the Books of Council and Session. But the productions made along with the record, and relied on by the respondents as shewing that the lady consented to an alteration of the terms of the deed, also shew conclusively that no proposal for an alteration was made to her until June 2, two days after her signature had been adhibited and attested, and that her husband, in like manner, subscribed the deed without the alteration, upon the written assurance of his law-agents that it would be subsequently inserted in the testing clause.

I am satisfied with the judgment of the First Division in *Smith* v. *Chambers*,[1] which, in my opinion, is decisive of the present case; and I entirely concur in the exhaustive exposition of the law and examination of previous decisions which is to be found in the opinion delivered by Lord Deas. I do not propose to occupy your Lordships' time by repeating the reasoning of Lord Deas, and shall content myself with a brief reference to two authorities relied on by the respondents, which, as already stated, are not noticed in his Lordship's opinion.

The case of *Brown* v. *Govan*[2] appears to be a recent discovery. It is not surprising to find that it was neither cited nor commented upon in *Johnstone* v. *Coldstream*,[3] *Dunlop* v. *Greenlees*,[4] or in *Smith* v. *Chambers*,[1] because the question which is involved in these cases and arises for decision in this appeal was not there raised, and no judicial opinion was expressed upon it. According to the report, a father by his contract of marriage made

[1] 5 R. 97, 5 R. (H. L.) 151.
[2] Feb. 1, 1820, F. C.
[3] June 30, 1843, 5 D. 1297, 15 Scot. Jur. 541.
[4] 2 Macph. 1, 3 Macph. (H. L.) 46.

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certain provisions in favour of the children of the marriage, payable on their attaining majority or being married; and by a subsequent declaration he postponed the period of payment until twelve months after his decease. During his lifetime he made a conveyance of heritable subjects to his children, in security of their provisions, upon which they were infeft. After his death the trustee in his sequestration brought a reduction of the conveyance and sasine following upon it. It was suggested by the respondents that the declaration postponing the period of payment was only to be found in the testing clause of the contract, and they read some extracts from the Session papers, which did not satisfy me that such was the case. Whether it was so or not is to my mind immaterial. If the fact was as represented, it is clear that the children, who were the only persons having an interest to raise the point, did not attempt to do so. The only defence upon which they relied was that the heritable security which they had obtained from their parent was in law equivalent to payment of their provisions.

There only remains to be noticed the opinion expressed by Lord Gordon in *Chambers* v. *Smith*,[1] which was undoubtedly adverse to the unanimous decision of the Court below, in relation to the testing clause of Dr Chambers' settlement. That point was not disposed of by the House; and, seeing that the opinion expressed by the learned Lord was strictly *obiter*, I feel at liberty respectfully to differ. It was mainly rested upon the ground that the decision of the learned Judges of the First Division was at variance with the judgment of this House in *Dunlop* v. *Greenlees*.[2] The two cases were, to my mind, essentially dissimilar. In *Chambers* v. *Smith*[3] the effect of the testing clause was to alter materially one of the directions of the trust created by the testator. In *Dunlop* v. *Greenlees*[2] the words introduced into the testing clause were merely descriptive of the object with which Mrs Greenlees, who was not a party to the deed, subscribed her husband's settlement. They did not alter or affect a single provision made by the testator; and, in my opinion, if they had been omitted from the testing clause, the legal inference deducible from the bare fact of her subscription would have been precisely the same.

For these reasons, I am of opinion that the order appealed from ought to be reversed, and the interlocutor of the Lord Ordinary restored; and I therefore concur in the judgment which has been moved by the Lord Chancellor.

Lord Herschell.—I am entirely of the same opinion. The matter has been so fully treated by my noble and learned friends who have preceded me that I shall not detain your Lordships long.

It is admitted by the learned counsel for the respondents that unless the condescendence discloses a case of negligence against the appellants, whereby the respondents have been damnified, there was no necessity to send this case to proof, and that the interlocutor of the Lord Ordinary ought to have stood.

I think the case might really be disposed of upon a very short point. The negligence charged is that the appellants, being professional men, advised the respondents erroneously—so erroneously as to be negligent—

[1] 5 R. (H. L.) 151. [2] 3 Macph. (H. L.) 46. [3] 5 R. 97.

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upon a question of law. At the time they gave their advice a decision had been arrived at by the very Court under whose superintendence the liquidation was being conducted, which the learned counsel for the respondents have not attempted to distinguish from the present case; and that decision was in exact accordance with the advice which the appellants gave to those who had employed them. The utmost that could be said is that subsequently to that decision, namely, when the case then in the Court of Session came before this House, where it was reversed upon another point, one of the noble and learned Lords expressed a doubt whether, upon the point which is now of importance, that case (*Smith* v. *Chambers*[1]) was rightly decided. My Lords, it was no part of the necessary duty of the appellants to discuss the questions of law which might arise upon the matters upon which they were asked to advise. I can see not the faintest shadow of ground for alleging that in giving the advice they displayed any want of care whatsoever. That would be enough to dispose of the case.

But, inasmuch as the question of law, whether the case of *Smith* v. *Chambers*[1] was correctly decided or not, has been elaborately argued and is of great importance, I think it right to say that I have arrived at the same conclusion as my noble and learned friends have already expressed. I cannot entertain any doubt whatsoever that *Smith* v. *Chambers*[1] was a perfectly sound and correct exposition of the law of Scotland. If there had been a long course of decisions to the contrary effect one might have been bound to give effect to them and to hold that the law of Scotland, as regards deeds and their execution, was in a condition so lamentably unsound and unreasonable as to require immediate amendment. But no such decisions have been furnished. The purpose and object of parties in reducing their agreements into writing and executing a deed which contains them is that, being thus solemnly recorded, no question shall arise afterwards as to what their agreement really was. It is not to depend upon infirmity of memory as to what passed between them. It is not to be liable to fraudulent misrepresentation as to what the agreement really was. The matter is to be put beyond doubt by a written instrument signed by the parties, their signatures being attested. If the law of Scotland were as the respondents contend it is, to my mind the value of a deed would be absolutely and utterly destroyed. What would be the use of parties solemnly recording the agreement which they had come to, signing the deed and having their signatures attested, if one of the parties afterwards, in whose custody the instrument was, behind the back of the other, could insert in the testing clause (which it would be perfectly proper for that party to fill in without reference to the other) a provision repugnant to some of the stipulations of the deed which the parties had signed? That might be perfectly honestly done, but the matter might never come to the notice of the other party until some dispute arose years afterwards; it might, indeed, never come to light until all the parties to the transaction were dead, and all that could be referred to was the instrument itself; and yet the provision thus inserted *ex post facto* in the instrument by one of the parties would inevitably control their rights, and might impose obligations or destroy rights which had been stipulated for

[1] 5 R. 97, 5 R. (H. L.) 151.

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and agreed to and embodied in the deed which had been signed and attested.

One need only state such a proposition to see that it would be impossible to maintain it on any ground of principle, and that, as I say, one could only give one's assent to it if constrained to do so by an overwhelming weight of authorities. But no such authorities have been produced: the case of *Johnstone* v. *Coldstream*[1] and the case of *Dunlop* v. *Greenlees*[2] appear to me to be cases as far as possible removed from the case of *Smith* v. *Chambers*[3] or the present case. The point that was decided by the Court of Session in *Johnstone* v. *Coldstream*,[1] and by the Court of Session and this House in *Dunlop* v. *Greenlees*[2] was entirely different from the present. The only prior case not reviewed in the judgment of *Smith* v. *Chambers*[3] is the case of *Brown* v. *Govan*.[4] I agree with my noble and learned friend Lord Watson, and for the reasons he has given, that that really is not a case in point at all.

For these reasons, my Lords, I think that, not only was there no case of negligence against the appellants, but that the opinion which was involved in the advice which they gave with regard to the law of Scotland was perfectly correct.

LORD SHAND.—I also am of opinion that the facts stated by the pursuers do not warrant the conclusion of liability for damages on the part of the law-agents who are sued in this action.

The whole case of the pursuers, the Assets Company, seems to depend on their establishing that the provision which was inserted in the testing clause of the marriage-contract was effectual. If it was not so, the pursuers have failed to shew that they have suffered any loss whatever on the facts stated.

By the provision contained in the marriage-contract as it was signed by Mrs Campbell, it was declared that her husband renounced and discharged "his *jus mariti* and right of administration over the whole estate presently belonging to her or which she might acquire or succeed to *stante matrimonio*." With that clause standing as a part of the deed she signed it. But days after she had signed the deed, when this testing clause was filled in, there was a most important stipulation added, repugnant to that which was contained in the deed when she signed it. It was to this effect:—"Such renunciation" (that is the renunciation I have just read) "and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and shall not extend or apply to the annual produce or interest of her said estate."

I am clearly of opinion, as I think all your Lordships are, that this alteration, seriously affecting a provision of the deed as it left the hand of the lady as she signed it, was ineffectual.

Having taken part in the decision of *Smith* v. *Chambers*[3] I do not propose to enter upon the grounds of that judgment. I might well have been silent in the First Division of the Court of Session after the elaborate and

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[1] 5 D. 1297.
[2] 2 Macph. 1, 3 Macph. (H. L.) 46.
[3] 5 R. 97, 5 R. (H. L.) 151.
[4] February 1, 1820, F. C.

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careful judgment of Lord Deas, but I find on looking to the report[1] that I went fully over the grounds of my own opinion, and I do not think it necessary to add anything to what I there said.

Although I do not say that it is very material, still it is worthy of observation that in one aspect of this case it is more unfavourable for the present pursuers than what occurred in the case of *Smith* v. *Chambers*.[2] The Lord Ordinary, Lord Kincairney, in the careful, exhaustive, and closely reasoned judgment which he has given in this case, makes this observation in reference to *Smith* v. *Chambers*,[2]—"In *Smith's* case, as I understand it, the Court proceeded, not only on the opinion that the testing clause is a part of a deed, which may be held to be settled law, but also on the assumption that in that case it was added before the granter's signature, and was itself authenticated. But if it were shewn in this case that the clause was added a couple of days after Mrs Campbell signed the deed, as seems probable, that might differentiate the two cases." Having refreshed my memory from the report of that case, I agree in the opinion Lord Kincairney states. I think there the Court gave their judgment upon the assumption that the addition had been made before the granter's signature. But in this case the matter stands very differently, for it is admitted, and it appears to be perfectly clear upon documents which the pursuers have themselves produced, that the lady signed the deed on May 31, and that the alteration was made days afterwards, certainly not earlier than June 3, when the marriage was just about to take place. It is, therefore, a clause that is unauthenticated in any way by the signature of the lady who is said to be bound by it. That appears to me to illustrate the dangers there would be in giving to the alterations inserted in a testing clause the extraordinary effect which is contended for by the respondents in this case.

It is true they have said that this feature of the case may be overcome. It was said by Mr Balfour in his able pleading that he was prepared to prove authority—practically by parole evidence—for the change that was made in the testing clause altering the deed. And again, it was said there was another answer to the defenders' argument, namely, that the deed had been acted upon by the spouses in such a way as to shew that the provision added in the testing clause was really a provision to which the spouses intended to give effect.

As to the proof of authority, it is obvious that evidence of that kind would be incompetent to control a solemn deed. It is really a proposal to control the written instrument by parole evidence—it might be by evidence of witnesses—as to what had occurred in conversations. It happens here that the evidence would be fortified by a signature given by the lady to a document in which she said, "I approve of the alteration," but that practically would be nothing stronger than parole evidence to cut down the effect of a deed deliberately entered into. Plainly, therefore, that answer could not be successfully maintained.

As to the acting of the parties, it is said that the lady, from the time of the marriage onwards, allowed her husband to draw this annual income. As was observed by my noble and learned friend opposite (Lord Herschell)

[1] 5 R. at p. 125. [2] 5 R. 97.

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in the course of the discussion, there is nothing more common than for a wife, although she has an income settled upon herself, to arrange that the husband shall draw it from time to time, and that arrangement goes on so long as it is satisfactory. Therefore, I should attribute no important effect to actings of that kind. But it must be further observed that actings after the marriage could surely never be allowed to construe or control the direct obligations of the parties as those are recorded in the deed which the parties had signed.

I have come to the conclusion without difficulty that there has been no allegation of such negligence on the part of the agents as would involve responsibility for damages under the claim made upon them. The clause was ineffectual as an alteration on the provision of the deed as to the lady's estate, and it was therefore of no consequence whether the agents did or did not read it.

It is true that after the date when *Smith* v. *Chambers*[1] was decided in the Court of Session, Lord Gordon, on an appeal to this House, expressed, I will not say a distinct opinion that that judgment was wrong, but at all events a strong opinion that, according to his view, sufficient effect had not been given to certain previous cases; but it is worthy of notice that in the opinions which were delivered in the First Division of the Court these cases were discussed; they were fully before the Court, and I think it was unanimously held that they were quite distinguishable from the case then before the Court. I believe several of your Lordships have already expressed that view.

Lord Kincairney very justly observes in his opinion that the instructions given to the agents "were as they are averred by the pursuers, to satisfy themselves as to the facts, and to advise the liquidators as to the terms on which they ought to settle." That was an instruction to give their final opinion upon the whole matter as to what they thought would be reasonable terms, and as to whether the terms which had been offered were reasonable or not. As he says in a subsequent passage, "but it is said that it was their duty to tell the liquidators that the question was not closed, and that opposing opinions had been expressed about it. It might have been proper enough to do that, but I see no reason to think that it was their duty. It was their duty to form their own opinion, and to advise the liquidators accordingly. But it was not their duty, nor according to their instructions, to reason out the matter with the liquidators, to say whether their opinion was given with confidence or hesitation, or to quote their authorities." I concur in these observations by Lord Kincairney. The law-agents in the circumstances might well hold the opinion, which I think was a sound opinion, that Mr Campbell had no right whatever to the income of the capital belonging to his wife, and entertaining that opinion, I think it cannot be maintained that they were bound to enter into details of the kind which have been suggested by the present respondents.

On these grounds, I am of opinion with your Lordships that we should revert to the opinion of Lord Kincairney, and reverse the interlocutor of the Second Division.

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[1] 5 R. 97.

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The pursuers reclaimed.

LORD JUSTICE-CLERK.—The Court are of opinion that this case cannot be satisfactorily disposed of without inquiry, and we give no opinion upon the matter dealt with by the Lord Ordinary, but his interlocutor will be recalled and a remit made to him to allow parties a proof of their averments before answer, the proof to be comprehensive of the whole questions between the parties, including any facts bearing on the question of damages, so that it may be exhaustively dealt with after the proof has been taken.

LORD YOUNG and LORD TRAYNER concurred.

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exclusion of the *jus mariti* was 'hereby declared' before signing. This may possibly be susceptible of explanation, but apparently there is here in the testing clause a glaring inconsistency. It appears to be self-contradictory.

"The pursuers maintain that this declaration had the effect of conferring on Mr Campbell a right to the annual interest of his wife's estate, and they aver that in reliance on the marriage-contract as thus completed, the marriage took place on 3d June 1862; that the deed was recorded on 5th June, and that, in accordance with the declaration, Mr Campbell thereafter drew and applied to his own purposes the income of his wife's estate. The pursuers put their case thus: they aver that it was the duty of Davidson & Syme to have called the attention of the liquidators to this provision in the testing clause, to have informed them that this liferent interest formed a part of Mr Campbell's estate or might fairly be claimed as such, and to have advised them that no settlement should be concluded with Mr Campbell except on condition of receiving from him the actuarial value of that life interest, and that it was also their duty to lay that information before the Court. They aver that Davidson & Syme did not call the attention of the liquidators to the provision in question, and advised them to settle with Mr Campbell on the footing that he had no such right, and that the marriage-contract was not laid before the Court at all, and that the attention of the Court was not called to the provision introduced into the testing clause. They aver that, if Davidson & Syme had fulfilled their duty, the liquidators would not have made the compromise, and that, if they did, the Court would not have sanctioned it; and they aver that loss arose to the liquidators in consequence.

"It is to be observed that the pursuers do not, and I think cannot, say that the liquidators would, if properly advised, have made a better compromise, for they do not, and I suppose cannot, say that Mr Campbell would have agreed to a compromise on any terms more unfavourable to him. Their case is, and must be, that there would have been no compromise, and that they would have recovered the amount of the calls by an action in which they would have succeeded in establishing that the annual interest of Mrs Campbell's estate formed an item of Mr Campbell's estate. I think it manifest that it is essential to the success of the pursuers' case to be able to shew that the declaration in the testing clause was effectual to restrict the clause in the body of the deed, by which the husband's *jus mariti* and right of administration were renounced to the fee of the wife's estate. It is clearly not enough to shew that, at the date of the settlement, that was a doubtful point, but it is essential to shew that, as the law stood at that time, it was a sound legal proposition. Otherwise there would have been no loss.

"Now, the pursuers put their charge of failure in professional duty against Messrs Davidson & Syme in an alternative form, which they were quite entitled to do, but which I have found somewhat embarrassing. They say that either Davidson & Syme failed to notice the testing clause altogether, through negligence; or that they read it and failed, through professional ignorance or mistake, to appreciate the legal effect of it.

"I take the second view first, and assume that Davidson & Syme read the

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This interlocutor was pronounced:—"Recall the interlocutor reclaimed against: Remit to the Lord Ordinary to allow the parties before answer a proof of their averments, and the pursuers a conjunct probation, reserving all questions of expenses."

The defenders appealed.

LORD CHANCELLOR.—This is an action brought by the Assets Company, whose title to sue I will assume, against the partners in a firm of Writers to the Signet, in consequence, as the pursuers allege, of loss sustained by reason of the negligence of the defenders. It appears that the firm in question were retained by the liquidators to advise them in respect of certain compositions which were being negotiated between themselves and the share-

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clause. It is then said that they were bound (1) to call the attention of the liquidators to it; (2) to have advised them not to compromise except on the footing that the life interest was part of the shareholder's estate; and (3) that they were bound to have brought the marriage-contract under the notice of the Court, and to have directed attention to its peculiarities.

"Now, I think that to the case as thus put, and as it appears on the record, and without further inquiry, the defenders have a sufficient answer.

"Their instructions were, as they are averred by the pursuers, to satisfy themselves as to the facts, and to advise the liquidators as to the terms on which they ought to settle. They were not instructed to inform the liquidators about the facts which the liquidators might be presumed to know, nor were they instructed to give their reasons for their advice, but only to advise the liquidators as to the terms of settlement.

"Admittedly they advised them on the footing that the life interest of Mrs Campbell's estate was not a part of her husband's estate, and if that view could not be taken without gross ignorance of law on their part, they may be liable for the consequent loss; otherwise not.

"Now, it is well settled that a law-agent does not guarantee the correctness of every advice he may give, and does not incur liability in consequence of every error into which he may fall, but is only liable in damages if his mistake be gross and inexcusable, and amounts to *crassa ignorantia*. The cases are conclusive on that point: *Purves* v. *Landell*, 1845, 4 Bell's Appeals, 46; *Cooke* v. *Falconer*, 20th Nov. 1850, 13 D. 157; *Hamilton* v. *Emslie*, 27th Nov. 1868, 7 Macph. 173. Now, if Messrs Davidson & Syme formed the opinion that the provision in the testing clause was ineffectual to restrict the provision in the body of the deed, it is hopeless to contend that that opinion indicated gross ignorance; for it was, if not absolutely warranted, at least strongly supported by the unanimous judgment of the Court, in the then recent case of *Smith* v. *Chambers' Trustees*, 9th Nov. 1877, 5 R. 97. In that case a clause had been introduced into the testing clause of a testamentary settlement, purporting to restrict the rights conferred on beneficiaries by the deed; and it was held to be ineffectual, a point on which the Judges in the Inner-House were unanimous. That case was not exactly the same as this, because here there is an allegation that the provision under question had been acted on. But if all that could be ascribed to Davidson & Syme was an opinion as to this case substantially the same as that held by the Judges of the Inner-House in *Smith's* case, of course that did not indicate *crassa ignorantia*, whatever it might indicate. It is true that very serious doubts have been expressed as to the soundness of the judgment in that case. The judgment itself was recalled in the House of Lords on another ground, which rendered it unnecessary to decide the point as to the effect of the testing clause; but Lord Gordon expressed a distinct opinion to the effect that the judgment of the Court of Session on that point was inconsistent with a previous judgment in the House of Lords in *Dunlop* v. *Greenlees' Trustees*, 2d June 1865, 3 Macph. (H. L.) 46, and was erroneous;

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holders of the Glasgow Bank in liquidation. The particular shareholder, the Rev. John Campbell, was liable to the extent of upwards of £5000 for unpaid calls, and it became material for the pursuers to ascertain what was the extent of his property, in order to judge whether they would or would not accept the composition offered by him in respect of his liability.

The only question in debate was whether they, the defenders, ought to have reckoned as part of his estate the income of his wife's separate property. The pursuers contend that the marriage-settlement made that income part of Mr Campbell's own property, and therefore to be reckoned as one of the items to be taken into consideration in relation to the composi-

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and the other Judges reserved their opinions. So far as judgment went, it may be admitted that, at the date of the settlement, the point might be held to be open; but Davidson & Syme could not be held to be in gross fault if their judgment concurred with that of the Judges of the First Division.

"But it is said that it was their duty to tell the liquidators that the question was not closed, and that opposing opinions had been expressed about it. It might have been proper enough to do that; but I see no reason to think that it was their duty. It was their duty to form their own opinion, and to advise the liquidators accordingly. But it was not their duty, nor according to their instructions, to reason out the matter with the liquidators, to say whether their opinion was given with confidence or hesitation, or to quote their authorities.

"The defenders say that the contract of marriage was before the Court. If so, the Judges presumably read the testing clause. In any case, I greatly doubt whether they would have gone back to any extent on the judgment in *Smith* v. *Chambers' Trustees*. The Judges who decided that case were the very Judges before whom the compromises with the City of Glasgow Bank shareholders came. It would not have been unreasonable had Davidson & Syme thought it hopeless to raise the question again, and I doubt whether the Court would have disapproved of the proposed compromise, and compelled the liquidators to litigate a question on which they had unanimously pronounced an adverse judgment. Lord Gordon, in the House of Lords, proceeded on what he considered the disconformity of the judgment in *Smith* with that of the judgment in *Dunlop* v. *Greenlees' Trustees*. But that case had been very carefully considered by the Judges in Scotland in *Smith's* case, and they were of opinion that the two judgments did not conflict.

"I am unable to hold that the pursuers' averments, which proceed on the assumption that Davidson & Syme read the testing clause, amount to such a charge of gross ignorance as would subject them in damages; and, in this view of the case, I do not require to consider the further averments, viz., that the liquidators did not know of this clause, and would not, had they known it, have concluded the settlement which they made; and that the Court would not have sanctioned the compromise. The prospect of being able to prove these averments seems but distant. But, if they were proved, the liability of the defenders would not follow, because they were not chargeable with *crassa ignorantia*. Neither do I require to consider whether the view on which they are said to have acted was right or wrong—that is to say, whether *Smith* v. *Chambers' Trustees* was well decided.

"But then the pursuers have averred alternatively that Davidson & Syme failed to read the testing clause; and that, I cannot doubt, is an averment of such gross negligence as would support an action against them for such damage as might be proved to have resulted from it. But then I do not see that there is any relevant averment that any damage resulted from that. No doubt it is averred that if they had read it then it would have been their duty to have advised the liquidators in the manner averred, but that seems to be the same point which has been already considered. What the

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tion to be accepted. The appellants, the defenders, contend that the marriage-settlement made it irrevocably the property of the wife; and the contention on the other side as to the liability of the defenders depends very much upon what is to be called in strictness the marriage-settlement. There is no doubt that in one part of the parchment writing signed by the spouses (though at different times under circumstances I shall have to refer to hereafter) there appears in writing a declaration that the renunciation by Mr Campbell of his *jus mariti*, which was absolute and unqualified in the earlier part of the instrument, was only to apply "to the capital or principal of the estate of Jane Campbell," the wife.

An important part of the discussion (though for reasons to be given hereafter I think not a conclusive part) relates to the place and the date at which this renunciation was written on the original parchment. But for the technicalities and the usage of Scottish conveyancing I should myself

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pursuers have not averred and have not undertaken to prove is, that the defenders, if they had read the testing clause, would have formed the opinion that the provision in it was effectual, and that it was their duty to have advised the liquidators to that effect. Had the pursuers averred that, the case might have been different; but I suppose that such an averment would have been hopeless.

"I think, therefore, that there is no relevant averment that the defenders were guilty of such negligence or ignorance of law leading to loss as can make them liable for that loss.

"The defenders further argued that there could have been no loss, because the case of *Smith* v. *Chambers' Trustees* was rightly decided, and would have been followed had a litigation been raised, and that the provision in the testing clause would have been held ineffectual. The pursuers argued that the judgment in *Smith* v. *Chambers' Trustees* was wrong, and that the clause was effectual. I was thus called on to review the judgment of the First Division. I consider that it is not necessary for me to undertake that task. If that had appeared to be necessary, I think it would have been proper to have allowed a proof, in order to ascertain whether there was not a vital difference between that case and this. In *Smith's* case, as I understand it, the Court proceeded, not only on the opinion that the testing clause is a part of a deed, which may be held to be settled law, but also on the assumption that, in that case, it was added before the granters' signature, and was itself authenticated. But if it were shewn in this case that the clause was added a couple of days after Mrs Campbell signed the deed, as seems probable, that might differentiate the two cases.

"I have found it necessary to examine the nature of the case made against the defenders before considering the title of the pursuers, and, as I have come to the conclusion that there is no relevant case against the defenders, it is unnecessary to consider at any length the question of title, which seems attended with considerable difficulty. It is of course clear that the pursuers could have no claim or action unless the liquidators had. Now, suppose a case of gross negligence or gross ignorance made out against the defenders, it is not quite obvious that the liquidators would have had an action. It might perhaps have been argued that their functions were limited to the recovery of calls sufficient to pay the whole debts of the bank, and that if they paid the whole debts they could not possibly be losers.

"On the whole, I am, however, disposed to think that, at the date of the assignation to the Assets Company, when the debts of the bank were not fully paid, the liquidators would have had a right to sue the defenders to recover from them the amount of calls which, through their fault, had not been recovered, and that such a right is covered by the definition of assets in the statute. I am therefore not prepared to sustain the plea of 'no title to sue.'"

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have said that the words I have quoted as existing on the parchment writing formed no part of the deed at all; but apparently it has been the practice, santioned by decision, to consider the attestation clause a part of the deed, and so to comply with the ancient Scottish statutes, though I cannot but think in requiring the witnesses to be designed in the body of the deed these statutes contemplated an attestation of the deed and not in the deed. The designing of the witnesses was required apparently for the purpose of ascertaining beyond dispute who the witnesses were to be, that they should be named and described in the body of the deed itself. The very distinction "in the body of the deed" would seem to shew that this was what was originally contemplated.

The practice, however, appears to have grown up (probably for convenience's sake) that after the parties have attached their signatures to that which was in truth the bargain to which both the minds had assented, a space should be left between the end of what I call the deed and the signatures to enable the attesting clause to be added and so satisfy the words "in the body of the deed," and no limit appears to have been placed by Scottish law as to the interval which might elapse between the signature of the parties to what they had agreed to and the addition of the attesting clause. So that in one case thirty-two years have been held not too long an interval within which the attestation clause may be added. The very words by which the attesting clause begins, "In witness whereof," seem to shew what is the true construction of what the attesting clause must be,—We who are the witnesses hereto are putting our names to this written instrument to which the parties have agreed.

The contention before your Lordships apparently is that this attestation clause may legitimately be used for the purpose of introducing new stipulations, and even, as in this case, for qualifying, and even contradicting, the instrument which had previously been agreed upon and signed. In Scottish law, as in English, a deed is described as a solemn instrument, and with the same object in both countries. That is, it is intended to place what the agreement was beyond the doubts incident to any transaction where an infirm memory, not assisted by any written record of what has taken place at some distant interval, may fail to describe it accurately. The proof of deliberation and authenticity was to be secured in various ways,—sealing, at one time required in both countries, as it is now required in this, signature by various statutes, delivery, and so forth. These are various expedients to preserve the evidence of things agreed upon, equally against failure of memory as against the commission of fraud, or the conflict between the parties as to what has taken place. If, however, new stipulations can be introduced many years after the parties have come to their agreement, and can either qualify or contradict the agreement by putting into the form of attestation such qualifications or contradictions, what becomes of the finality of a deed?

It is nothing to the purpose to suggest that if challenged you must prove the assent of the parties to the new matter thus introduced by the attestation clause. You can only prove it by the very means which the existence of a deed at all was intended to prevent the necessity of having recourse to, and it is manifest that if you can alter or qualify a deed by the introduction of verbal evidence, its function as a deed is gone.

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The authority of the Court of Session itself had decided,[1] not very long before the transactions now in question, that such a provision in the attesting clause of a deed was ineffectual to restrict the operation of what I have called the deed itself; and I concur both in the decision itself and in the reasoning by which that decision was supported.

My Lords, I do not stay for the moment to comment on what might be the operation on the minds of the defenders here of that decision, because I propose to treat more at large the question of the alleged negligence. But, speaking of the matter of law only, I think that was the law of Scotland, and I think nothing has passed in your Lordships' House which can qualify or cut down that decision. In saying that I do not omit to consider the observations of Lord Gordon in *Smith* v. *Chambers*.[2] I think the noble and learned Lord was in error in supposing that there was any conflict between the judgment of your Lordships in *Dunlop* v. *Greenlees*[3] and the decision in *Smith* v. *Chambers*.[2] In the case referred to by Lord Gordon,[3] all that had to be proved was the wife's consent to a provision for herself, and she put her signature "in token of her consent to and approval of the foregoing settlement." It appears to me that, whether she signed that consent in the attesting clause or on the paper in which the deed was wrapped up, her consent was effectual. In a strict sense her signature of the deed, although it was written on the same parchment, and although included in what was described as an attesting clause, was no signature to the deed. She was no party to the deed. Her signature had no operation in the deed as a deed. Her signature only operated as a conclusive proof that she had assented to that provision for herself in the deed, and she might just as easily have established that consent by a separate and independent writing altogether.

It appears to me that the diligence of the learned counsel has failed to discover any authority which justifies the proposition now contended for. The only case[4] suggested to be in point is one in which, as my noble and learned friend Lord Watson pointed out, it would have been impossible for the parties, representing the interests they did, to urge the objection now insisted on.

But I will now assume that the question is more open to doubt than I think it is. Can it be gravely contended that a Writer to the Signet in Scotland can be made liable in an action for negligence because his opinion has coincided with the unanimous judgment of the Court of Session? As I have said, I think the judgment in *Smith* v. *Chambers*[1] on this point was perfectly right. But suppose for a moment that Lord Gordon's[2] observations should have made the defenders doubtful of the accuracy of the decision in *Smith* v. *Chambers*,[1] does it follow that they would be negligent for advising their clients to accept the composition? They might well and most prudently think it was better to accept the composition offered than to incur the risk of a law-suit to be carried to your Lordships' House in order to solve those doubts. That the same Court before which an approval of the composition in question was to come in the first instance would

[1] Smith v. Chambers, 5 R. 97.
[2] 5 R. (H. L.) 151.
[3] 3 Macph. (H. L.) 46, 37 Scot. Jur. 470.
[4] Brown v. Govan, Feb. 1, 1820, F. C.

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adhere to their own decision was tolerably certain, and therefore the proposition must be, that to accept a composition—which for the moment I will assume to be not all that could have been obtained—rather than incur the expense of an appeal to your Lordships' House, was negligence. That is too absurd, as it appears to me, to require more than the statement of the proposition. Besides negligence, the plaintiff in such an action is bound also to prove the loss or damage in consequence of the negligence. Is it susceptible of proof that, if Mr Campbell had been driven to extremities, more could have been obtained in any view of this case? I think not.

My Lords, I concur entirely with the very powerful reasoning of Lord Kincairney, and I only regret that the Judges of the Second Division did not deal with his judgment in such a way as to allow your Lordships to understand why they did not accept his reasoning.

(His Lordship then moved the order at the end of the report.)

Lord Watson.—(After stating the pursuers' averments)—In my opinion the relevancy of these averments entirely depends upon the proposition that the words so introduced into the testing clause form part of the deed, and must as such receive their full legal effect. If that proposition fails the other averments of the respondents amount to nothing more than this, that before marriage there was an informal agreement between the future spouses to alter the terms of their probative deed. As might have been expected, Mr Balfour did not maintain that such an agreement could *per se* prevail against the deed; but he argued at some length that the agreement was after marriage so validated *rei interventu* as to have that effect. Upon the general question as discussed by the learned counsel I do not find it necessary to express any opinion. His argument completely ignored the well-known rule of Scots law, which regards such acts of *rei interventus* by a wife after marriage, or even a formal ratification by her, as a *donatio inter virum et uxorem* which she can revoke at pleasure.

Two years before the date of the acts of negligence imputed to the appellants, the learned Judges of the First Division had unanimously decided in *Smith* v. *Chambers*,[1] that words similarly introduced into the testing clause of a trust-disposition and settlement, which materially qualified one of the directions previously given by the testator, were of no legal effect. Upon that point separate judgments were delivered by Lords Deas and Mure, and by my noble and learned friend opposite (Lord Shand), with the concurrence of the late Lord President Inglis. It does seem rather extravagant that a Scottish law-agent should be accused of negligence and want of skill because, in advising the liquidators as to the terms of a compromise, he accepted the law laid down by the same Judges who had the control of the liquidation, and whose sanction to the compromise was requisite.

If the judgment of the Court of Session in *Smith* v. *Chambers*[1] be according to law, it necessarily follows that the present action is groundless. That decision was accordingly strenuously impeached by the respondents' counsel, partly upon the authority of previous decisions with which it is said to conflict, and partly on the strength of observations made by my pre-

[1] Smith v. Chambers, 5 R. 97.

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decessor, Lord Gordon, in the case of *Smith* v. *Chambers*,[1] when it came by appeal to this House. The other noble and learned Lords who were present when the appeal was disposed of did not find it necessary to consider that part of the case which related to the testing clause of the deed, and expressed no opinion upon the point. In deciding *Smith* v. *Chambers*[1] the Judges of the First Division had, of course, no opportunity of considering the remarks subsequently made by Lord Gordon; but all the authorities cited to us in the course of the argument for the respondents, with the exception of *Brown* v. *Govan*,[2] which has been exhumed by the industry of their counsel, were carefully examined and discussed by Lord Deas, who also refers to a number of other authorities which have not been cited by the respondents' counsel, but are by no means favourable to the respondents' contention.

The testing clause of a probative deed, which is an anomalous feature of Scottish conveyancing, apparently owes its origin to 1681, c. 5, which enacts that "all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses," and also "that in all the said cases the witnesses be designed in the bodie of the writ, instrument, or execution respectively, otherwise the same shall be null and void, and make no faith in judgment, nor outwith." The Act appears to me to contemplate that these requisites shall be inserted in the body of the deed before it is executed by the subscriptions of the parties to it and of their attesting witnesses. That course might be possible in cases where there was only one party to the deed, or where several parties and their witnesses were all present for the purpose of its execution at the same time and at the same place. But it became a practical impossibility in cases where a deed was executed by several parties and their respective witnesses at different times and in different places. In order to meet the difficulty the practice was introduced, and sanctioned by decisions of the Court, of filling in the testing clause after the deed had been executed by all the parties and their witnesses at any time before the deed was recorded in a public register, or produced in judgment. Mr Bell (Principles, s. 2226) justly observes that it is "a very dangerous practice." In *Blair* v. *Earl of Galloway*[3] it was held that a testing clause might be lawfully inserted by the holder of the deed after the lapse of thirty-two years, one of the learned Judges observing,—"As to the defect in the execution of the deed, there is nothing in the law of Scotland requiring the testing clause to be filled up within a specified period, and I therefore consider the objection to be a great deal too critical."

Their admission of the practice which has just been noticed involved the Judges of the Court of Session in the unpleasant consequences which inevitably attend the affirmation of two propositions which are self-contradictory. On the one hand, it compelled them to hold, *fictione juris*, that the testing clause had actually been filled in before execution of the deed, and had been subscribed by the parties and their witnesses. On the other

[1] 5 R. (H. L.) 151.
[2] Feb. 1, 1820, F. C.
[3] Nov. 15, 1827, 6 Shaw, 51.

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hand, it equally compelled their recognition of the fact, that according to the practice which they themselves had sanctioned, and which was generally if not invariably followed, the testing clause formed no part of the deed at the time of its subscription, but was or might have been added after the deed had been formally authenticated by the signatures of the parties to it, and of the attesting witnesses. In these circumstances, it appears to me to be clear beyond doubt, that a testing clause which may have been, and probably was, inserted after subscription, ought not to contain, and cannot legitimately contain, any terms which would, if given effect to, cut down or modify the agreement which the parties had, in point of fact, executed. I am not prepared to go that length, unless constrained by clear and cogent authority, which I have been unable to find, either in the argument of the present respondents or elsewhere. It would be an extraordinary state of the law, if one of the parties to a deed, who had the custody of it, could, after the lapse of twenty or thirty years, and after the death of some or all of the parties to it, alter its whole tenor or effect by the insertion of a testing clause. But that is the logical result of the argument addressed to us for the respondents.

In my opinion, it is not immaterial to notice the facts and allegations which are before us in the present case, bearing upon the time at which the testing clause of the marriage-contract was written into the deed, which was executed by the wife on May 31, and by the husband on June 2, 1862. The insertion must have been made on or before June 5, because, on that day, the instrument, with the testing clause as it now stands, was duly recorded for preservation in the Books of Council and Session. But the productions made along with the record, and relied on by the respondents as shewing that the lady consented to an alteration of the terms of the deed, also shew conclusively that no proposal for an alteration was made to her until June 2, two days after her signature had been adhibited and attested, and that her husband, in like manner, subscribed the deed without the alteration, upon the written assurance of his law-agents that it would be subsequently inserted in the testing clause.

I am satisfied with the judgment of the First Division in *Smith* v. *Chambers*,[1] which, in my opinion, is decisive of the present case; and I entirely concur in the exhaustive exposition of the law and examination of previous decisions which is to be found in the opinion delivered by Lord Deas. I do not propose to occupy your Lordships' time by repeating the reasoning of Lord Deas, and shall content myself with a brief reference to two authorities relied on by the respondents, which, as already stated, are not noticed in his Lordship's opinion.

The case of *Brown* v. *Govan*[2] appears to be a recent discovery. It is not surprising to find that it was neither cited nor commented upon in *Johnstone* v. *Coldstream*,[3] *Dunlop* v. *Greenlees*,[4] or in *Smith* v. *Chambers*,[1] because the question which is involved in these cases and arises for decision in this appeal was not there raised, and no judicial opinion was expressed upon it. According to the report, a father by his contract of marriage made

[1] 5 R. 97, 5 R. (H. L.) 151.
[2] Feb. 1, 1820, F. C.
[3] June 30, 1843, 5 D. 1297, 15 Scot. Jur. 541.
[4] 2 Macph. 1, 3 Macph. (H. L.) 46.

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certain provisions in favour of the children of the marriage, payable on their attaining majority or being married; and by a subsequent declaration he postponed the period of payment until twelve months after his decease. During his lifetime he made a conveyance of heritable subjects to his children, in security of their provisions, upon which they were infeft. After his death the trustee in his sequestration brought a reduction of the conveyance and sasine following upon it. It was suggested by the respondents that the declaration postponing the period of payment was only to be found in the testing clause of the contract, and they read some extracts from the Session papers, which did not satisfy me that such was the case. Whether it was so or not is to my mind immaterial. If the fact was as represented, it is clear that the children, who were the only persons having an interest to raise the point, did not attempt to do so. The only defence upon which they relied was that the heritable security which they had obtained from their parent was in law equivalent to payment of their provisions.

There only remains to be noticed the opinion expressed by Lord Gordon in *Chambers* v. *Smith*,[1] which was undoubtedly adverse to the unanimous decision of the Court below, in relation to the testing clause of Dr Chambers' settlement. That point was not disposed of by the House; and, seeing that the opinion expressed by the learned Lord was strictly *obiter*, I feel at liberty respectfully to differ. It was mainly rested upon the ground that the decision of the learned Judges of the First Division was at variance with the judgment of this House in *Dunlop* v. *Greenlees*.[2] The two cases were, to my mind, essentially dissimilar. In *Chambers* v. *Smith*[3] the effect of the testing clause was to alter materially one of the directions of the trust created by the testator. In *Dunlop* v. *Greenlees*[2] the words introduced into the testing clause were merely descriptive of the object with which Mrs Greenlees, who was not a party to the deed, subscribed her husband's settlement. They did not alter or affect a single provision made by the testator; and, in my opinion, if they had been omitted from the testing clause, the legal inference deducible from the bare fact of her subscription would have been precisely the same.

For these reasons, I am of opinion that the order appealed from ought to be reversed, and the interlocutor of the Lord Ordinary restored; and I therefore concur in the judgment which has been moved by the Lord Chancellor.

Lord Herschell.—I am entirely of the same opinion. The matter has been so fully treated by my noble and learned friends who have preceded me that I shall not detain your Lordships long.

It is admitted by the learned counsel for the respondents that unless the condescendence discloses a case of negligence against the appellants, whereby the respondents have been damnified, there was no necessity to send this case to proof, and that the interlocutor of the Lord Ordinary ought to have stood.

I think the case might really be disposed of upon a very short point. The negligence charged is that the appellants, being professional men, advised the respondents erroneously—so erroneously as to be negligent—

[1] 5 R. (H. L.) 151. [2] 3 Macph. (H. L.) 46. [3] 5 R. 97.

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upon a question of law. At the time they gave their advice a decision had been arrived at by the very Court under whose superintendence the liquidation was being conducted, which the learned counsel for the respondents have not attempted to distinguish from the present case; and that decision was in exact accordance with the advice which the appellants gave to those who had employed them. The utmost that could be said is that subsequently to that decision, namely, when the case then in the Court of Session came before this House, where it was reversed upon another point, one of the noble and learned Lords expressed a doubt whether, upon the point which is now of importance, that case (*Smith* v. *Chambers*[1]) was rightly decided. My Lords, it was no part of the necessary duty of the appellants to discuss the questions of law which might arise upon the matters upon which they were asked to advise. I can see not the faintest shadow of ground for alleging that in giving the advice they displayed any want of care whatsoever. That would be enough to dispose of the case.

But, inasmuch as the question of law, whether the case of *Smith* v. *Chambers*[1] was correctly decided or not, has been elaborately argued and is of great importance, I think it right to say that I have arrived at the same conclusion as my noble and learned friends have already expressed. I cannot entertain any doubt whatsoever that *Smith* v. *Chambers*[1] was a perfectly sound and correct exposition of the law of Scotland. If there had been a long course of decisions to the contrary effect one might have been bound to give effect to them and to hold that the law of Scotland, as regards deeds and their execution, was in a condition so lamentably unsound and unreasonable as to require immediate amendment. But no such decisions have been furnished. The purpose and object of parties in reducing their agreements into writing and executing a deed which contains them is that, being thus solemnly recorded, no question shall arise afterwards as to what their agreement really was. It is not to depend upon infirmity of memory as to what passed between them. It is not to be liable to fraudulent misrepresentation as to what the agreement really was. The matter is to be put beyond doubt by a written instrument signed by the parties, their signatures being attested. If the law of Scotland were as the respondents contend it is, to my mind the value of a deed would be absolutely and utterly destroyed. What would be the use of parties solemnly recording the agreement which they had come to, signing the deed and having their signatures attested, if one of the parties afterwards, in whose custody the instrument was, behind the back of the other, could insert in the testing clause (which it would be perfectly proper for that party to fill in without reference to the other) a provision repugnant to some of the stipulations of the deed which the parties had signed? That might be perfectly honestly done, but the matter might never come to the notice of the other party until some dispute arose years afterwards; it might, indeed, never come to light until all the parties to the transaction were dead, and all that could be referred to was the instrument itself; and yet the provision thus inserted *ex post facto* in the instrument by one of the parties would inevitably control their rights, and might impose obligations or destroy rights which had been stipulated for

[1] 5 R. 97, 5 R. (H. L.) 151.

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and agreed to and embodied in the deed which had been signed and attested.

One need only state such a proposition to see that it would be impossible to maintain it on any ground of principle, and that, as I say, one could only give one's assent to it if constrained to do so by an overwhelming weight of authorities. But no such authorities have been produced: the case of *Johnstone* v. *Coldstream*[1] and the case of *Dunlop* v. *Greenlees*[2] appear to me to be cases as far as possible removed from the case of *Smith* v. *Chambers*[3] or the present case. The point that was decided by the Court of Session in *Johnstone* v. *Coldstream*,[1] and by the Court of Session and this House in *Dunlop* v. *Greenlees*[2] was entirely different from the present. The only prior case not reviewed in the judgment of *Smith* v. *Chambers*[3] is the case of *Brown* v. *Govan*.[4] I agree with my noble and learned friend Lord Watson, and for the reasons he has given, that that really is not a case in point at all.

For these reasons, my Lords, I think that, not only was there no case of negligence against the appellants, but that the opinion which was involved in the advice which they gave with regard to the law of Scotland was perfectly correct.

Lord Shand.—I also am of opinion that the facts stated by the pursuers do not warrant the conclusion of liability for damages on the part of the law-agents who are sued in this action.

The whole case of the pursuers, the Assets Company, seems to depend on their establishing that the provision which was inserted in the testing clause of the marriage-contract was effectual. If it was not so, the pursuers have failed to shew that they have suffered any loss whatever on the facts stated.

By the provision contained in the marriage-contract as it was signed by Mrs Campbell, it was declared that her husband renounced and discharged "his *jus mariti* and right of administration over the whole estate presently belonging to her or which she might acquire or succeed to *stante matrimonio*." With that clause standing as a part of the deed she signed it. But days after she had signed the deed, when this testing clause was filled in, there was a most important stipulation added, repugnant to that which was contained in the deed when she signed it. It was to this effect:—"Such renunciation" (that is the renunciation I have just read) "and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and shall not extend or apply to the annual produce or interest of her said estate."

I am clearly of opinion, as I think all your Lordships are, that this alteration, seriously affecting a provision of the deed as it left the hand of the lady as she signed it, was ineffectual.

Having taken part in the decision of *Smith* v. *Chambers*[3] I do not propose to enter upon the grounds of that judgment. I might well have been silent in the First Division of the Court of Session after the elaborate and

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[1] 5 D. 1297.
[2] 2 Macph. 1, 3 Macph. (H. L.) 46.
[3] 5 R. 97, 5 R. (H. L.) 151.
[4] February 1, 1820, F. C.

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careful judgment of Lord Deas, but I find on looking to the report[1] that I went fully over the grounds of my own opinion, and I do not think it necessary to add anything to what I there said.

Although I do not say that it is very material, still it is worthy of observation that in one aspect of this case it is more unfavourable for the present pursuers than what occurred in the case of *Smith* v. *Chambers*.[2] The Lord Ordinary, Lord Kincairney, in the careful, exhaustive, and closely reasoned judgment which he has given in this case, makes this observation in reference to *Smith* v. *Chambers*,[2]—"In *Smith's* case, as I understand it, the Court proceeded, not only on the opinion that the testing clause is a part of a deed, which may be held to be settled law, but also on the assumption that in that case it was added before the granter's signature, and was itself authenticated. But if it were shewn in this case that the clause was added a couple of days after Mrs Campbell signed the deed, as seems probable, that might differentiate the two cases." Having refreshed my memory from the report of that case, I agree in the opinion Lord Kincairney states. I think there the Court gave their judgment upon the assumption that the addition had been made before the granter's signature. But in this case the matter stands very differently, for it is admitted, and it appears to be perfectly clear upon documents which the pursuers have themselves produced, that the lady signed the deed on May 31, and that the alteration was made days afterwards, certainly not earlier than June 3, when the marriage was just about to take place. It is, therefore, a clause that is unauthenticated in any way by the signature of the lady who is said to be bound by it. That appears to me to illustrate the dangers there would be in giving to the alterations inserted in a testing clause the extraordinary effect which is contended for by the respondents in this case.

It is true they have said that this feature of the case may be overcome. It was said by Mr Balfour in his able pleading that he was prepared to prove authority—practically by parole evidence—for the change that was made in the testing clause altering the deed. And again, it was said there was another answer to the defenders' argument, namely, that the deed had been acted upon by the spouses in such a way as to shew that the provision added in the testing clause was really a provision to which the spouses intended to give effect.

As to the proof of authority, it is obvious that evidence of that kind would be incompetent to control a solemn deed. It is really a proposal to control the written instrument by parole evidence—it might be by evidence of witnesses—as to what had occurred in conversations. It happens here that the evidence would be fortified by a signature given by the lady to a document in which she said, "I approve of the alteration," but that practically would be nothing stronger than parole evidence to cut down the effect of a deed deliberately entered into. Plainly, therefore, that answer could not be successfully maintained.

As to the acting of the parties, it is said that the lady, from the time of the marriage onwards, allowed her husband to draw this annual income. As was observed by my noble and learned friend opposite (Lord Herschell)

[1] 5 R. at p. 125.

[2] 5 R. 97.

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in the course of the discussion, there is nothing more common than for a wife, although she has an income settled upon herself, to arrange that the husband shall draw it from time to time, and that arrangement goes on so long as it is satisfactory. Therefore, I should attribute no important effect to actings of that kind. But it must be further observed that actings after the marriage could surely never be allowed to construe or control the direct obligations of the parties as those are recorded in the deed which the parties had signed.

I have come to the conclusion without difficulty that there has been no allegation of such negligence on the part of the agents as would involve responsibility for damages under the claim made upon them. The clause was ineffectual as an alteration on the provision of the deed as to the lady's estate, and it was therefore of no consequence whether the agents did or did not read it.

It is true that after the date when *Smith* v. *Chambers*[1] was decided in the Court of Session, Lord Gordon, on an appeal to this House, expressed, I will not say a distinct opinion that that judgment was wrong, but at all events a strong opinion that, according to his view, sufficient effect had not been given to certain previous cases; but it is worthy of notice that in the opinions which were delivered in the First Division of the Court these cases were discussed; they were fully before the Court, and I think it was unanimously held that they were quite distinguishable from the case then before the Court. I believe several of your Lordships have already expressed that view.

Lord Kincairney very justly observes in his opinion that the instructions given to the agents "were as they are averred by the pursuers, to satisfy themselves as to the facts, and to advise the liquidators as to the terms on which they ought to settle." That was an instruction to give their final opinion upon the whole matter as to what they thought would be reasonable terms, and as to whether the terms which had been offered were reasonable or not. As he says in a subsequent passage, "but it is said that it was their duty to tell the liquidators that the question was not closed, and that opposing opinions had been expressed about it. It might have been proper enough to do that, but I see no reason to think that it was their duty. It was their duty to form their own opinion, and to advise the liquidators accordingly. But it was not their duty, nor according to their instructions, to reason out the matter with the liquidators, to say whether their opinion was given with confidence or hesitation, or to quote their authorities." I concur in these observations by Lord Kincairney. The law-agents in the circumstances might well hold the opinion, which I think was a sound opinion, that Mr Campbell had no right whatever to the income of the capital belonging to his wife, and entertaining that opinion, I think it cannot be maintained that they were bound to enter into details of the kind which have been suggested by the present respondents.

On these grounds, I am of opinion with your Lordships that we should revert to the opinion of Lord Kincairney, and reverse the interlocutor of the Second Division.

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[1] 5 R. 97.

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LORD DAVEY.—I am of the same opinion. It appears to me that those who maintain the doctrine that the substantive provisions in the earlier part of the deed may be varied by words introduced into the testing clause, rest their argument on the legal presumption that everything in the deed was there before execution by the parties. Legal presumptions are very good and useful things when properly applied, but they ought not as a rule to be introduced in plain contradiction of the facts or the settled usage of mankind. It has been decided and is now settled law that the testing clauses may lawfully and properly be inserted after execution, and it is admitted that such is the almost invariable practice. When once that has been decided it appears to me that the legal presumption referred to no longer applies to the testing clause, and the real presumption of fact is the other way. The considerations of convenience and the inveterate practice which led to its being held that the testing clause may be inserted after execution by the parties have no application to words contained in the testing clause which have the effect of varying the provisions contained in the earlier part of the deed. It is in this sense that I understand and appreciate what has been said by learned Judges, that the testing clause is not the proper place in which to introduce substantive provisions.

But, my Lords, if I felt more doubt than I do as to the correctness of the decision of the Court of Session in *Smith* v. *Chambers*,[1] it seems to me, as it does to your Lordships, extravagant to hold that law-agents were guilty of actionable negligence because they gave advice to their clients which involved the assumption that a recent and unanimous decision of the very Judges before whom the question would come was correct. I say this notwithstanding the *obiter dictum* of Lord Gordon in this House in *Smith* v. *Chambers*.[2] That noble and learned Lord assumed, as I think erroneously, that the decision of the Court of Session in *Smith* v. *Chambers*[1] was inconsistent with *Johnstone* v. *Coldstream*[3] and *Dunlop* v. *Greenlees*.[4] I may remark that Lord Deas, who delivered the leading opinion in *Smith* v. *Chambers*,[1] was a party to the decision of the Court of Session in *Dunlop* v. *Greenlees*.[4] That learned Judge thought the latter decision right and not inconsistent with the opinion he was delivering in *Smith* v. *Chambers*.[1]

It does not very clearly appear what facts the Inner-House desired proof of in this case. I am of opinion with the Lord Ordinary that no evidence is required for the decision of the case, and I think his judgment should be restored.

ORDERED, that the interlocutor of the Second Division of November 27, 1895, complained of in the appeal be reversed: That the interlocutor of the Lord Ordinary dated June 18, 1895, be restored; and that the cause be remitted to the Court of Session in Scotland, with directions to find the appellants entitled to the expenses incurred by them in the Court of Session from and after the date of the interlocutor restored: Further ordered that the respondents pay the appellants the costs incurred in respect of the appeal.

FAITHFULL & OWEN—DAVIDSON & SYME, W.S.—WILLIAM ROBERTSON & Co.—J. SMITH CLARK, S.S.C.

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[1] 5 R. 97. [2] 5 R. (H. L.) 151. [3] 5 D. 1297.
[4] 2 Macph. 1, 3 Macph. (H. L.) 46.

No. 8.

May 8, 1896.
Callander and Trossachs Hydropathic Co., Limited, v. Marshall.

CALLANDER AND TROSSACHS HYDROPATHIC COMPANY, LIMITED, AND THE EAGLE PROPERTY COMPANY (Defenders), Appellants.—*D.-F. Asher, Q.C.—W. Campbell.*
WILLIAM H. MARSHALL (Pursuer), Respondent.—*Balfour, Q.C.—John Wilson.*

(IN the Court of Session, July 18, 1895, 22 R. 954.)

The defenders appealed.

After argument, counsel for the appellants consented to the appeal being dismissed.

THE HOUSE dismissed the appeal.

DEACON, GIBSON, & MEDCALF—SIMPSON & MARWICK, W.S.—RANKEN, FORD, FORD, & CHESTER—J. & J. TURNBULL, W.S.

No. 9.

July 13, 1896.
Carruthers v. Carruthers.

MISS MARGARET CARRUTHERS (Pursuer), Appellant.—*A. S. D. Thomson.*
WILLIAM CARRUTHERS (Trustee of David Carruthers) (Defender), Respondent.—*Craigie.*

Trust—Personal liability of trustees—Failure to fulfil trust directions as to audit of factor's accounts.—A truster empowered his trustees to appoint a factor, who might be one of their own number, and directed them "annually, within one month after the 31st day of December in each year during their administration, to cause their factor to make up an account of the intromissions had by him in virtue hereof in the course of the year ending on that date, and to lay the same, with the whole vouchers thereof, before them, to be by them examined and audited."

The trustees did not obey the truster's direction as to an annual account and audit, but the factor's accounts were occasionally rendered and examined. The factor's account for the period from 1st March 1888 to 1st June 1890, which was correct, and was examined by the trustees, shewed that the trust-estate was due to the factor a balance of £61, and that one and a-half year's interest, amounting to £130, was due to heritable creditors. There was no subsequent examination of the factor's accounts by the trustees. In December 1891 the factor absconded and became bankrupt, leaving unaccounted for a balance of £382 of trust funds, of which £165 had come into his hands between June and December 1890, and the remainder in 1891.

In an action brought by a beneficiary under the trust to have the trustees ordained to replace the balance due by the factor, on the ground of contravention of the trust-deed, and *separatim*, of "gross breach of trust and neglect of duty whereby a portion of the trust-estate had been lost," it was proved that if the trustees had in January 1891 called for the factor's account it would have shewn that he had in hand £165 of trust funds, subject to his own claim for £61, and to claims by heritable creditors for £130 of arrears of interest. It was proved that prior to December 1891 the trustees had no cause to doubt the honesty or solvency of the factor.

Held (*rev.* judgment of Second Division) (1) that there was *culpa lata* on the part of the trustees in failing to call for the factor's account in January 1891; (2) that the *onus* lay upon the trustees to shew that if they had called for the account in January 1891 the balance of £104 then in the hands of the trustee would have been lost notwithstanding, and that the trustees having failed to discharge the *onus*, they were liable for said sum; (3) that the trustees were not in fault in regard to sums received by the factor after 31st December 1890, and were not liable therefor.

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Ld. Herschell.
Lord Watson.
Lord Macnaghten.
Lord Morris.
Lord Shand.
Lord Davey.

(In the Court of Session, June 26, 1895, 22 R. 775.)
The pursuer appealed *in forma pauperis*.

Lord Herschell.—This is an appeal from interlocutors o the Second Division of the Inner-House affirming the interlocutor of the Lord Ordinary. The controversy between the parties arises out of the provisions of a trust-deed, by which certain property was vested in trustees for the benefit of the truster during his life (he died on April 7, 1879), and afterwards upon trusts which it is not necessary to enter into beyond saying that if there has been money lost to the trust-estate by reason of any acts of the respondents of which the appellant has a right to complain, she has a sufficient interest and title to enable her to sue here and to require that the money should be made good to the trust fund.

The trust-deed contained this provision:—"With full power to my said trustees to appoint factors either of their own number or other fit persons for uplifting the rents and interest of my said estate, and to hold him liable to them for all omissions, errors, or neglect of management, and for his own personal intromissions with my said estate, and I do hereby direct my said trustees under this settlement, annually, within one month after the 31st day of December in each year, during their administration, to cause their factor to make up an account of the intromissions had by him by virtue hereof in the course of the year ending on that date, and to lay the same, with the whole vouchers thereof, before them, to be by them examined, audited, and (if found to be correct) approved of." Then there is a further provision that in the event of their being dissatisfied with the management of the estate by the factor they may remove him and appoint a new factor in his place.

Nothing is said in that clause about the appointment of one of their number as the factor with a remuneration to him for his services; but I think there can be no doubt that the intention of the truster in giving the power was to enable them not only to appoint one of their own number the factor, which they could have done without any such power, but also to appoint one of their own number as factor and to pay him remuneration, which without such express power it would not have been competent for them to do. It gave them, therefore, in my opinion, that power which they would not have possessed at common law.

But the truster whilst empowering his trustees to leave in the hands of one of their number the entire collection of the rents and the disposal of them, at the same time guarded that provision with this further one, that the other trustees should at least once in every year, within one month from the termination of the year, examine and audit the whole of the last year's accounts, require vouchers, and see that the accounts had been properly kept, and that the money had been properly received and properly applied. The trustees appear to have largely disregarded this provision. The first account delivered comprised the items of account between the date of the truster's death in 1879 and January 31, 1881. The next account comprised the items between January 31, 1881, and May 15, 1882. No other account was delivered until February 1888, which included the accounts of nearly six years. In the month of June

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1890 an account was made out shewing the condition of the trust-estate down to that period. Some controversy arose as to how far this account was seen or in the possession of the trustees; but it is not, in my view, material, and therefore I do not enter upon that conflict of view. It is enough to say that it is common ground that down to June 1890 there had been no improper dealing with the trust funds, that at that date there was a sum of £61, 5s. 3d. due to Mr Hall Grigor, the factor, and certain other accounts were outstanding. Mr Hall Grigor was not in express terms appointed factor, but he had been, by the manner of dealing with him and the manner in which the accounts were rendered, clearly appointed factor and allowed a remuneration for his services. No question is raised as to his having been a factor duly appointed under the trust-deed, and therefore there is no dispute that it was the duty of the trustees to have examined his accounts more frequently than they had done. But, as I have said, down to June 1890, although there had been a breach of duty on their part in that respect, the trust-estate had in no way suffered.

During the year 1890 sums of money were received by Mr Hall Grigor which, after allowing for the balance of £61 odd that had been due to him, left in his hands a sum of £104, 2s. 7d. Now this sum of money he obviously ought to have applied in the payment of certain ground-rents or the interest on heritable bonds on the land which formed part of the trust-estate, which was at that time and had been for a considerable time due. This sum of money never was in any way applied to trust purposes by Mr Hall Grigor. During the year 1891 he received further sums on account of the trust-estate; and at the end of 1891 he absconded, leaving the whole of these sums of money due from him to the trust unaccounted for.

Now the first question is whether the appellant is entitled to an order that the respondents should make good to the trust-estate the sum of £104, 2s. 7d. About the breach of duty on their part in not requiring the delivery of accounts at the commencement of the year 1891 and auditing them, there cannot be two opinions. But it is said that the trustees are protected by the clause of immunity, which is now to be taken as inserted in all trust-dispositions, against omissions on their part; that the not requiring of the delivery of and not auditing the accounts was an "omission"; that the clause of immunity protects them against it, and therefore they cannot be made liable in respect of it. My Lords, it is well settled that the clause of immunity to which I have referred does not protect in a case of *culpa lata* or gross negligence. The first question, therefore, which I proceed to consider is whether in this case there was *culpa lata* on the part of the trustees.

Now, they were entrusted with a power which they had not at common law, which I have already alluded to; but the truster, whilst he enabled them thus to employ one of their number as factor, insisted upon a check on the proceedings of that factor. It was the very thing which in that case he left the other trustees to do, to exercise that check by an annual audit. Nothing can be more emphatic than the terms of the provision; and it was clearly made a condition of their leaving the trust-receipts and expenditure to one of their number as factor that they should exercise that supervision. My Lords, can it be said under those circumstances that where the trustees fail to exercise that check, and, taking advantage of the power given them

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to leave the trust management to another, do not supervise the action of that other in the manner expressly directed by the truster, there has not been *culpa lata* on their part? I entirely concur with Lord Rutherfurd Clark in thinking that such conduct on their part constitutes *culpa lata*. It is admitted that, if that view be correct, the immunity clause does not protect the trustees. Then what is the extent of their liability? They are liable, as it seems to me, for all the results naturally flowing from the breach of duty on their part; and I think where this *culpa lata* is shewn, and it might be reasonably concluded that the trust would not have suffered as it did if the duty had been observed, it lies with the trustees to shew, if they seek to absolve themselves on that ground, that no benefit would have accrued to the trust if they had discharged their duty, and that the loss would have been precisely the same, and must have been precisely the same whether they did so or not. I do not think they are entitled to insist upon the Court speculating as to whether it is or is not possible that, even if the trustees had done their duty, the loss would equally have resulted. In the present case I own I have a strong impression and belief that if they had called for accounts in January 1891, or at the end of 1890, in order that they might be audited in the course of the following January, this £104 would have been applied in the payment of the outstanding ground-rents, and that the accounts would not only have appeared upon the face of them to be perfectly proper, but would have been perfectly proper; and that £104 would have been applied in discharge of the liability of the trust, and therefore would not have been lost to the trust-estate. If that be so, then this £104 has been lost to the trust in consequence of the failure of the trustees to do their duty—a clear, obvious, and expressly imposed duty which they failed to discharge.

The only other question is whether the further sums which were received by Mr Hall Grigor, the factor, in the course of 1891, and misappropriated by him, can be recovered against the trustees. The case there seems to me to be very different. If the conclusion is a probable one that the accounts delivered in 1891 would have been in order, and all would have appeared to have been properly paid, then there would be nothing to excite the suspicion of the trustees, and they would have been acting with perfect propriety if during the rest of the year 1891 they had left the matter as theretofore in the hands of Mr Hall Grigor, in which case he would have received the moneys—the time for audit would not have arrived, and he would have misappropriated them before the trustees had any opportunity of ascertaining that anything was wrong. Under those circumstances I do not see my way to hold the respondents liable for more than this sum of £104, 2s. 7d., which was in the hands of the factor prior to the termination of the year 1890. I think therefore that the proper course in the present case will be to reverse the interlocutors appealed from, and to declare that the respondents are bound to make good to the trust-estate the sum of £104, 2s. 7d., with interest from January 31, 1891. As regards costs, I think the appellant must receive the costs in the Inner-House and also the costs in this House, those costs to be taxed according to the rule laid down where the appellant sues *in forma pauperis;* and I move your Lordships accordingly.

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LORD WATSON.—I agree in the judgment which has just been moved by my noble and learned friend.

I am not altogether satisfied in this case that what was done or left undone by the trustees amounted to a mere "omission" on their part. They have from the outset of the trust administered it through one of their own number, who was appointed to be their factor, and was remunerated for his services in that capacity out of the trust funds. The whole management of the trust was devolved upon the factor. At common law the trustees had no power to take that course. Under the trust they had power to do so, but subject to this very plainly expressed condition, that there should be an annual and regular audit of the factor's accounts. With that audit the trustees practically dispensed. That is said to have been a mere matter of omission, and, in one view that may be taken of it, it was a mere matter of omission; but the result, and the necessary result, was that their administration as actually conducted was sanctioned neither by the common law of trust nor by the provision of the deceased's deed. I am not prepared to hold that a course of administration which cannot be defended or justified either on the ground of its being consistent with the common law or on the ground of its being consistent with the provisions of the trust-deed can be regarded as a mere "omission."

But it is unnecessary in this case to go any further than the character of the act, even on the assumption that it ought to be treated as a matter of omission. The immunity clause of the Act of 1861, or a similar immunity conferred by the terms of a trust-deed, does not afford a protection to trustees against any act or omission which, according to the law, is regarded as constituting *culpa lata*. My Lords, I think the acting of the trustees in this case did amount to *culpa lata*. I should be very sorry to hold that the systematic disregard of a check enacted by the testator in his trust-deed, a reasonable check, and in some cases, as in the present, a necessary precaution, does not constitute *culpa lata*.

Upon the amount of damage I do not think it necessary to say anything. I entirely agree with the observations which have been made by the noble and learned Lord on the woolsack in regard to that part of the case.

LORD MACNAGHTEN.—I am of the same opinion.

LORD MORRIS.—I concur.

LORD SHAND.—I also concur.

LORD DAVEY.—I concur.

ORDERED, that the interlocutors so far as complained of in the appeal be reversed, with a declaration that the respondents are bound to restore and make good to the trust-estate the sum of £104, 2s. 7d., with interest thereon at the rate of £4 per cent per annum from January 31, 1891: Further ordered, that the respondents pay to the appellant the costs incurred by her in the Inner-House: Further ordered, that the respondents pay to the appellant the costs incurred by her in respect of her appeal to this House, the said costs in this House to be taxed in the manner usual when the appellant sues *in forma pauperis*, and the amount thereof to be certified by the Clerk of the Parliaments: Further ordered, that the cause be remitted back

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to the Second Division of the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment: And further ordered, that unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the Bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RANGER, BURTON, & FROST—FINLAY & WILSON, S.S.C.—ROBINS, HAY, WATERS, & LUCAS—MACKENZIE & BLACK, W.S.

No. 10.

July 27, 1896. Metcalfe v. Cox.

METCALFE AND OTHERS (Members of the University Court and of the Senatus of St Andrews University) (Pursuers), Appellants.—*Sol.-Gen. Dickson—Byrne, Q.C.—Pitman.*

COX AND OTHERS (Members of Council of University College, Dundee) (Defenders), Respondents.—*D.-F. Asher, Q.C.—Henry Johnston—Clyde.*

University—Affiliation of College—Affiliation and incorporation distinguished—Universities (Scotland) Act, 1889 (52 *and* 53 *Vict. c.* 55), *secs.* 15, 16, *and* 21.—The Universities (Scotland) Act, sec. 15, enacted that the Commissioners under the Act "may, if they think fit, make ordinances to extend any of the Universities by affiliating new Colleges" to them, "subject to the following conditions . . . (3) The University Court, or any College which under this Act shall have been affiliated to the University, may respectively, at any time thereafter, resolve that such College shall cease to be affiliated to such University" . . . "and the University Court shall, subject to the approval of the Universities Committee [of the Privy Council] rescind the ordinance by which such College was affiliated to such University."

Section 16 enacted,—"Without prejudice to any of the powers hereinbefore conferred, the Commissioners shall with respect to the University of St Andrews and the University College of Dundee have power (1) to affiliate the said University College to, and make it form part of, the said University, with the consent of the University Court of St Andrews, and also of the said College."

Section 21 enacted,—"After the expiration of the powers of the Commissioners, the University Court of each University shall have power to make such ordinances as they think fit, with the approval of Her Majesty in Council . . . (2) Altering or revoking any of the ordinances affecting such University which have been or may be framed and passed under the Universities (Scotland) Act, 1858, or this Act, and making new ordinances. . . ."

Held (1) that the power to rescind an affiliation of a College to a University under section 5 was applicable only to cases of mere affiliation, and would not apply to the case of Dundee College, in the event of its being affiliated and made to form part of the University of St Andrews; and (2) that section 21 could not be construed as giving power to the University of St Andrews, after Dundee College had been incorporated with it, to revoke the ordinance making the incorporation.

Ld. Chancellor (Halsbury). Lord Watson. Ld. Herschell. Lord Morris. Lord Shand.

(IN the Court of Session, March 4, 1896, reported in the present volume, p. 559—previous reports, 22 R. 210, and 22 R. (H. L.) 14.)

In March 1894 the present action was raised by the Rev. William M. Metcalfe and other members of the University Court of St Andrews

University and by certain members of the Senatus against, *inter alios*, the Rev. William James Cox and others, the members of the Council of University College, Dundee, concluding for reduction of the following:—

1. A minute of the University Court of the University of St Andrews dated 15th February 1890, bearing to consent to the union of University College, Dundee, and the University of St Andrews.

2. The agreement between the University of St Andrews and the University College, Dundee, dated 15th February 1890.

3. A docquet appended to a copy of a letter of the clerk of the Commissioners dated 4th March 1890, bearing to be a consent by the University Court of the University of St Andrews to the alteration made by the Commissioners on the terms of the agreement.

4. An order of the University Commissioners dated 21st March 1890, purporting to affiliate the University College of Dundee, and to make it form part of the University of St Andrews; and

5. An order of the Commissioners dated 10th April 1890, purporting to declare that the new University Court of the University of St Andrews had been duly constituted.

Defences were lodged by Mr Cox and others, the members of the Council of University College, Dundee.

On 8th April 1895 the House of Lords held that the pursuers were entitled to a decree reducing the orders of the Commission, on the ground that the statutory procedure as to ordinances had not been followed, and remitting the cause to the Second Division of the Court of Session "to pronounce decree to that effect, and to dispose of the conclusions of the summons with respect to the documents first, second, and third called for and sought to be reduced."

When the case came before the Second Division, the attention of the Court was called to the fact that, on 3d February 1894, the University Commissioners had issued another order to the same effect as the previous order, but with regard to which the procedure prescribed by the statute had been followed, and that this order had been laid before the Privy Council for approval.

The Court, on the ground that the validity and effect of the documents sought to be reduced were questions within the jurisdiction of the Privy Council, pronounced an interlocutor dismissing the action.

The pursuers appealed.

The principal question raised was whether the following agreement dated 15th February 1890, being the second document sought to be reduced was *ultra vires* of the parties thereto:—"Agreement for the union of University College, Dundee, with the University of St Andrews, under and in terms of section 16 of the Universities (Scotland) Act, 1889.—University College, Dundee (afterwards called Dundee College), shall be affiliated to and form part of the University of St Andrews, in terms of section 16 of the Universities (Scotland) Act, 1889, in the manner and upon the terms following:—1. The said union shall, as regards duration, be permanent, and dissoluble only by Act of Parliament. . . . 4. Subject to the provisions of the statute, the Council of Dundee College shall elect to the University Court from time to time such number of representatives as the Scottish Universities Commissioners may fix and allow, and such elected person or persons shall become and be members of the said Court accordingly; but subject thereto, none of the other conditions of section 15 of the said Universities (Scotland) Act, 1889, shall apply to Dundee College,

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or its principal or professors, provided always that none of the representatives of Dundee College elected under the provisions of this article shall be entitled to sit and vote in the University Court while any matter falling under article 8 hereof is under consideration. . . ."

The appellants, besides contending that they were entitled to a judgment on the merits from the Court below, maintained on the merits (*a*) that the University Court had no power to enter into an agreement, but merely to give or refuse an unqualified consent to affiliation; (*b*) that the agreement was inconsistent with the Act, in so far as it stipulated that the union should be permanent, and dissoluble only by Act of Parliament, while subsection 3 of section 15 of the Act provided means by which a College once affiliated might cease to be affiliated, and section 21 gave power to the University Court of each University "to make such ordinances as they think fit, with the approval of Her Majesty in Council . . . (2) altering or revoking any of the ordinances affecting such University which have been or may be framed and passed under the Universities (Scotland) Act, 1858, or this Act, and making new ordinances" on certain conditions, and that article 4 of the agreement was inconsistent with section 5 of the Act.

The respondents supported the judgment, and further contended that subsection 3 of section 15 of the Act applied to cases of mere affiliation, and not to cases of affiliation and incorporation, and that the power to make ordinances given by section 21 must be construed as limited to ordinances for the management of a University.

LORD CHANCELLOR.—In this case I confess I have had some difficulty in following the objections which have been made, and I am afraid my difficulty has not been removed yet. Whatever may be the jurisdiction to reduce documents, about which I am afraid my mind is not very clear even up to the present moment, it appears to me that it is enough to say that no ground has been made good at present in this case to justify such a proceeding.

I propose to deal very shortly with the only point which, as it seems to me, the case properly raises, and that is what has in fact been done, and whether any objection can properly be raised to what has been done. In the first place, the document sought to be reduced has been variously described as a consent or an agreement. I do not think it is very material to consider whether it is the one or the other. As a matter of fact, it is one of the documents which formed a stage towards something which was ultimately to become an operative document in the sense in which the Dean of Faculty used those words. But, apart from considering what its nature is or what the power of reducing it was, if it were susceptible of reduction on any grounds, it appears to me that the objection to it fails. What was consented to, and the form in which it was consented to, appears to me to come within the Act of Parliament. That brings us back to the question, What has in fact been done? As I understand it, the objection is this, We want to keep alive by the consent we give the power, if it is thought proper, to dissolve the union which shall ultimately be made (I am using words different from those of the statute on purpose), and this document which is to be made in pursuance of the power given by the statute does

something which is inconsistent with the statute. That is the objection. Well, my Lords, all I can say is that I think it is exactly in conformity with the statute, and that the ordinance ultimately made is completely covered by the authority which the statute conveys.

Then we come to what is the real point, and the only point in this case which seems to me to be in truth susceptible of argument, namely, the point upon the 21st section, and the question which arises under the 2d subsection of the 21st section. The only point is this: it is said you must keep alive and applicable to a completely incorporated university the same powers and the same facilities of dissolving the union which exist in merely affiliated bodies.

It must be conceded, I think, that the language of the statute and the mode in which the words are used are perhaps not a model of draftsmanship, but the substance of it is clear enough. There is one thing which the statute describes as affiliation. Two separate institutions are to have such a bond of union between them as may be called affiliation. What that bond is and how far it involves the management of the two concerns it is immaterial to inquire. The statute has made the distinction, and the statute must be obeyed. That affiliation can be dissolved at the option of either, that is certain, and the very fact that they are so distinguished, that the partial union between them can be so dissolved at the option of either, is carried out in the statute by this, that in order to be affiliated and to continue affiliated they are absolutely separate institutions and not incorporated into one. Then one comes to those institutions which are to be incorporated into one, so that one forms part of the other. They then become no longer two separate institutions, but one institution, and when that second condition of things has arisen, you must read the statute by the light which the statute itself gives as to what is the meaning of the institution so constituted. When so constituted, let us see what the arrangements contemplated by the statute would come to if the construction now insisted upon were the true one. "Divided again at the instance of either." What does that mean? There is no "either." There are not two, but one. It appears to me, therefore, that the very starting point of the inquiry shews that the statute never could have contemplated that when they were once united they could be capable of being severed again at the instance of those who at one time had formed an independent institution. I say that the language is not susceptible of that. The whole difficulty of it is, I think, sufficiently exhibited by the mere statement of the proposition. When one comes to consider the subject-matter we are dealing with, an united body, one body, which has one finance, it seems to me that it is impossible to say that that can be the meaning or the construction of the statute.

But, further than that, I think the language is not susceptible of the construction contended for by the Solicitor-General. It does not appear to me that it is possible to suggest that an ordinance which affects an university is an ordinance which is capable of destroying the university. One might just as well say that a Rule Committee which is intended to regulate the process and practice of a Court should as one of its incidents have the power to destroy that Court altogether, and to say that no such Court

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should exist. I am wholly unable to follow an argument of that sort, and it seems unnecessary to pursue the subject further than that. When once one begins to understand the technical language which is used in the statute, and to apply it to what the statute has enacted, it appears to me to be impossible to concede the proposition that the Solicitor-General contends for.

I am not quite sure that I follow the reasoning of the Court below, nor is it necessary to consider it. I take the proposition that is now put before your Lordships; it is one which I cannot agree with, and I think that the order of the Court below was right, whatever reasoning it may have rested upon, and that this appeal ought to be dismissed; and I move your Lordships accordingly.

LORD WATSON.—I also am of opinion that your Lordships have no alternative except to affirm the judgment of the Court below, although in coming to that conclusion I have not been influenced by the reasons which were assigned by the learned Judges of that Court.

The only question which is of any importance appears to me to be a very simple one. I do not think it necessary to discuss how far a document of the character of what is termed an "agreement" in this case can be made the subject of a reduction or a declarator of nullity. It is quite sufficient for the disposal of the appeal, in my opinion, that the considerations urged in support of it are, when one comes to examine them, perfectly illusory.

I shall only say a word upon the most important of them, namely, the objection that one of the conditions of the agreement, which is that the union to be effected by the Commissioners shall not be dissoluble except by Parliament, is a condition which infringes the provisions of the Act. That is founded upon the idea that section 21 will, in the event of and after affiliation and incorporation, give to the University Court of the newly incorporated university a power, subject to the checks provided in the statute, to make ordinances putting an end to that new incorporation and to its own existence. My Lords, I cannot so read section 21. It gives a power to alter ordinances which affect an existing university—a power on the face of it plainly implying that there is to be no power to destroy the university or to impair the university as then constituted. The only power is to make regulations which shall prevail within the corporation which is then existing.

My views upon this part of the case are confirmed by the provisions of section 5. The most important governing body with a Scottish university under the Act of 1889 is the University Court. It is to them that the power of making ordinances and of repealing ordinances is committed by section 21. The constitution of that Court as part of the university is not committed to the Commissioners, and cannot in any view of it be said to be committed to their successors, the University Court. The University Court which is to have this power has its constitution prescribed by section 5 of the statute, which neither of the Commissioners nor any one who succeeds them in the right of making ordinances has power to repeal or touch.

I shall not refer to any of the other grounds which have been urged in

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support of this appeal, and I shall simply content myself with expressing my concurrence with the views which have been already expressed by the Lord Chancellor.

LORD HERSCHELL.—I am of the same opinion. It is not necessary to inquire here, in the view which your Lordships take, whether, upon the shewing of the appellants themselves, there was anything in this so-called agreement which was capable of being reduced, because, looking at the substance of the matter, I think it perfectly clear that there is nothing in that consent which can be said to be inconsistent with any of the provisions of the statute. The suggestion that the consent could not be made a conditional one, that it must be an absolute Yes or No, appears to me to be incapable of serious treatment.

The other point, that there is conflict with the statute in a clause which commences "Subject to the provisions of the statute," appears to me, to say the least of it, as untenable.

The only remaining point is that with which my noble and learned friends have dealt: whether the provision that the union should be only capable of dissolution by Act of Parliament was inconsistent with the power contained in the statute itself to dissolve that union by an order made under the statute, under the provisions of which the ordinance was made, or is to be made, constituting this University of St Andrews with the Dundee College incorporated in it. My Lords, I do not think it necessary to say anything upon this point, because I entirely agree with what has been said. I think no violence is done to the statute by construing section 21 as wholly inapplicable to the revocation of such an ordinance as the present, in so far as it constitutes the University of St Andrews with the Dundee College incorporated in it.

It is quite unnecessary, and it would be out of place now, to say what provisions might be dealt with by an ordinance under section 21. All that at least seems to me certain on the present occasion is this: that it is hopeless to contend that by an ordinance made under that section, any ordinance, whatever its terms, which constituted the University of St Andrews with the Dundee College incorporated in it, could be revoked.

LORD MORRIS.—I am of the same opinion.

LORD SHAND.—The Court of Session, in dealing with this case, have not advanced to the consideration of the question raised between the parties on the merits, but have held that the action, so far as regards the documents which have now formed the subject of discussion, ought not to be entertained, because the whole of the matters in controversy ought properly to be discussed before the Universities Committee of Her Majesty's Privy Council. I do not think it necessary to discuss this ground of decision further than to say I am not prepared, on the argument we have heard, to agree with it. It appears to me that cases may occur in which, where there is a direct violation of the statute, I shall not say by agreement only, but by the terms of an agreement or consent followed by an ordinance, the Court of Session would have jurisdiction to cut down the proceedings, and should exercise that jurisdiction if called on to do so. It is a satisfaction to me that in

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this matter, which has been so long a subject of litigation, and in which litigation is so very undesirable, your Lordships are able, on the argument which has been submitted to the House, to deal with the questions which have been raised on their merits, and, to some extent at least, to give a decision on questions which have been much disputed.

On those questions I entirely agree with what has fallen from your Lordships. I think the pursuers have failed to shew that their objections to the agreement and relative documents are well founded. The main, and substantial, point on which argument has been maintained is, that the provision of the agreement under its first head—namely, that the union between St Andrews University and the College of Dundee shall, as regards duration, be permanent and shall be dissoluble only by Act of Parliament—is in violation of or contrary to the provisions of the statute. That argument was based on two provisions of the statute: the first of them contained in the 3d subsection of section 15, and the second in section 21.

Now, my Lords, in regard to the 3d subsection of section 15, I think one observation only requires to be made. The whole of that section deals with affiliation, and affiliation only. One of its provisions is this,—"That the University Court, or any college which under this Act shall have been affiliated to the university, may respectively at any time thereafter" (that is, after affiliation) "resolve that such college shall cease to be affiliated to such university." That applies as it appears to me, to affiliation only; it has no application whatever to such a case as we have before us, where the agreement, which has been followed by an ordinance, is not only that there shall be affiliation, but that there shall be what has been called in the former judgment in this case incorporation. Section 16 provides that the Commissioners shall have power as therein stated "to affiliate the said University College" (that is, the College of Dundee) "and make it part of the said university." The result of that really is that the Dundee College would be merged in the university, and that the two institutions would no longer be two but one only—the University of St Andrews. The provision is for incorporation, not affiliation only. The provision therefore of section 15, which applies to affiliation alone, and gives the parties power to resolve that affiliation shall cease after a certain lapse of time, has no application to a totally different class of case, where you have not merely affiliation but incorporation—the College of Dundee merged in and forming part of the University of St Andrews.

The other ground on which it was maintained that the provision of the agreement goes too far and is contrary to the provisions of the statute, is that section 21 provides that "After the expiration of the power of the Commissioners the University Court of each university shall have power to make ordinances" "altering or revoking any of the ordinances affecting such university which have been or may be framed and passed under the Universities Act." It has been maintained that this provision must apply even to the case of an ordinance which provides, not only that the college should be affiliated, but should form part of the university. My Lords, I think that so to hold would be straining the provision of subsection 2 of section 21 beyond its true meaning. There appears to me to be great force, indeed irresistible force, in the argument which was submitted by the Dean

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of Faculty, that the meaning of that clause giving power to alter and revoke ordinances is satisfied by reference to section 14 of the statute, which contains power to the Commissioners to make ordinances with regard to endowments and bursaries, and many other matters which are closely connected with the administration of the university and with this alone. I think it would be stretching the meaning of these words too far to say that they authorise the altering or revoking of an ordinance which incorporates the college with the university. I accept the view, as it was shortly put by my noble and learned friend opposite, that the ordinances there referred to are not ordinances constituting the incorporated body, but ordinances affecting the university after it has been so constituted, and affecting it in reference to the details of its management and other like matters. It does not embrace the power to destroy the incorporation itself; indeed, after such incorporation has taken place it appears to me that it would be a matter almost inexplicable to go back upon what has been done, and all that has followed the incorporation. That is a very strong consideration, in my mind, for interpreting the words "ordinances affecting such university" in this sense.

The fourth head of the agreement was also objected to; but even if there were force in the criticism on the details of that provision, the provision itself is made expressly "subject to the provisions of the statute"; so the statute must prevail.

I am of opinion, with your Lordships, that the case for the pursuer entirely fails on its merits; and if the Court of Session, instead of granting a decree dismissing the action, had granted a decree of absolvitor dealing with the case on its merits, I should have been prepared to affirm that decree.

INTERLOCUTOR appealed from affirmed, and the appeal dismissed, with costs.

GRAHAMES, CURREY, & SPENS—J. & F. ANDERSON, W.S.—MARTIN & LESLIE—J. SMITH CLARK, S.S.C.

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DAME REBECCA S. BARNES OR ROSS (Defender), Appellant.—*Haldane, Q.C.—Clyde.*

SIR CHARLES H. A. F. LOCKHART ROSS, Bart. (Pursuer), Respondent.—*Lord-Adv. Murray—Sol.-Gen. Dickson—Pitman.*

Minor and Pupil—Allowance for heir's maintenance and education—Keeping up establishment for minor heir.—Circumstances in which a mother, who had for ten years as her son's tutor and curator managed large entailed estates and kept up the family residence for her own and his behoof at a cost of £3000 per annum, and expended upwards of £1000 per annum for his maintenance and education and travelling and other expenses, was *held* (*varying* judgment of the First Division) entitled in a question with her son to take credit for an annual charge at the rate of £3000 for his maintenance and education, in the sense of fitting him for his future position in life.

Ld. Chancellor (Halsbury).
Lord Watson.
Ld. Herschell.
Lord Shand.

SIR CHARLES W. A. ROSS, Bart., of Balnagowan, died on 26th July 1883, survived by his widow and by an only child, Sir Charles H. A. F. Lockhart Ross, Bart., who attained majority on 4th April 1893. The present action was raised by the son against his mother, Lady

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Ross for count and reckoning for her intromissions with the pursuer's estate as tutor and curator, and as an individual, from 26th July 1883 to 4th April 1893.

The defender lodged an account shewing receipts from rents, woods, and estate produce, amounting to £158,666, 9s., and payments amounting to £159,382, 3s., and bringing out a balance due by the heir to the defender of £716, 2s. 3d.* The payments included a charge for upkeep of establishments and heir's maintenance and education of £4000 a year to 26th July 1892, and of £3000 for the period between that date and 4th April 1893.†

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* The abstract of accounts lodged by the defender was as follows [the item as to the Forest Farm, No. 3, is not material] :—

"*Receipts.*

"Amount of rents, woods and estate produce, received per Appendix No. I. page 4, ...		£158,666 0 9
"*Payments.*		
"1. Public burdens, repairs, interest of heritable debt, rent charges, management, and miscellaneous estate payments, also upkeep of establishments and heir's maintenance, per Appendix, No. II. p. 4,	£129,344 2 10	
"2. Jointure to Lady Lockhart Ross, under marriage-contract and bonds of annuity to Martinmas 1892, per Appendix No. III. p. 5, ...	18,605 9 7	
"3. Sums payable in respect of Forest Farm sheep stock, including sum borrowed from Lady Ross, and interest, in terms of Mr Howden's report for year 1884, per Appendix No. IV. p. 5, . .	3,513 11 3	
"4. Rent of furniture in Balnagowan Castle, Bonnington House, and shooting lodges, belonging to Lady Lockhart Ross, per Appendix No. V. p. 6, .	5,212 17 6	
"5. Interest on sums due to Lady Lockhart Ross for period of accounts, per Appendix No. VI. p. 6, . .	2,698 11 10	
"6. Balance in factor's hands at 4th April 1893, to which Lady Ross is entitled,	7 10 0	
		159,382 3 0
"Balance due by the heir to Lady Lockhart Ross,		£716 2 3"

† Appendix II.—"Payments for public burdens, repairs, interest of heritable debt, &c. &c., upkeep of establishments and heir's maintenance, from 26th July 1883 to 4th April 1893."

[Here followed a statement of the annual payments for public burdens and interest on heritable debts, and an annual charge at the rate of £4000 a year for upkeep of establishments and heir's maintenance, amounting in all to £129,344, 2s. 10d.]

"*Note.*—In regard to the statement of the round sum of £4000 per annum, in respect of cost of upkeep of establishments, and maintenance and education of the minor heir, it is stated that the curator did not consider it necessary, as between herself and her son, to keep regular accounts and vouchers of expenditure on the above heads, and that, in point of fact, beyond some incomplete jottings and memoranda, she has no accounts, and beyond her cheques she has no vouchers of her expenditure on these heads. It might be possible, at the cost of much time and labour, to collect some

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Objections lodged to these accounts by the pursuer contained, *inter alia*, the following articles:—"(1) The accounts lodged by the defender are not fully vouched. In particular, no vouchers have been produced to instruct the sum of £4000 per annum, for which the defender takes credit for the upkeep of establishments and heir's maintenance in Appendix No. II. of defender's account. The pursuer is willing, however, under reservation of his right to demand a detailed and fully vouched account, to allow the defender to take credit for the sum of £19,220, 11s., being the amount of an allowance, calculated at the rate of £2000 per annum, from 26th July 1883 to 4th April 1893, as shewn in Appendix I. hereto, and he objects to any larger sum than that being charged, whatever vouchers may be produced. (3) The pursuer objects to the charge made for interest on furniture, and submits that the defender is only entitled to 5 per cent on the value of the furniture in Bonnington House and the shooting lodges, as shewn in Appendix III. hereto, and to no interest on the furniture in Balnagowan Castle, she having occupied the castle herself."

The offer contained in the first of these articles was not accepted, and the defender lodged accounts shewing an expenditure on the upkeep of Balnagowan Castle, gardens, &c., of upwards of £3000 per annum, on the school fees, personal expenses, and travelling expenses of the heir of £1260 per annum, and on Ankerwycke, their residence near Eton, of £657, in all about £5000 a year.

The Lord Ordinary allowed a proof, and a proof was led.

The following were the material facts:—

The average free income from the entailed estates was over £5000, after deducting an annuity to the defender of £2000, which was a burden upon them.

The unentailed estates of Balnagowan, of which the annual value did not exceed £1000, were left to the pursuer, subject to a liferent given to the defender. The total income of the defender (including interest on the furniture in Balnagowan and shooting lodges) amounted to nearly £4000.

The late Sir Charles left to the defender the whole of his moveable property, including the furniture in Balnagowan Castle and in shooting lodges. The total value of the moveable estate amounted to £32,000, of which the pursuer was entitled to one-half as legitim.

The garden and policies attached to Balnagowan Castle extended to eight acres, and the keeping up of the establishment there required an outlay of £3000 per annum. The defender spent about £5000 a year in keeping up the establishments at Balnagowan Castle and Eton and in travelling to Egypt and other places.

The pursuer was at school at Inverness College, where he remained till 1886. He then went to Eton, which he left in 1891 for Trinity College, Cambridge. According to Lady Ross's evidence he was of a headstrong disposition, and both at school and college was extravagant

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material from which to create an account more or less complete of her expenditure on these heads. But she herself is quite satisfied—and she believes that her son must be satisfied also from his own knowledge—that the sum actually spent by her on his account, and to a great extent at his own request, upon these heads has been considerably in excess of the round sum here stated, and for the present she is content to state that sum as covering the expenditure, reserving her right to restate this branch of the account upon such materials as she may be able to recover hereafter should that be found necessary."

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in his expenditure. Letters were produced by her written by Sir Charles when he was at Eton, and by Sir Charles' tutors there, which supported her evidence. She explained that fearing that he would borrow money unknown to her she arranged with him to supply him amply with pocket-money and to provide for him such mechanical and electrical appliances, and such shooting, yachting, and boating as he might want. The defender had kept no record of the net expenditure upon these heads, but she maintained that it amounted to considerable sums, and was so far beneficial to the heir as to prevent him running into debt.

The accounts so far as they related to the expenditure upon Balnagowan Castle, and on the establishments near Eton, were not seriously disputed as regarded amount, but it was maintained by the pursuer that both establishments were kept up almost entirely for the defender's own benefit and to gratify her own wishes. Upon this point there was a conflict of evidence as to how far the pursuer used these establishments himself and for the entertainment of his school and college friends.

As regards the item of travelling expenses the defender maintained that the journeys abroad were undertaken by her on account of the pursuer's health, while on the other hand the pursuer's evidence was that this was not the case, but that he merely attended his mother on some of these occasions at her request. In regard to the Scotsburn shootings the pursuer denied that he authorised that they should be retained for him, but admitted writing a letter in October 1889 to Lady Ross in which he said,—"I hope for the next three years you will keep Scotsburn in your hands, and then I can take it off you, as half our game goes there, and we are in a maimed condition without it."

Scotsburn shooting extended to the extent of two-thirds over the unentailed part of Balnagowan, and to the extent of one-third over the entailed estate. Of the rent, £100 was credited to the entailed estate, and £200 to the unentailed estate. The defender kept the shooting unlet for the years 1889 to 1892.

The Lord Ordinary (Stormonth-Darling), on 22d April 1895, pronounced an interlocutor containing, *inter alia*, the following findings:—"The Lord Ordinary having considered the cause, finds with reference to article 1 of the pursuer's objections to the defender's account that the defender is entitled to take credit in her said account for sums in name of upkeep of establishment and maintenance of heir at the rate of £2000 a year from 26th July 1883 to 26th July 1886, and £2500 a year from the last-mentioned date till 4th April 1893. and also as separate items of charge against the pursuer for sums amounting to £2205 which were placed to his credit after he went to Cambridge, and for the actual payments made by the defender in respect of guns and boats for the pursuer's use: . . . With reference to article 3 of said objections, finds that the defender is entitled to take credit for interest on the appraised value of the furniture in Bonnington House, and the shooting-lodges, as brought out in Appendix III. to said objections, but substituting the rate of 10 per cent for the rate of 5 per cent therein proposed, and that the defender is not entitled to take credit for any interest on the furniture in Balnagowan Castle: . . . With reference to the further item of rent for Scotsburn shootings, finds that the defender is not entitled to charge against the pursuer any rent in respect thereof, and subject to these findings, appoints the cause to be enrolled, in order that the

total sum due by the defender to the pursuer, including interest, may be ascertained."*

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* "NOTE.— . . . 1. *Upkeep of Establishments and Heir's Maintenance.* —The question here is between £4000 a year, claimed by the defender, and £2000 a year which the pursuer is willing to allow. Lady Ross began by resolving to make £1500 suffice for this purpose; then she tentatively fixed £2000 a year, as shewn by Mr Pitman's memorandum of 3d April 1884, but before long she increased this to £3000 a-year, and this sum was regularly passed by the estate officials to the credit of her private account. It now appears that, on an average of years, she spent nearly £5000 a year without taking into account her purely personal expenses. Of this she proposes to charge the heir with a proportion amounting to four-fifths, and she does so on the avowed principle, as expressed in her answers to the pursuer's objections, that as the heir was to succeed to a large income 'there was no object in accumulating a sum of ready cash for his coming of age.' I cannot subscribe to that doctrine. Considering that the pursuer was to succeed to a free income of not much more than £5000 a year, with all the responsibilities of a large proprietor of land, and with the necessity of raising money to buy the very furniture in the family residence, a prudent guardian would have acted on exactly the opposite principle, and would have made it his first endeavour to accumulate such a sum as might enable the heir, on his attaining majority, to meet all capital expenditure and start clear. On the other hand, I say nothing against the defender's resolution to keep up the family place. Undoubtedly that required a much larger expenditure than would have been necessary for the actual maintenance and education of a boy of twelve. But the advantages to the boy himself of being brought up with tastes, habits, and associations which would fit him for the position he was to fill, were such as to outweigh all considerations of mere economy. I look at the question, therefore, in this light. Lady Ross had herself an income not far short of the heir's. It would have been possible for her to live more economically away from Balnagowan, but to her also it must have been a satisfaction to remain in the house where her married life had been spent, and to retain the influence and authority which such a residence implied. For these advantages I think she might fairly be called upon to make some pecuniary sacrifice. I have not therefore fixed the sums of £2000 and £2500 a-year successively on the footing that these sums ought to have covered the whole expense of the joint establishment and ward's education, but on the footing that, with a suitable contribution from Lady Ross, and with a proper regard to economy, they might have been made to do so. On this principle it seems to me that, for the first three years of the period of guardianship the sum of £2000 a year proposed by the pursuer is quite sufficient, for so long as he was at Inverness College the mere cost of his education must have been comparatively small. After he went to Eton, I think an addition of £500 a year is reasonable. But I have fixed these sums on the footing that the pursuer is to allow—as he expressed his willingness to do—not merely the sums amounting to £2205 which were placed to his credit after he went to Cambridge, but also the actual payments made by the defender for guns and boats, as a separate charge against him, and I have provided for this accordingly. I may add that I think the defender's proposal to saddle her son with the expense of her summer residence on the Thames is quite preposterous. . . .

"3. *Interest on Furniture.*—The pursuer admits his obligation to pay interest on the value of the furniture in Bonnington House and the shooting lodges, but I think the rate which he proposes is too low by one half. Neither party has proposed any test of value except the appraisement made by Mr Dowell, and I have not left out of view that the appraisement was probably a moderate one. With regard to the furniture in Balnagowan Castle, the defender had the use of it herself, and it is an afterthought

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On 13th November the Lord Ordinary pronounced an interlocutor giving effect to the findings in his former interlocutor.

On a reclaiming note by the defender, the First Division, on 25th February 1896, pronounced an interlocutor in which, *inter alia*, they "recall the findings in said interlocutor of 22d April 1895 with reference to article 1 of the pursuer's objections to the defender's account: . . . Find with reference to article 1 of the pursuer's said objections to the defender's account that the defender is entitled to take credit in her said account for sums in name of upkeep of establishment and maintenance of heir at the rate of £2000 a year, from 26th July 1883 to 26th July 1886, and £2500 a year from the last-mentioned date to 26th July 1891; and £2000 a year from the last-mentioned date to 4th April 1893." *

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on her part to make any charge for it. Her original resolution was to make none, and I think she was right then, and is wrong now.

"8. *Scotsburn Shooting.*—This is an item which, so far as I see, is not specifically dealt with in any of the pursuer's objections; but counsel on both sides discussed it, and I have dealt with it accordingly. The defender proposes, as I understand, to debit the pursuer with £200 a year from 1890 onwards, as rent of the shootings on the unentailed portion of Scotsburn estate, on the ground that these were retained by her entirely for the pursuer's behoof. In proof of this she founds on a letter written to her by the pursuer from Eton on 9th October 1889, in which he says—'I hope for the next three years you will keep Scotsburn in your own hands, and then I can take it off you, as half our game goes there, and we are in a maimed condition without it.' Now, I think there has been too much of this sort of thing in the defender's case. Her argument repeatedly has been that the boy wanted her to do this or that; therefore she did it; and therefore he must pay for it. It was no part of her duty as his guardian to gratify every whim of a rather headstrong lad, and if she did so out of good nature, or for the sake of making things pleasant at the time, it by no means follows that he should be compelled to bear the cost. In this instance, I daresay, the retention of Scotsburn increased the sporting attractions of Balnagowan both to the pursuer and to all the male visitors who came there. It would be perfectly justifiable for the guardian of such a ward to retain a moderate portion of his own shooting instead of letting it, and in so far as Scotsburn was entailed, I do not think the pursuer could complain (or does complain) of its not having been let. But it is a very different thing to charge him with a rent for the portion of the shooting which belonged to the defender herself, and I see no justification for it."

* The following opinion was delivered:—

Lord Adam.—The chief question at issue between the parties, and which was argued to us under this reclaiming note, was the amount of the annual allowance which the defender should be entitled to credit herself with for the upkeep of establishments and the maintenance of the heir during his minority.

The defender claims a sum of £4000 per annum on this account. The Lord Ordinary has allowed her a sum of £2000 per annum during the first three years of her guardianship, and a sum of £2500 thereafter. The pursuer does not object to this, except as regards the time of his residence at Cambridge, when, for the reasons which I shall afterwards mention, he suggests that the sum allowed should be £2000 per annum, as fixed by the Lord Ordinary for the first three years.

In consequence of the refusal of certain other persons (who had been named by the late Sir Charles Ross as guardians to the pursuer along with Lady Ross) to accept of that office, she became his sole guardian at his father's death. He was then about twelve years of age, and was an only

The defender appealed.
At delivering judgment,—

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LORD CHANCELLOR.—The question with which your Lordships have to deal in this case does not admit of very precise treatment. How much money belonging to a ward may be spent upon his bringing up must in each case depend upon the circumstances of the case, and no rule applicable to every case can ever possibly be laid down so as to bring out a definite sum.

In the case now before your Lordships a mother was left sole guardian of her only child, who would be possessed of ample means upon his attaining his majority. In this action he now complains that too much has been spent by his mother during the period of the guardianship. It appears to me that, not only can no rule be laid down which will bring out a definite sum, but I think no sum in particular can be pointed out of which it can be affirmed absolutely that it was proper to spend it, though it is possible, in respect of some sums, to say that they were beyond the authority of the guardian. A broad view is all the case is susceptible of, and that may be

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child. He then became entitled to the entailed estates, but his father had left him without a sixpence of money. He left his whole personal estate to the defender Lady Ross, including the furniture in Balnagowan Castle and in the various shooting lodges, and the valuable sheep stock on the Forest Farm, which his father had had in his own hands. He had also left to Lady Ross the liferent of the unentailed lands, and a jointure of £2000 a year, charged on the entailed lands. From these sources she seems to have had an income of £4000 a year. The free income from the entailed lands to which the pursuer became entitled appears to have been about £5000 a year —but the rents did not become payable to him until about eighteen months after his succession—having been backhanded rents, I suppose. Such were the relative positions of the pursuer and defender at the commencement of the tutory. Lady Ross had the sole control of the property and person of her son, and it is obvious that she was in a position of great difficulty and delicacy. She was well-advised of this by her law-agents, and of the necessity of keeping the strictest accounts of her curatorial management, as it was her duty to do. She, however, did nothing of the kind. She kept no account whatever. She made no distinction between her own and her son's affairs—with the result that they became apparently inextricably confused and intermingled, and hence the necessity of the present proceedings. In such circumstances I agree with the Lord Ordinary that she must be held to a strict accounting.

It lay with Lady Ross to determine as to the future upbringing of her son. She resolved to reside at Balnagowan Castle, and to keep up an establishment there that he might have a home to come to during his vacations. That was a matter, it appears to me, within her discretion to decide. Whether it was a prudent resolution or not, looking to the hampered circumstances in which her son was placed, being absolutely without money, may be questionable; but it is not challenged by him, and it is on that footing that the present accounting has taken place. But it appears to me that it was a resolution which could only reasonably be arrived at on the footing that Balnagowan should be kept up at the joint expense of his mother and himself. Any use or enjoyment he could have out of Balnagowan was comparatively small. He was either at school or college during the whole period of the guardianship, and could only be at Balnagowan for about three months in the year, during his holidays. As far as his personal requirements were concerned, a very different establishment would have been necessary from that which was in fact kept at Balnagowan. I alto-

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thus stated, whatever it was proper under the circumstances for a prudent guardian to spend is proper to be allowed, and whatever is beyond that line ought to be disallowed.

The only rule that can be laid down in such a case is that the boy should be brought up in such a way as is appropriate to the position which he is afterwards to fill. This is simple enough; but it is obvious that it opens a wide field of inquiry, so that it is impossible to say what ought or ought not to have been spent without having the circumstances of each case before one. It is plain that the disposition and tendencies of the boy himself must be considered by a prudent guardian who intends, having the goal which is to be reached before him, that the boy should be properly fitted for the station in life which he is afterwards to fill; that he should neither be lavishly supplied according to his own will, nor, on the other hand, so treated with false economy that he might, and probably would, have an entirely erroneous view of his responsibilities when he attained his majority.

I confess for myself it would be to my mind absolutely impossible to go through each of the leading topics which have been made the subject of

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gether demur to the proposition that Lady Ross was entitled to keep up a large establishment at Balnagowan at her son's expense, consisting of numerous male and female servants, carriages and horses, and six or eight gardeners. The large establishment which was maintained at Balnagowan was in fact primarily maintained for Lady Ross's use, and she had almost the entire enjoyment of it. It appears to me that the establishment must be regarded as a joint establishment, kept up for the mutual benefit of mother and son, to the maintenance of which both were bound to contribute; and it appears to me, without going into detail, that the sum of £2000 a year, which the Lord Ordinary has fixed as the son's contribution to the expense thereof, is amply sufficient.

It will be observed that the Lord Ordinary has allowed Lady Ross an additional sum of £500 a year after her son went to Eton, in respect of the increased cost of his education. The pursuer did not object to this, although he considered the allowance large. It will be observed, however, that the Lord Ordinary has continued this sum during the two years while the pursuer was at Cambridge, and has also allowed Lady Ross to credit herself with a sum of £2205 during that time. It appears that the pursuer had then a bank account of his own, into which Lady Ross paid this sum for which she thus receives credit. The pursuer does not object to Lady Ross receiving credit for this sum, but he maintains that out of this account he paid the whole of his expenses at Cambridge, and that his education there cost his mother nothing, and that therefore his annual contribution should be reduced during these years to the original sum of £2000. I think the pursuer is right in this, and that the interlocutor should be altered accordingly.

The next finding in the Lord Ordinary's interlocutor which was objected to by Lady Ross was that in which he finds that she is not entitled to take credit for any interest on the furniture in Balnagowan Castle. I agree with the Lord Ordinary as to this. I think that this furniture is fairly to be considered as part of Lady Ross's contribution to the joint establishment, of which she had herself the principal use and enjoyment. . . .

As regards the Scotsburn shootings and the rate of interest to be allowed on the amount ascertained to be due by Lady Ross, I agree with the Lord Ordinary, and do not desire to add anything.

Lord M'Laren and Lord Kinnear concurred.

The Lord President was absent.

inquiry at your Lordships' bar, and to affirm or to deny as to those items which had been contested that they were properly debited to the mother, or were properly expended by the mother in the course of her guardianship.

I take in the first place the education of the boy; and I think it is necessary to give to that word "education" a very wide signification. It is not a question simply of what literary accomplishments he may become the master of, but he is to be fitted for life as a gentleman inheriting ample means and having duties in the place in which he is to exercise his functions afterwards, and it may be (I am speaking only now generally) appropriate and proper that, apart from keeping up the house, which, it can hardly be denied, could not be abandoned without injury to the estate, he should also be accustomed to the amusements and habits of those with whom he has afterwards to associate and among whom he is to live, and that he should be, as his mother, I think, in one place says, acquainted with the tenants among whom he is to reside and upon whom he is to exercise an influence.

Passing on to another matter, one cannot help thinking that during his education at Eton (still using the word "education" in a very extended sense) it may have been very proper and appropriate that he should be familiar with the amusements which are there in vogue, and also that he should be as much as possible associated with his own mother at that time. I confess there is one passage of the Lord Ordinary's judgment with which I cannot say that I feel myself in harmony. The Lord Ordinary, speaking of an argument which had been urged by the mother, or by those who were representing her, that it was at the boy's own desire, says,—"I think there has been too much of this sort of thing in the defender's case. Her argument repeatedly has been that the boy wanted her to do this or that; therefore she did it; and therefore he must pay for it. It was no part of her duty as his guardian to gratify every whim of a rather headstrong lad, and if she did so out of good nature, or for the sake of making things pleasant at the time, it by no means follows that he should be compelled to bear the cost." My Lords, I think that is an inadequate view of this question. Assuming the part which the mother has to play is that of a person who is really actuated, and only actuated, by a desire for the heir's good, including in that not only the mere increase of his temporal wealth, but that which is invaluable to a young man, namely, that he should have the association and interests belonging to his class, that he should have the advantage of association with his own mother and the influence of a mother, the value of which to a young man is inestimable—that if she had not herself been the guardian, but some other person had been the guardian, and he was considering what would be the best for the lad's real interest, I cannot doubt that a prudent guardian would have said to himself,—"It may be that I can get a person for pay to look after this young man; it may be that he would live cheaper in a place that I should appoint, and by associating with a person who would, at much less expense than his mother, maintain the common home in which the two were to live"; but I cannot help thinking the guardian would also say to himself,—"No person can be so useful a guardian, no person can be so likely to bring up the lad well, and look after him, and associate with him in a way calculated for his permanent benefit, as his own mother"; and therefore one would think that a prudent guardian

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would be quite justified in paying a much larger sum, in drawing much more upon the funds at his disposal as a guardian, for what I have described as the inestimable advantage of the boy living with his mother in the style and manner which it would become proper for him to maintain afterwards.

It seems to me that, taking that view, it is impossible to put your finger upon a particular piece of expenditure and say it was not proper that he should have this or that—it was not proper that the mother should have a summer residence for herself in the immediate neighbourhood of Eton. Taking that item by itself as if it were the only thing you were to regard, I can quite well understand that a great many of those things might be rejected as extravagant and improper. It seems to me, with submission to the Lord Ordinary, that that is not the real question we have to determine. The question is what, under the circumstances as they have turned out, was proper expenditure. I do not reject the teaching of experience. We have to look at the matter now after the fact. I believe it to be perfectly legitimate to say that if this had been a question which the Court were considering beforehand as to what would, could, or might be appropriate expenditure for this boy, it may be that one would not have been able to anticipate that this or that sort of expenditure ought to be incurred; but I do not reject the teaching of experience, and I do not reject the fact which the Lord Ordinary himself refers to, that the boy with respect to whom these inquiries arise was a headstrong boy very desirous of having his own way. The question of how a boy of that character ought to be treated is a matter which is eminently a question for a prudent guardian to consider; and if the associations with which the mother was able to surround him at Eton, and if the fact that he was amply supplied with money, more amply perhaps than *a priori* would be considered the proper thing to do, involved a certain amount of expenditure, when we are looking at the question in the light of experience, it appears to me that a great deal of that expenditure was most appropriate, most wise, and conceived not only in the spirit dictated by the love of a mother for her son, but that it is what a prudent guardian who stood in no relation of blood or kindliness would advise to be done.

Under these circumstances, as I say, it is impossible, taking a broad view of this case, to do more than to say that the style of living and the mode in which he was being brought up, and the circumstances with which he was surrounded, undoubtedly disclose a state of things in which it was a prudent course for a mother as guardian to do many things which *a priori* one might have said would have been beyond the ordinary mode in which one would treat a boy of that age.

With respect to some part of the case your Lordships are not called upon to form any judgment, because the candour of the learned counsel who has ably argued on behalf of the defender at your Lordships' bar has admitted that it is impossible to maintain some of these specific items as sums which ought to be allowed—for instance, the claim in respect of Forest Farm, as to which it cannot be denied that it is hardly susceptible of being sustained. Though, as I said just now, one cannot lay one's finger always upon a particular form of expenditure, and say this was undoubtedly authorised and

proper, there are some things of which one can say certainly they were not. I think your Lordships have been very fairly treated by the learned counsel in the arguments they have addressed to us in eliminating as far as possible what really was not susceptible of argument on behalf of the appellant.

The history of the case seems to me in some respects a very painful one. I cannot help thinking that many of the things which are now made subject of complaint and are susceptible of argument after the event are matters which undoubtedly were done for her son at the time by a loving and devoted mother, who would probably have given anything to him.

Now, my Lords, while I say that I cannot help feeling that there are some lines which must be sharply drawn, and notwithstanding that the defender is a mother, one must not diminish, if one can help it, the obligation upon a person who is managing the estate and effects of another to be able to render an account afterwards of what he or she has done. I cannot help feeling, therefore, with respect to a great many of these things, when the mother is challenged (whether one would have expected the son to raise the point or not is another question) she has only herself to thank for the consequences of disregarding the very wise advice of those whom she had at first consulted to keep accounts. She was bound to keep accounts, and if in any respect she has suffered—and I cannot help feeling that she must have suffered very bitterly in having to defend an action of this sort against her son—she had to some extent brought it upon herself by her neglect to follow the wise advice that was given to her, by keeping accounts so as to be able to shew what in fact she had spent, and in respect to what matters she had spent it.

I do not propose to go into details. As I have said, I do not think the matter is susceptible of being treated as if one could go through every item of this account, or even the heads of the account, and say what was spent, or what ought to have been spent, in a particular month or in a particular year. Speaking generally, it appears to me that her mode of treatment of her son, regarding her simply as a guardian, was not only most kind, which might be expected, but also most wise. The particular disposition and tone which the son adopted, and which may be seen, both from his own correspondence and from the reports of his tutors at Eton, shew that questions of great difficulty arose as to the mode in which he should be kept from borrowing money by supplying him with money amply, and the mode in which he should be kept away from certain associations which might be injurious to him in after life; all the efforts were dictated, I have no doubt, not only by affection, but by wisdom. Still, having said all that, the question remains, and a very puzzling question it would be if one were to strive to go into it as a matter of minute detail, whether or not the allowance that has been hitherto made by the Courts below has been exactly what your Lordships would desire. My Lords, I cannot help thinking that they have drawn the line too narrowly—that the amounts which have been allowed in respect of upkeep and education have been too strictly limited. Therefore I have to move your Lordships that the judgments, so far as they have drawn too narrow a line, should be reversed, and that your Lordships should take a somewhat more liberal and wider view. I propose that the interlocutor of the First Division should be varied to the following extent

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and effect:—That the appellant shall be entitled, in lieu of the yearly allowances made to her by the interlocutor in the name of upkeep of establishment and maintenance of the heir, to take credit in account for an allowance at the rate of £3000 per annum, such allowance being in addition to the sums advanced by her to the heir, amounting to £2205, which are specified in the Lord Ordinary's interlocutor of April 22, 1895. That is the substance of what I shall move your Lordships. Then one has to deal with the costs. As I have said, I think the circumstances shew that there has been a considerable departure from what I would call the accurate business keeping of accounts by the appellant, and I think in respect of that matter it is impossible to say that your Lordships could visit altogether upon the heir the costs which have been incurred in these somewhat painful proceedings. I think, therefore, that the interlocutor of the Lord Ordinary, dated November 13, 1895, and the interlocutor of the First Division, should be reversed—first, in so far as they relate to, or decern for, the expenses of process; and secondly, in so far as they fix or decern for the balance due by the appellant; that each of the parties shall bear the expenses of process hitherto incurred by them in the Court of Session, and that the respondent shall pay to the appellant her costs of this appeal; that the interlocutor appealed from, except in so far as hereby varied or reversed, be affirmed, and the cause remitted to the First Division of the Court.

Lord Watson.—This case comes before us in a very unsatisfactory shape. The appellant acted for nearly ten years as the guardian of the respondent, who is her only child. During that period she did not, as it was her plain duty to have done, keep tutorial or curatorial accounts, shewing the precise sums which from time to time were spent out of the income of the minor's estate upon his education and maintenance. Unfortunately the kindly relations which had previously subsisted between the mother and son ceased about the time of his attaining his majority—shortly after which he raised the present action of accounting. The investigations which have been made in the course of the action afford sufficient materials for ascertaining the amount of the expenditure upon the minor's estate, which entirely consisted of land, and also the amount of the net income derived from it. But the family expenditure of guardian and ward had been massed together, and there are no materials for determining with anything like precision whether some of these outlays were or were not, at the time when they were made, meant to come out of the funds of the minor. I have difficulty in resisting the conclusion that there are various charges for which the appellant now seeks to take credit which, at the time when they were incurred, were not intended to fall upon the minor, and would in all probability never have been placed to his debit had it not been for their subsequent disagreement.

I agree with the learned Judges below in thinking that the presumption must *in dubio* be against a guardian who has failed to keep regular accounts; but I am of opinion, at the same time, that a guardian who has in other respects done her duty by the ward, is entitled, even in the absence of such accounts, to a fair and reasonable allowance out of the income of

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his estate. In estimating the amount of the allowance, the only test which occurs to me is to consider what sums would, in the circumstances of this case, have been allowed to the mother by the Court, or by an independent guardian, in respect of the minor being educated by her, and occupying along with her the principal residence upon his own property.

Keeping that principle in view, I have come to the same conclusion with your Lordships in regard to the increased allowance which ought to be made to the appellant in substitution for the annual sums with which she has been credited by the judgment of the First Division. After the observations which have been made by the Lord Chancellor, in which I concur, I do not think it necessary to state the considerations which have led me to that result. I only desire to explain that the allowance has been estimated with reference to the whole period of minority and then distributed, and that it does not necessarily represent what ought to have been the amount allowed for each particular year.

LORD HERSCHELL.—I am entirely of the same opinion, and I desire only to add a word or two. I agree with my noble and learned friends that it is impossible to lay down any rigid rule in a case of this sort; but I think the test is that which my noble and learned friends have pointed out, the sum allowed ought to be such as it would be reasonable for an independent guardian or curator to allow to the mother for the maintenance of the child and of the establishment, and in determining what is reasonable all the circumstances of the case must be taken into account, the leading consideration,—in fact as regards the amount, one may say, the governing consideration,—being the interest of the heir.

LORD SHAND.—Concurring as I do, not only in the judgment proposed, but in the views which your Lordships have stated as the ground of that judgment, I think it unnecessary to add anything to what has fallen from your Lordships.

ORDERED, that the said interlocutor of the Lords of Session in Scotland of the First Division, of February 25, 1896, complained of in the said appeal, be, and the same is hereby, varied to the following extent and effect: That the appellant shall be entitled, in lieu of the yearly allowances made to her by the said interlocutor in name of upkeep of establishment and maintenance of the heir, to take credit in account for an allowance at the rate of £3000 per annum from July 26, 1883, to April 4, 1893; such allowance being in addition to the sums advanced by her to the heir, amounting to £2205, which are specified in the Lord Ordinary's said interlocutor of April 22, 1895: Further ordered, that the said interlocutor of the Lord Ordinary of November 13, 1895, and also the said interlocutor of the Lords of Session of the First Division, of February 25, 1896, be, and the same are hereby, reversed (1) in so far as they relate to, or decern for, expenses of process, and (2) in so far as they fix or decern for a balance due by the appellant: Further ordered, that the said interlocutors appealed from, except in so far as hereby varied or reversed, be, and the same are hereby, affirmed: Further ordered, that each

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of the parties shall bear the expenses of process hitherto incurred by them in the Court of Session, and that the respondent shall pay, or cause to be paid, to the appellant, the costs incurred by the said appellant in respect of the said appeal to this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments: And it is further ordered, that the cause be, and the same is hereby, remitted to the First Division of the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and judgment, &c.

MARTIN & LESLIE—KEITH R. MAITLAND, W.S.—GRAHAMES, CURREY, & SPENS—J. & F. ANDERSON, W.S.

No. 12.

July 16, 1896. Highland Railway Co. v. Great North of Scotland Railway Co.

THE HIGHLAND RAILWAY COMPANY (Defenders), Appellants.—*Littler, Q.C.—Johnston—Dundas.*

THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY (Pursuers), Respondents.—*Lord-Adv. Murray—Cripps, Q.C.—Ferguson.*

Arbiter—Award—Ambiguity—Extrinsic Evidence.—The Great North of Scotland Railway Company and the Highland Railway Company referred to A B as arbiter the following question:—"Whether the proviso of section 82 of the Highland Railway Act, 1865, applies to traffic exchanged under the Great North of Scotland Railway Act, 1884, between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rules of the Clearing House?"

The arbiter in his award found "that the proviso of section 82 of the Highland Railway Act, 1865 . . . does not apply to traffic exchanged under the Great North of Scotland Railway Act, 1884, between the two companies at Elgin," and further, "that the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rules of the Clearing House."

In an action raised by the Great North of Scotland Railway Company for implement of the award, the defenders made and asked to be allowed a proof of the following averment:—"The terms 'traffic exchanged under the Act of 1884 between the two companies at Elgin,' occurring in the question submitted to A B do not include, and were not intended to include, passenger traffic. This was explained to A B, and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."

Held (*aff.* judgment of Second Division) that the award was unambiguous, and must receive effect.

Ld. Chancellor (Halsbury). Lord Watson. Ld. Herschell. Lord Morris. Lord Shand.

ON 18th June 1886 the Great North of Scotland Railway Company and the Highland Railway Company referred to Mr James Beale as arbiter the following questions:—"(1) Whether the proviso to section 82 of the Highland Railway Act, 1865, applies to traffic exchanged under the Great North of Scotland Railway Act of 1884 between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage and under the rules of the Clearing-House? (2) If the proviso applies at all, does it apply to anything other than competitive traffic passing *via* Aberdeen?"

On 9th July 1886 Mr Beale issued the following award:—"I hereby award and determine that the proviso of section 82 of the

Highland Railway Act, 1865, printed on the fourth page of, and referred to in the above written submission, does not apply to traffic exchanged under the Great North of Scotland Railway Act, 1884, between the two companies at Elgin, and I further award and determine that the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage and under the rules of the Clearing House."

In February 1894 the Great North of Scotland Railway Company brought this action against the Highland Railway Company for implement of the decree-arbitral.

In their defences the Highland Railway Company made, and asked to be allowed a proof of, the following averment:—"The terms 'traffic exchanged under the Act of 1884 between the two companies at Elgin' occurring in the first question submitted to Mr Beale do not include, and were understood by the parties not to include, passenger traffic. This was explained to Mr Beale, and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."

On 25th November 1894 the Lord Ordinary (Wellwood) pronounced the following interlocutor:—"Finds and declares, decerns and ordains, in terms of the conclusions of the summons," &c.

The Second Division, on 1st February 1895, adhered to the Lord Ordinary's interlocutor.

The defenders appealed.

LORD CHANCELLOR.—I think for the decision of this case it is not necessary to enter into any detail. What has passed in the interlocutory observations between your Lordships and the learned counsel is sufficient to shew that it is impossible that these interlocutors should be reversed. It seems to me that the case depends upon very short grounds indeed. Here is an award on the face of it perfectly good, dealing in express terms with the very subject which was submitted to the arbitrator in a written document which discloses without the least doubt what it was that was submitted to him. That written document submits to the arbitrator two questions—raising the questions in a very specific form, which were apparently the subjects in dispute in regard to a particular Act of Parliament.

I am not going into particulars with respect to them, because it seems to me to be *luce clarius* that what was in dispute was decided by the arbitrator. Upon the face of the award the very thing submitted to him was decided by him. To my mind it is not susceptible of argument that the document discloses any ambiguity at all upon the face of it. In order to make it ambiguous we are asked to enter into the mind of the arbitrator, and to go upon various speculations as to what may have been intended by him, but upon the face of the award the very thing which was submitted to him has been decided. That is all I propose to say upon that matter, because it seems to me that although we have had it argued for some hours now it cannot be made more clear than the documents themselves make it.

As to the other question which has been raised, assuming your Lordships affirm the interlocutors, all I wish to say is this, that if Mr Johnston

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has the right which he says he has, he has got it; but I will be no party to give him any additional right. The litigation such as it is has been conducted for a good many years. The award is ten years old, and I certainly do not consider that the condition of things is such that he ought to receive any encouragement from your Lordships' House for further litigation. The only thing we decide is the matter submitted to us. If that decision is nevertheless capable by another process of being made of no avail, I cannot help it, but I certainly would not by any reservation be a party to doing that which would first allow a cause to be brought to this House on appeal, to be argued and decided in this House, and then give an opportunity of taking an additional proceeding afterwards which would render that judgment of no effect whatever.

I therefore move your Lordships that the interlocutors be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—I am of the same opinion. It does not certainly occur to me that there is any such ambiguity appearing upon the face of this award as to entitle the parties to a proof for the purpose of clearing up its meaning. The terms of the document are to my mind quite plain and unambiguous. The criticisms that have been made upon its findings by the learned counsel who have addressed us for the Highland Railway Company have no doubt raised, or been calculated to raise, some doubts, whether upon full consideration a better arrangement could not have been made by the arbiter, but really they amount to nothing else than an impeachment of his findings upon the merits. They certainly did not in the least degree suggest the existence of ambiguity.

Upon the other point, I think your Lordships are bound to dispose of this case, and ought to take the course of disposing of it. We have heard some statements at the bar, but upon examining the record I can find no statement whatever made on the part of the defenders which could raise a relevant case for setting aside or impeaching the award. They may have such a case, and it may be competent for them to state it. If, notwithstanding our decision in the present suit, they have a right, they may state it. I shall only say that I do not wish to convey a suggestion that in my opinion such a right exists.

LORD HERSCHELL.—I am of the same opinion.

LORD MORRIS.—I concur.

LORD SHAND.—It appears to me, as it does to your Lordships, that the agreement of reference and the award are quite unambiguous. The contract of reference refers to the arbitrator the question whether the proviso to section 82 of the Highland Railway Act of 1865 applies to the traffic exchanged under the Act of 1884. That word "traffic" includes in my opinion all traffic. The contention of the appellants is that it does not include passenger traffic, and that it does not include competitive traffic. I can see no foundation for such a contention. According to the plain meaning of the word "traffic," used without qualification in the contract of reference and award, and the meaning of the word "traffic" as it is used in the statute in which the proviso is contained, it applies to and includes

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all traffic. Therefore upon the interpretation of this agreement of reference and the award I am of opinion that the limited construction for which the appellants contend is inadmissible, and that the pursuers are right and are entitled to succeed in their action.

As to the other matter which has been adverted to, I agree in what has fallen from your Lordships as to this not being a case in which there should be any stay of proceedings or express reservation of a right to bring an action of reduction, especially after the lapse of time and the protracted proceedings which have occurred since the statute of 1884 was passed. On the other hand, it strikes me that there is force in the observation that this action deals with the interpretation of the award only, and it may well be pleaded that any decree following upon that interpretation is limited to the case of the award being regarded as effectual and operative. The defenders in this case may still be entitled to bring an action of reduction with the object of setting aside the award altogether on grounds which could not have been maintained in defence to the present action but which could only be urged and receive effect in an action at their instance. In such an action an entirely different question from that of interpretation of the agreement and award would arise for decision. As to what might occur if such an action were raised, and the remedy to which the appellants might in that case be entitled, I desire to reserve my opinion.

THEIR Lordships dismissed the appeal, with costs.

MARTIN & LESLIE—J. K. & W. P. LINDSAY, W.S.—DYSON & Co.—GORDON, FALCONER, & FAIRWEATHER, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1895-96.

HENRY WHITCHURCH, Appellant.—*Lorimer.*
JOHN MILLAR, Respondent.—*Salvesen—Findlay.*

No. 1.

Oct. 25, 1895.
Whitchurch v. Millar.

Breach of the Peace—Relevancy—Proof—Salvation Army Procession.—A member of the Salvation Army was charged under a summary complaint, which set forth that on Sunday afternoon he "did behave in a disorderly manner, and did march along the said street playing on a concertina or other similar instrument, and refuse to desist, and annoy and disturb the lieges, and commit a breach of the peace." The accused was convicted. In an appeal the case stated that the following facts were proved:—The appellant marched at the head of a procession playing on a concertina, there being singing and shouting by members of the procession; the playing of the concertina attracted a crowd of thirty or forty persons, thereby making it difficult for people to pass; this was the cause of annoyance to several persons who were examined as witnesses; the complainer on being asked to desist refused to do so.

Held that the complaint was relevant, and that the Magistrates, on the facts proved, were entitled to convict.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

JOHN MILLAR, Chief Constable, Hamilton, brought a summary complaint in the Police Court there, against Henry Whitchurch, a "Captain" in the Salvation Army, which bore that the accused "did about three o'clock on the afternoon of Sunday, 4th August 1895, in Quarry Street, Hamilton, behave in a disorderly manner, and did march along said street playing on a concertina or other similar instrument, and refuse to desist, and annoy and disturb the lieges, and commit a breach of the peace." The Magistrates found the accused guilty of the crime charged, and dismissed him with an admonition.

Whitchurch obtained a case, which set forth the following facts:—That the appellant was the "Captain" of the Salvation Army, and that on Sunday 4th August (the Sunday previous to the trial), about three o'clock in the afternoon, he marched at the head of a procession through one of the principal thoroughfares of the burgh, viz., Quarry Street, playing on a concertina, accompanied with singing and shouting by members of the procession. In consequence of the playing of the concertina on this Sunday, with the singing and shouting being heard at a considerable distance, and also on account of complaints previously made against the appellant for using instrumental music in a similar manner on a recent previous Sunday, a police-constable followed the procession, which constituted a crowd of thirty to forty persons, and knowing that the appellant had been formerly warned

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against playing such instruments on Sundays, went to and called upon him to stop playing the concertina. The appellant replied that he would not stop unless he was arrested. He was accordingly arrested, and taken to the police station. He was again asked if he would desist from using instrumental music on Sundays, but he refused to stop, and said he was acting on instructions from Headquarters. He was liberated, to appear when summoned. It was further proved that the playing of the concertina attracted a crowd of about thirty or forty persons, thereby making it difficult for people to pass, and that this was the cause of annoyance to several of the witnesses examined who were residenters in the neighbourhood.

The question of law for the opinion of the Court of Justiciary was:—"Whether, in order to the facts of the case being laid before them, the Magistrates were right in sustaining the relevancy of the complaint, and whether the Magistrates having held the facts as above stated to be satisfactorily proved, they were justified in finding that a breach of the peace had been committed?"

Argued for the appellant;—(1) The charge was irrelevant. Nothing was said of obstruction in the street. To play on a concertina was not a breach of the peace. He was not accused of noise and shouting. It was not charged that a crowd assembled. (2) The facts did not warrant conviction. The crowd only consisted of the members of the demonstration. It was not alleged to be disorderly.[1] "Difficulty in passing" was not obstruction. This case was *a fortiori* of *Hutton* v. *Main*,[2] where the conviction was quashed. In *Deakin* v. *Milne* there was more specification and proof, and besides, a disregarded proclamation of the Magistrates.[3] Reasonable apprehension was a necessary element in breach of the peace and was absent.[4]

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK.—As to the relevancy of this complaint I have no doubt. What is said to have been done here might or might not create a breach of the peace, according to circumstances, but it has been alleged in this complaint that in this case it did create a breach of the peace. The facts found proved were that the appellant marched at the head of a procession playing on a concertina, there being singing and shouting by members of the procession, and that the playing of the concertina attracted a crowd of thirty or forty persons, thereby making it difficult for people to pass, and that this was the cause of annoyance to several persons who were examined as witnesses, and that the complainer on being asked to desist refused to do so, which facts unquestionably constitute a relevant ground for a charge of a breach of the peace. It is a small breach of the peace no doubt, but still a breach of the peace, and in my opinion the Magistrates were quite right in so holding, if they were satisfied that the facts proved established the averment that a breach of the peace had been committed.

LORD YOUNG.—This was a small breach of the peace in a sense. There was no violence of any kind, but I think these processions going about the streets are a nuisance to the lieges, and as it was proved to be so here when

[1] Bewglass v. Blair, Feb. 10, 1888, 15 R. (Just. Cases) 45, 1 W. 574.
[2] Hutton v. Main, Nov. 5, 1891, 19 R. (Just. Cases) 5, 3 W. 41.
[3] Deakin v. Milne, Oct. 27, 1882, 10 R. (Just. Cases) 22, 5 Coup. 174.
[4] Ferguson v. Carnochan, July 8, 1889, 16 R. (Just. Cases) 93, 2 W. 278.

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there was a gathering,—and the same would be true even without it,—I am of opinion that the Magistrates were quite entitled to interpose and stop it, and if it was not instantly stopped, a prosecution was most legitimate. Should another prosecution prove necessary I hope that it will end very differently from a mere admonition. One may sympathise with this appellant, who no doubt thought he was doing his duty honestly, and was under the influence of people whose orders he could not very well resist, yet there is no other way of protecting the public, and public order in the streets of towns, than by imposing a suitable penalty if this form of nuisance is persevered in.

LORD TRAYNER.—I have no doubt about the relevancy of the complaint and the soundness of the conviction upon the facts stated to be proved. I do not want to say anything against this particular appellant. I daresay he was quite earnest and honest in his endeavours to do good, and I think it was more a mistake than a crime on his part, but it was a mistake which amounted to a breach of the peace. For my own part I think the Magistrates acted very discreetly in not imposing a fine, but simply pronouncing an admonition, because in the circumstances it was enough for this particular appellant, and may prevent him from repeating what he has done.

THE COURT dismissed the appeal.

YOUNG & ROXBURGH, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 2.

Oct. 25, 1895.
Mackenzie v. M'Dougall.

ROBERT MACKENZIE, Complainer.—*Johnston—Dewar.*
JOHN M'DOUGALL (Procurator-Fiscal, Justice of Peace Court, Roxburghshire), Respondent.—*Clark—Addison Smith.*

Public-House—Breach of certificate—Sale of victuals outside of licensed premises—Public-Houses (Scotland) Acts Amendment Act, 1862 (25 *and* 26 *Vict.* c. 35), *schedule A.*—A hotel licence, which authorises the sale in the hotel, "but not elsewhere, of victuals and of spirits," does not preclude the holder from selling victuals elsewhere than in the hotel.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Lord Trayner.

ON 14th September 1895 Robert Mackenzie, holder of a certificate* to keep an inn at the Spread Eagle Inn, Kelso, was convicted in the Justice of Peace Court of Roxburghshire of a breach of his certificate, on the ground that he had sold victuals, consisting of sandwiches and pies, in a refreshment-tent in Inch Park, Kelso.

Mackenzie brought this bill of suspension against John M'Dougall, Procurator-fiscal to the Justices of the Peace for the county.

LORD JUSTICE-CLERK.—I think it to be quite plain that this conviction is bad. The Act of Parliament requires that a person must have a certificate for premises in which liquor is sold. He can, like any other citizen, sell victuals without any certificate. A person having an hotel licence receives a certificate to sell victuals and spirits, but the fact that victuals

* The Public-Houses (Scotland) Acts Amendment Act, 1862 (25 and 26 Vict. c. 35), schedule A, provides a form of certificate for inns and hotels which authorises the holder "to keep an inn and hotel . . . for the sale in the said house, but not elsewhere, of victuals and of spirits . . . or other exciseable liquors.

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are mentioned in the certificate cannot by implication prevent the holder of the certificate from selling, elsewhere than on the licensed premises, articles for the sale of which no certificate is required. No licence is required by any man to sell a ham sandwich or a pie. I am therefore of opinion that the conviction should be suspended.

LORD YOUNG and LORD TRAYNER concurred.

THE COURT suspended the conviction.

JAMES PURVES, S.S.C.—PARTY—Agents.

No. 3.

Oct. 25, 1895. Galbraith v. Disselduff.

WILLIAM GALBRAITH, Complainer.—*Guy.*
WILLIAM DISSELDUFF (Procurator-Fiscal, Justice of Peace Court, Dunoon), Respondent.—*Graham.*

Conviction—Several charge and general conviction—Prevention of Cruelty to Animals Act, 1850 (13 *and* 14 *Vict. c.* 92), *sec.* 1.—A complaint set forth that A, a carriage-hirer, and B his servant, did "cruelly beat, illtreat, overdrive, . . . or procure to be cruelly beaten, illtreated, overdriven," two horses "belonging to A, then under charge of B, and did cause the said animals to draw a brake laden with passengers, and the said B did unmercifully and unnecessarily lash them with the shaft of a whip, said animals being in a poor, weak, and emaciated condition, and completely exhausted, whereby said animals were subjected to pain and suffering, contrary to the Act 13 and 14 Victoria, caput 92, section 1."

The Justices found A and B "guilty of the contravention charged," and convicted them.

In a suspension by the master *held* that the conviction against him was bad, on the ground that as one of the acts charged as together constituting the contravention was attributed to the servant alone, the general conviction against the master was not valid.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

WILLIAM GALBRAITH, carriage-hirer, Kirn, and his servant John Ness, brake-driver, were charged in the Justice of Peace Court, Dunoon, with a contravention of the Prevention of Cruelty to Animals Act, 1850, in that they "did, on 16th July 1895, cruelly beat, illtreat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, illtreated, overdriven, abused, or tortured, on the shore road between Kirn and Dunoon, two brown horses belonging to the said William Galbraith, then under charge of the said John Ness, and did cause the said animals to draw a brake laden with passengers, and the said John Ness did unmercifully and unnecessarily lash them with the shaft of a whip, said animals being in a poor, weak, and emaciated condition, and completely exhausted, whereby said animals were subjected to pain and suffering, contrary to the Act 13 and 14 Victoria, caput 92, section 1, whereby the said William Galbraith and John Ness are liable to a penalty not exceeding £5."

The Justices found "William Galbraith and John Ness guilty of the contravention charged," and convicted them "of the contravention charged."

Galbraith brought this bill of suspension, and argued;—While there was specification of the *modus* against Ness there was none against the complainer. Where a statutory offence could be committed in various ways it was not enough to libel the statute and find that the offence had been committed in one or other of various

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possible ways.[1] The Magistrates should have specified the acts which made the complainer guilty of the contravention.

Argued for the respondent;—"Illtreating or causing to be illtreated" was one offence under the statute, and not an alternative charge. Accordingly a general conviction was good.[2] *O'Neills'* case distinguished the case of *De Banzie*. It was not necessary to libel guilty knowledge.[3]

LORD TRAYNER.—I think the relevancy of this complaint is open to very serious question, but I refrain from dealing with that matter, because it appears to me that there is another ground, free from difficulty or doubt, on which the present complaint can be decided. The complainer and John Ness are charged together with a contravention of the statute referred to, but part of the acts libelled as amounting to such contravention is stated to have been the act of Ness alone. The conviction however is general, and convicts the complainer of the "contravention charged." The complainer is therefore convicted of something with which he was not charged; the conviction to that extent is without warrant. This is such a serious disconformity between the charge and the conviction that, in my opinion, the latter cannot be sustained.

LORD YOUNG.—I am of the same opinion. It is not improper to say that I regret the result, because I think it is probable that what the Magistrates meant to do was to convict the suspender of having sent out horses unfit for work, and with a servant having authority from him to treat them in such a way as would bring them to the end of the journey, as he in fact did. That offence might have been so libelled as to be a relevant charge, or a valid conviction might have followed even under the charge as made if that conviction had stated what particular facts the suspender was found guilty of. But I agree with Lord Trayner in thinking that it ought to appear clearly on the face of the conviction, taken by itself or in connection with the complaint, that the Magistrates have rightly apprehended the facts which they thought were proved, and upon which they could lawfully convict. I am not judicially convinced that the Magistrates here held facts to be proved which would warrant the conviction of the suspender—the master. The conviction of the servant has not been questioned.

LORD JUSTICE-CLERK.—I entirely concur in the judgment proposed by Lord Trayner. This complaint is clumsily framed. But if it had been necessary to decide the case on the question of relevancy I should be prepared to hold that the complaint was of very doubtful relevancy, but I think it may be read as if the words "said animals being in a poor, weak, and emaciated condition," &c., qualified the whole libel, and so applied to the case of the complainer. But I agree with Lord Trayner that this conviction, which convicts both the persons accused of the contravention charged, cannot possibly stand. I have no doubt that Galbraith was wrongly

[1] De Banzie v. Peebles, March 16, 1875, 3 Couper, 89, *per* Lord Young, pp. 96-7, 2 R. (Just. Cases) 22.

[2] O'Neills v. Campbell, July 18, 1883, 5 Couper, 305, 10 R. (Just. Cases) 76.

[3] Wilson v. Johnstone, May 28, 1874, 3 Couper, 8, 1 R. (Just. Cases) 16; Wright v. Rowan, Jan. 23, 1890, 2 White, 426, 17 R. (Just. Cases) 28.

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convicted of the whole offence "as charged," when part of the contravention was so expressed in the complaint as not to apply to him. If it was intended to charge that the complainer was a party to the alleged cruel beating of the horses, it would have been easy to frame the complaint so as to make this part of the charge apply to him also. But whoever framed the complaint chose a form which excluded the application of that part of the charge to the complainer.

THE COURT pronounced the following interlocutor:—"Pass the bill; suspend the conviction and sentence complained of *simpliciter*, and decern."

GEORGE S. MUNRO, S.S.C.—W. S. HARRIS, L.A.—Agents.

No. 4.

Oct. 25, 1895. Fairfoul v. Somerville.

ARCHIBALD FAIRFOUL, Appellant.—*Salvesen—A. S. D. Thomson.*
GEORGE SOMERVILLE (Procurator-Fiscal, Burgh Court of Edinburgh), Respondent.—*Comrie Thomson—Boyd.*

Police—Street—Bye-law regulating omnibus traffic—Loitering—Relevancy.—A bye-law framed by the magistrates of a burgh for the regulation of omnibus traffic provided as follows:—"The driver of an omnibus shall not loiter therewith on the public streets, either when on the way to its stance, before starting, or at any other time." A driver was charged with a contravention of the bye-law in so far as he did on a certain date, with an omnibus of which he was driver, loiter on a certain public street. It was proved that the accused drove his omnibus at a slow walking pace four times along a street, stopping to take up passengers, before starting for his destination. The street was not crowded, and the omnibus caused no danger, obstruction, or inconvenience.

Held that the facts proved did not justify the conviction, even if the charge were relevant.

Question whether the charge was relevant.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

ARCHIBALD FAIRFOUL was charged under a complaint in the Burgh Court of Edinburgh with a contravention "of No. 16 * of the bye-laws made by the Magistrates of the City for the regulation of the Edinburgh omnibus traffic, in terms of the powers conferred on them by the Edinburgh Municipal and Police Amendment Act, 1891,† in

* Bye-law No. 16 was in these terms,—"The driver of an omnibus shall not loiter therewith on the public streets, either when on the way to its stance, before starting, or at any other time."

† Section 65 of the Edinburgh Municipal Police (Amendment) Act, 1891, enacts,—"The Magistrates and Council are hereby authorised and empowered to make bye-laws for the prevention within the city of the plying or running of tramway cars, omnibuses, brakes, or other carriages for the public or common conveyance of passengers which are unlicensed, or which shall be in a state of disrepair or insecurity, or not adapted in all other respects for the public conveyance of passengers with safety, and for the prevention of any person not licensed in terms of the immediately preceding section from acting within the city as a driver or conductor of any such tramway car, omnibus, brake, or other carriage, and for the prevention within the city of overcrowding of tramway cars, omnibuses, brakes, and other carriages, and for regulating, except within the stations and the station premises of any railway company, the places at which the same shall stand, and all other matters tending to promote regularity and public convenience, and for regulating the times of starting on the streets of omnibuses, brakes, or other carriages, and in all cases under a penalty not exceeding for each

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so far as, upon the 15th day of September 1895, he did with the omnibus Dunedin, No 91, of which he was the driver, loiter on the public street in Princes Street, Edinburgh."

The following objections to the complaint were stated,—"(1) It is irrelevant and incompetent, (2) there is a want of specification, and (3) it does not aver that in consequence of the loitering inconvenience or danger arose to the public, or that any traffic was obstructed or impeded."

The Magistrate repelled these objections, and after hearing evidence, convicted the accused of the contravention charged.

The accused craved a case, which was stated. It set forth that on the said 15th September 1895, at 11.10 a.m., the appellant drove the said omnibus four times along Princes Street at a slow walking pace, stopping to take up passengers on the way; and that he then left Princes Street at 11.55, and went southwards by North Bridge on his way to Roslin with seven passengers; that the street was not crowded; and that the said omnibus did not impede or obstruct the traffic on it, or endanger or inconvenience any person.

The questions of law for the opinion of the Court were,—"(1) Is the complaint competent or relevant? (2) Do the facts proved warrant such conviction?"

The appellant argued;—(1) The bye-law was *ultra vires* of the magistrates. Section 65 of the Act of 1891 did not confer power to frame such a bye-law. (2) The complaint was not relevant. It did not aver that the Sheriff had confirmed the bye-law. It did not aver obstruction or inconvenience.[1] In any case it was necessary to prove obstruction or inconvenience.

The respondent argued;—The bye-law was within the scope of the statutory powers of the magistrates. The complaint was relevant, and the conviction was warranted. It was unnecessary either to aver or prove obstruction. (1) The bye-law was silent as to obstruction, and the charge followed the bye-law. The policy of the bye-law was to forbid loitering whether in fact it resulted in obstruction or not. Obstruction was likely to arise from this habit, and accordingly the magistrates forbade it. This was within their right. There were many things forbidden and punished, not because they did, but because they might cause inconvenience, *e.g.*, furious driving, or drunkenness and disorderly conduct. (2) Even if obstruction were of the essence of the offence it was present, in the sense that it was an unreasonable use of the street. The magistrates could not deny passage along the street, but they were entitled and bound to distribute to all an equal use of the street. The accused made an unreasonable use of the street. He used it not as a means of passage, but as a place of business. Unreasonable use amounted to obstruction.[2]

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offence £2 on the defaulting owners, or contractors, or lessees, or conductors, or drivers of such tramway cars, omnibuses, brakes, or other carriages, and the Magistrates and Council may vary and alter such bye-laws from time to time and under a like penalty for contravention . . . Provided further, that any bye-laws, and variations or alterations thereof, made by the Magistrates and Council under the powers of this section shall be subject to confirmation by the Sheriff. . . ."

[1] Leisk v. Galloway, November 12, 1884, 5 Couper, 497, 12 R. (Just. Cases) 5.

[2] Gerring v. Barfield, 28 Justice of Peace Cases, 615; De Caux v. Powley, 28 Justice of Peace Cases, 806.

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LORD JUSTICE-CLERK.—The complaint here proceeds on a bye-law which is stated to have been passed by the Magistrates of Edinburgh in virtue of statutory authority, and which has, as a matter of fact, been approved by the Sheriff, although that is not stated. I give no opinion whether the absence of that statement in the complaint makes the complaint irrelevant or not. But the complaint does not specify the way in which the bye-law has been infringed. It simply repeats the word "loiter" and adds nothing further. That word gives really no notice of the charge to be made against the accused. It gives him no notice of the modes of the particular offence at all. The offence is one which can be committed in a variety of ways, and there is no indication of the way in which it has been committed. My own inclination is to hold that this complaint is irrelevant. But apart from that, in the statement of facts found proved by the Magistrate there is no ground for a conviction. This man, who was driving one of the four-in-hand chars-à-bancs which start from Princes Street, drove several times up and down the street, picking up passengers prior to starting on his journey. The Magistrate found that nothing was done to obstruct the street. Nothing was found proved against the appellant but driving quietly along and stopping from time to time to pick up passengers. It is absurd to think that any driver who knew that loitering was forbidden should be expected to think that what he was then doing was covered by the word "loitering."

I am therefore of opinion that this conviction is bad, both upon the ground that the complaint is irrelevant as being without specification, and also upon the ground that the facts stated by the Magistrate to have been proved do not warrant a conviction even if it were held that the word "loiter" specified an offence.

LORD YOUNG.—I am not of opinion that the magistrates may not lawfully make a bye-law against loitering in the streets. I have no doubt that with regard to licensed carriages, such as cabs and omnibuses, the magistrates and the police may prevent their drivers loitering with them in the streets. I think the drivers of private carriages also may be prevented from impeding the traffic by loitering in the street—stopping to chat with other drivers, gossiping, and idling. If the charge here had been that the driver was idly stopping to chat or smoke with a friend, the police might have interfered and ordered him to get on; they might have told him that loitering was forbidden and that he was loitering, and if he had refused to comply, might have had him prosecuted quite properly. But the driver here was not loitering. He was going along the street picking up passengers, in the lawful performance of his lawful duty for which he was employed. I put this question for consideration, whether the magistrates would have power to prevent 'buses going along the streets more than once for the purpose of picking up passengers, and not in course of their journey from one place to another? Should a bye-law to that effect now be made, its legality will be tested when a case under it arises. But no such bye-law has yet been made. The only thing forbidden is loitering. The Magistrate has stated the case with great fairness and propriety. He adds, and very properly, that no inconvenience was caused by what this driver did. I am expressing no dis-

approbation of what the magistrates have done in making this bye-law. I simply hold that here there has been no valid conviction under it. Omnibuses may without loitering be driven along Princes Street, not only for the convenience of people going from one end of the street to another, but also for the convenience of people going to Roslin or elsewhere to which omnibuses may lawfully take them.

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LORD TRAYNER.—I confine myself strictly to answering the questions which have been put to us. These questions are (1) Is the complaint competent or relevant? (2) Do the facts proved warrant a conviction? I have great doubt as to the relevancy of the complaint. I have no doubt that the facts proved do not warrant the conviction.

THE COURT pronounced the following judgment:—"Answer the second question in the negative: Sustain the appeal: Reverse the determination of the inferior Judge, and decern."

HUTTON & JACK, Solicitors—THOMAS HUNTER, W.S.—Agents.

No. 5.
Nov. 2, 1895.
Bremridge v. Hume.

RICHARD BREMRIDGE (Registrar under the Pharmacy Acts, 1852 and 1868), Appellant.—*Salvesen—T. B. Morison.*
WILLIAM HUME, Respondent.—*D. Dundas.*

Statutory Offence—Pharmacy Act, 1868 (31 *and* 32 *Vict. cap.* 121), *secs.* 1 *and* 15—*Chemist—"Scientific instrument maker and technical chemist" assumed as designation by person not on the register.*—The Pharmacy Act, 1868, sec. 1, enacts that it shall be unlawful for any person "to assume or use the title 'chemist and druggist,' or chemist or druggist, or pharmacist, or dispensing chemist or druggist in any part of Great Britain unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be registered under this Act."

Held that the use of the title "scientific instrument maker and technical chemist" by a person who had not the statutory qualification was a contravention of the Act.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

WILLIAM HUME, 1 Lothian Street, Edinburgh, was charged in the Sheriff Court at Edinburgh upon a complaint at the instance of Richard Bremridge, 17 Bloomsbury Square, London, Registrar under the Pharmacy Acts, 1852 and 1868, in name and by authority of the council of the Pharmaceutical Society of Great Britain. The complaint set forth (1) that the accused was guilty of an offence within the meaning of the 1st and 15th sections * of the Pharmacy Act,

* The Pharmacy Act, 1868 (31 and 32 Vict. cap. 121), enacts,—"Whereas it is expedient for the safety of the public that persons keeping open shop for the retailing, dispensing, or compounding of poisons, and persons known as chemists and druggists, should possess a competent practical knowledge of their business, and to that end that from and after the day herein named all persons not already engaged in such business should before commencing such business be duly examined as to their practical knowledge, and that a register should be kept as herein provided. . . ."

Section 1. "From and after the 31st day of December 1868 it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title 'chemist and druggist,' or chemist or druggist, or pharmacist, or dispensing chemist or druggist, in any part of Great Britain unless such person be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be

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1868, in so far as he "not being a duly registered pharmaceutical chemist, or a chemist and druggist within the meaning of the said Act. . . . on or about the 13th day of June 1895 did, unlawfully and contrary to the 1st and 15th sections of the said recited Act, take, use, and exhibit the name or title 'chemist,' in so far as he did use and exhibit, or caused to be used and exhibited, the name or title 'chemist' or 'technical chemist' on and in connection with a printed advertisement or price-list issued by him to the public, whereby he became liable in a penalty of £5 sterling."

The Sheriff-substitute (Sym) assoilzied the accused.

The complainer obtained a case. The following facts were stated:—"(1) The respondent is not on the register established under the Pharmacy Acts. (3) A circular or advertisement issued by the respondent at the time libelled designs him as a 'scientific instrument maker and technical chemist.' (4) It was admitted that the respondent has a thorough knowledge of chemistry. The respondent explained to me that he did not undertake to dispense drugs or compound prescriptions. His contention was that the word 'chemist' is capable of construction according to the circumstances and the context in which it is used, and that he used the term 'scientific instrument maker and technical chemist' with the view of distinguishing himself from a dispensing 'chemist.' He claimed a right to do so."

The question of law was,—"Did the respondent, by designing himself as a scientific instrument maker and technical chemist, infringe sections 1 and 15 of the Pharmacy Act, 1868?"

Argued for the appellant;—The accused had contravened the Act, which contained a universal prohibition against the use of the name "chemist." The qualification assumed did not save him.[1] The Act was passed in the interest of the public. Its object was not only to prevent mistakes, but to check and prevent crime. In the accused's shop the most dangerous poisons might be sold without trace of their source or destination. Such terms as "export and shipping chemist," "analytical chemist," and "botanical chemist," had been penalised in English County Courts.[2] The danger lay in the use of the word "chemist" over a shop where poisons in their pure state were sold,[1] and purchasers there would be served by a person who though a chemist had not the qualification required by the Act, and did not keep a register of poisons sold. It was not maintained that the

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registered under this Act, and conform to such regulations as to the keeping, dispensing, and selling of such poisons as may from time to time be prescribed by the Pharmaceutical Society with the consent of the Privy Council."

Section 15. "From and after the 31st day of December 1868 any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, or who shall take, use, or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist and druggist . . . shall for every such offence be liable to pay a penalty of £5."

[1] Royal College of Veterinary Surgeons v. Robinson, L. R. [1892], 1 Q. B. D. 557.

[2] The Pharmaceutical Society v. Wright, April 3, 1882, Q. B. D. (unreported). "Shipping Druggist"; the Pharmaceutical Society v. Kelsal, Nov. 10, 1882, Stockport County Court (Judge Hughes), "Analytical Chemist"; the Pharmaceutical Society v. Hudspith, Jan. 17, 1887, Durham County Court, "Botanic Chemist."

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term chemist was only applicable to a person qualified under the Acts. It was enough to state that a retailer of poisons could not call himself chemist unless he fulfilled the provisions of the Act.

Argued for the respondent;—The prosecution proceeded on a misapprehension of the Act. The object of the Act was to guard the public from unqualified persons, but the accused, though not a pharmacist, was a skilled chemist. The question lay between the definitions of pharmacy and chemistry. He never had kept poisons suitable for prescriptions. His business was to supply chemicals for purposes pertaining to mechanical arts. His description of himself was no more than the truth, and he was entitled to the description, because it gave to his business its appropriate status.

At advising,—

LORD TRAYNER.—I have felt the decision of this case to be attended with difficulty, but I have come to be of opinion that the appeal should be sustained.

The statute which the respondent is charged with having contravened was passed "for the safety of the public," and forbade anyone keeping open shop for, *inter alia*, the retailing of poisons, or assuming or using the title of "chemist," unless qualified and registered as the statute provides. The respondent has assumed and uses, both as a sign over his shop door and on his trade circular or advertisement, the title of "technical chemist," but he maintains that the title of chemist so qualified, taken along with the fact that in direct connection therewith he designs himself as a "scientific instrument maker," is not within the statutory prohibition. I think it is. The respondent uses the title of "chemist," and that in connection with premises in which, according to his advertisement, poisons are sold in small quantities, and the public, for whose safety and protection the Act was passed, are more likely than not to regard the title "chemist" without paying any attention, or perhaps understanding, the qualification of "technical." That the prefixing of a qualifying adjective to the title "chemist" or "druggist" does not take the person using such title out of the statutory prohibition has been decided in England, where "botanical chemist" and "shipping druggist" have been treated as contraventions of the statute, the persons using these titles not having the statutory qualifications or right to assume the title of "chemist" or "druggist." Had these English decisions been to a contrary effect I would not have dissented from them; they would then, I must admit, have been more in accordance with the inclination of my own mind. I am, however, not questioning their soundness, and it is not desirable that an imperial statute should be interpreted differently in different parts of the kingdom. I am prepared to follow them, and decide accordingly against the respondent. In doing so, I am doing the respondent no wrong, or even putting him to any serious inconvenience, while I am, I think, only affording to the public the protection which the statute intended the public to have.

I think the question put to us should be answered in the affirmative.

LORD YOUNG.—I appreciate the difficulty which Lord Trayner has felt with regard to this case, and indeed I felt it so strongly that the inclination

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of my own opinion would have been not to interfere with the judgment of the Sheriff-substitute.

I do not, however, dissent from the judgment proposed by Lord Trayner.

LORD JUSTICE-CLERK.—I have no vote in this Court unless there is a difference of opinion, and I do not understand that Lord Young dissents from the judgment of the Court. I may, however, be allowed to say that I entirely concur with the opinion of Lord Trayner. I think the case is fairly struck at by the Act, and even apart from the English decisions my opinion would have been to the same effect.

THE COURT pronounced this interlocutor:—"Answer the question stated in the case in the affirmative: Reverse the determination of the inferior Judge in respect of which the case has been stated: Find no expenses due, and decern."

P. MORISON, S.S.C.—F. J. MARTIN, W.S.—Agents.

No. 6.
Nov. 2, 1895.
Bremridge v. Turnbull.

RICHARD BREMRIDGE (Registrar under the Pharmacy Acts, 1852 and 1868), Complainer (Appellant).—*Salvesen—T. B. Morison.*
J. M. TURNBULL, Respondent.—*A. J. Young—Trotter.*

Statutory Offence—Pharmacy Act, 1868 (31 *and* 32 *Vict. cap.* 121), *secs.* 1 *and* 15—*Keeping open shop for retailing poisons by unregistered person—Chemist—Photographic Chemist.*—The Pharmacy Act, 1868, sec. 1, enacts, that it shall be unlawful for any person "to sell or keep open shop for retailing, dispensing, or compounding poisons . . . unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be registered under this Act."

A dealer in photographic materials was charged with an offence under the Act, in so far as he, not being a duly registered pharmaceutical chemist, or a chemist and druggist, did at his shop unlawfully "keep open shop for the retailing, dispensing, or compounding of poisons."

The following facts were proved:—That the accused had not the statutory qualification; that he had a shop open to the public for the sale of photographic materials, including some of the scheduled poisons; that his assistants were instructed to sell poisons only to persons engaged in photography or to chemists; that his trade catalogue bore that the scheduled poisons were only to be sold in wholesale quantities, but specified prices per ounce and per lb.; that an assistant in the shop on one occasion sold one ounce of one of the scheduled poisons.

In an appeal upon a case stated *held* that the facts stated amounted to the offence of keeping open shop for the retailing of poisons.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Lord Trayner.

J. M. TURNBULL, 6 Rose Street, Edinburgh, was served with a complaint in the Sheriff Court, Edinburgh, by Richard Bremridge, 17 Bloomsbury Square, London, Registrar under the Pharmacy Acts, 1852 and 1868, in name and by authority of the Pharmaceutical Society of Great Britain, charging him with an offence within the meaning of sections 1 and 15 of the Pharmacy Act, 1868,* "in so far as on 27th May 1895, he, 'not being a duly registered pharmaceutical chemist, or a chemist and druggist within the meaning of the Pharmacy Acts, 1852 and 1868,' did, at his shop, 6 Rose Street, 'unlawfully and contrary to' the said sections of the Pharmacy Act, 1868, 'keep open shop for the retailing, dispensing, or compounding of poisons,' and did, *inter*

* Quoted *supra*, p. 9, note.

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alios, sell by retail to Alexander Spence, residing at 133 High Street, Linlithgow, a poison, within the meaning of the said recited Act, to wit, a quantity of perchloride of mercury, being a preparation of 'corrosive sublimate,' whereby the respondent became liable in a penalty of £5 sterling."

Turnbull pleaded not guilty. Evidence was led, and the Sheriff-substitute (Sym) found the charge not proven. On the complainer's motion the Sheriff-substitute stated a case on appeal, which set forth the following facts:—"The respondent is not on the register of chemists established under the Pharmacy Acts, nor is any assistant in the shop after mentioned on said register. The respondent occupies and keeps a shop at 6 Rose Street, Edinburgh, which was open to the public on 27th May 1895, and other days during the period libelled. He is a dealer in the articles used in photography at the said shop. . . .

"Some of the articles used in photography are poisonous chemical substances, certain of which are scheduled as poisons in the Pharmacy Acts. A trade circular produced by the respondent (in which he is designed as 'photographic chemist') bears that he does not sell the poisons enumerated in the Pharmacy Acts except in wholesale quantities.* His assistants are instructed only to sell those poisons to persons engaged in photography or to chemists, and on some occasions other persons have been refused these poisons on offering to buy them. On 27th May, Alexander Spence, designed in the complaint, who is a qualified chemist, but was quite unknown to the respondent and his assistants, went to the respondent's shop. The respondent was absent. Spence was acting on the instructions of the Pharmaceutical Society. He asked an assistant in the shop for certain photographic 'plates,' which were worth 2s. 6d., and he also asked how corrosive sublimate was sold. He was told that it was sold at 3d. per ounce, which is the ordinary retail price of corrosive sublimate, and he said he would take one ounce. He was asked no further questions, and paid 2s. 6d. (two shillings and sixpence) for his purchases, including the said 3d. Corrosive sublimate is a poison mentioned in the schedule to the Pharmacy Act. It is a dangerous poison, even in very small quantities. Spence took the one ounce which he bought to the office of the Pharmaceutical Society, where it was analysed.

"The defence maintained to me upon the first charge was that the transaction which I have described in paragraph 2 was a 'wholesale' transaction, and did not therefore fall under the prohibition contained in the statutory provision libelled.

"I was of opinion that it was not a wholesale, but a retail transaction. But I was of opinion that while this transaction would have justified a prosecution of the assistant for the offence of 'selling poisons' without legal qualification, it did not constitute on the part of the respondent the offence of 'keeping open shop for the retailing, dispensing, or compounding of poisons' without legal qualification, which has been held to be a different offence.

"I therefore found the charge not proved."

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* The trade circular containing a list of "photographic chemicals" which contained, *inter alia*, certain of the poisons mentioned in schedule A of the Act, had this note,—"All chemicals in this list coming under the Pharmacy Act, 1868, can only be supplied in wholesale quantities." The prices of the different articles were stated per ounce as well as per lb.

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The question of law was:—"(1) Did the facts which I have stated constitute on the part of the respondent the offence of keeping open shop for the retailing, dispensing, or compounding of poisons, contrary to sections 1 and 15 of the Pharmacy Act of 1868?"

Argued for the appellant;—One sale was enough to justify the charge.[1] A conviction of keeping open shop was competent without any sale.[2] Besides the sale, the catalogue produced proved that open shop was kept for retailing poisons. The transaction here was retail, not wholesale. Section 17 shewed that a wholesale transaction was a sale to a dealer who bought to resell; a retail transaction was a sale to a customer for his individual use. It was the treatment of the purchase by the purchaser which determined its character. Instructions to sell to particular classes of customers were immaterial. The customer might be an amateur, or he might assume a fictitious character.

Argued for the respondent;—The Sheriff was final on facts, and the question of "open shop" was one of fact. One sale by an assistant against orders was not enough to justify conviction. The instructions were only to sell wholesale, and if these were obeyed the transactions were exempted from operation of the Act.

At advising,—

LORD TRAYNER.—With regard to this question, I differ from the view taken by the Sheriff-substitute, and would answer it in the affirmative. The shop in question was the respondent's shop, and it was certainly kept open, *inter alia*, for the sale of poisons in small quantities. That the actual sale in question was made by a shopman or servant does not affect the question. It was part of the shopman's duty or service to make such sales, and what he did within the ordinary scope of his employment must be regarded as the act of the respondent, his employer.

LORD YOUNG.—I concur.

The LORD JUSTICE-CLERK concurred.

THE COURT answered the question in the affirmative, sustained the appeal, and reversed the determination of the inferior Judge.

P. MORISON, S.S.C.—CUTHBERT & MARCHBANK, S.S.C.—Agents.

No. 7.

Nov. 2, 1895. Laird v. Anderson.

ISABELLA LAIRD, Complainer.—*Johnston.*
WILLIAM FAIRWEATHER ANDERSON (Burgh Prosecutor, Dunbar), Respondent.—*D. Dundas.*

Public-House—Breach of certificate—Complaint—Inducia—Home Drummond Act, 1828 (9 *Geo. IV. cap.* 58), *sec.* 23—*Summary Procedure (Scotland) Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 6—*Burgh Police (Scotland) Act*, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 515.—The Home Drummond Act, 1828, sec. 23, requires a complaint of breach of a publican's certificate to be served at least six free days before the diet of appearance. Under the Summary Procedure (Scotland) Act, 1864, sec. 6, all summary complaints must be served upon an *inducia* of not less than forty-eight hours. In terms of the Burgh Police (Scotland) Act, 1892, sec. 515, offences under the Public-

[1] Pharmaceutical Society v. Piper & Co., L. R., 1893, 1 Q. B. 686; Pharmaceutical Society v. Arnison, L. R., 1894, 2 Q. B. 720.

[2] Bremridge v. Tomlinson, 21 R. (Just. Cases) 46, 1 Adam, 393.

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Houses Acts for breach of certificate may be tried by police magistrates in the same way and manner in all respects as may be provided for the trial of police offences under any general or local Act in force where the offender resides, or where the offence has been committed.

Held that a complaint of breach of a publican's certificate brought under the Summary Procedure Act and the Burgh Police Act, 1892, must be served upon an *inducice* of six days in terms of the Home Drummond Act, 1828.

Complaint—Illegal Citation—Burgh Police Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 477.—The Burgh Police (Scotland) Act, 1892, sec. 477, enacts,—"It shall not be competent to any party who shall appear to answer to any complaint to plead want of due citation or informality in the warrant, citation, or execution."

Where a person cited under the Burgh Police Act, 1892, upon an *inducice* of three days to answer to a complaint which required an *inducice* of six days, appeared and pleaded that she had not been duly cited, and was afterwards convicted, *held* that the citation being invalid the subsequent proceedings were inept.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

MRS ISABELLA LAIRD, publican, Belhaven, was served by William Fairweather Anderson, burgh prosecutor, Dunbar, with a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, the Criminal Procedure (Scotland) Act, 1887, and the Burgh Police (Scotland) Act, 1892, charging her with a breach of certificate.

On 3d September 1895 the complaint was served with warrant by the magistrates to summon the accused to appear in answer to the complaint on the 7th September.

On 7th September the accused appeared and objected to the citation in respect that the Home Drummond Act, 1828, prescribed an *inducice* of six days.* The Magistrates (although this was opposed by Mrs Laird's agent), adjourned the diet till Saturday 14th September in order to consider the objection.

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* The Home Drummond Act, 1828 (9 Geo. IV. cap. 58), sec. 23, enacts,—"And upon complaint for breach of certificate being made, the Sheriff or bailie, or the justices to or before whom such complaint shall have been made shall grant a warrant to the officers of Court to summon the party complained against to appear at a time and place to be specified in such warrant and summons (such summons being served at least six free days before the diet of appearance) to attend the hearing of such complaint."

The Public-Houses (Scotland) Acts Amendment Act, 1862, sec. 18, enacts,—"In the case of any person complained of for any offence against the recited Acts or this Act, excepting for breach of certificate, it shall be lawful for any Sheriff, or any one justice or magistrate, to or before whom such complaint shall have been presented, unless by the Act otherwise provided, to grant warrant for summoning the person complained of upon an *inducice* of not less than forty-eight hours to appear to answer such complaint at a time and place to be therein specified."

The Summary Procedure (Scotland) Act, 1864, sec. 6, enacts,—"On a summary complaint being laid before the Court, it shall be lawful for the Court to grant warrant to cite the respondent . . . to appear before the Court on *inducice* of not less than forty-eight hours."

The Burgh Police Act, 1892, sec. 515, enacts,—"All offences under or against the Public-Houses Acts Amendment (Scotland) Act, 1862, and the Acts therein recited, or any of them, or of any Act or Acts amending or superseding the same, for any breach of or offence against the terms, provisions, or conditions of any certificate granted under the said Acts, or any of them, may be prosecuted and tried before and by any magistrate or magistrates of police of any burgh, officiating in any Court for the trial of

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On the 14th September the Magistrates again adjourned the diet to 21st September, and on that day they heard evidence, in respect of which they found the accused guilty of the contravention charged.

Mrs Laird brought this bill of suspension, and pleaded;—(2) The *inducice* on the summons was inadequate and contrary to law.

Argued for the complainer;—The *inducice* of the Act of 1828 had never been altered by subsequent statutes. Such a prosecution demanded fair notice and preparation for answer, for a third offence involved forfeiture. Nothing then but specific repeal would diminish the protection of accused persons. Summary trial of public-house offences, under section 26 of the Public-Houses (Scotland) Acts Amendment Act, 1862, was "subject to the provisions and conditions provided in the said recited Acts or either of them." Section 18, which gave *inducice* of forty-eight hours, exempted complaints for breach of certificate. The Summary Procedure (Scotland) Act, 1864, section 6, prescribed *inducice* of forty-eight hours, but did not specially curtail that of the Act of 1828. Section 515 of the Burgh Police (Scotland) Act, 1892, was silent as to *inducice*, so also was section 477. Thus the *inducice* here were too short, and the accused was not properly before the Court.

Argued for the respondent;—The Burgh Police Act, which allowed such complaints to be prosecuted in the same way as other police cases, was wide enough in its terms to apply to *inducice*. Besides, the accused had appeared, and, in terms of section 477, could not plead informal citation.

At advising,—

Lord Trayner.—The complainer objects to the validity of a conviction obtained against her, dated 21st September last, proceeding upon a complaint at the instance of the respondent, charging the complainer with a breach of her certificate as a publican, and consequently of a contravention of the Public-Houses Acts. She objects to the conviction on various grounds, and, *inter alia*, on the ground that she had not been duly cited to answer the complaint brought against her. The fact is that the complainer was cited on an *inducice* of forty-eight hours, while according to her contention she could only legally be called to answer to the complaint on an *inducice* of six days. This objection was stated to the Magistrate when the complaint was called before him. He does not from the minute of procedure appear to have dealt with the objection at all. He neither sustained nor repelled it, but simply adjourned the diet. This was irregular certainly. The objection once stated should have been disposed of one way or another. After a second adjournment (neither of the adjournments were at the request

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police offences under the provisions of any local or general Police Act, in the same way and manner in all respects as may be provided for the trial of police offences by any such local or general Police Act in force in the county, district, burgh, or place where the offender shall reside, or the offence shall have been committed, and such magistrate or magistrates shall have power to impose the penalties and punishments, and declare the forfeitures provided in that behalf by the said Public-Houses Acts, or any of them."

Section 477 provides,—"It shall not be competent to any party who shall appear to answer to any complaint to plead want of due citation or informality in the warrant, citation, or execution."

of the present complainer) the magistrate heard evidence and pronounced the judgment now complained of.

By the Act of 9 Geo. IV. cap. 58, sec. 23, it is provided that anyone charged with the offence with which the present complainer was charged shall be summoned before the sheriff, bailie, or justices of the peace to answer thereto, "such summons being served at least six free days before the diet of appearance." It is not disputed, and at all events I think it clear, that if that statutory provision is still in force the present complainer was illegally brought before the Magistrate, and that never having been legally brought before him, the whole procedure subsequent to the first diet of compearance was inept. We have nothing here of the nature of waiver or acquiescence on the part of the complainer, because at the outset of the proceedings her objection was distinctly stated and never departed from. The adjournments of the diet, as I have said, were not made at her request or with her concurrence; they were made, so far as appears, *ex proprio motu* of the Magistrate, and in the first instance against the express objection of the complainer. The respondent, however, maintains that the citation objected to was quite regular, in respect the complaint against the present complainer was brought under the Summary Procedure Act, 1864, by section 6 of which it is provided that, under the complaints there referred to, the person complained of may be cited to appear on an *inducie* of not less than forty-eight hours, which *inducie* was given in the present case. I am not prepared to sustain that contention. It appears to me that the section of the Summary Procedure Act just referred to was intended to provide for all complaints brought under that Act, the procedure in which was not specially provided for by some other statute, but was not intended to refute or supersede special directions given or provisions made by another statute with regard to the procedure to be followed in any complaint made or raised on account of a contravention thereof. In this connection it is important to observe that while by the Public-Houses Amendment Act, 1862, the *inducie* on all complaints for any offence against that Act or the Act of 9 Geo. IV. cap. 58, was fixed at not less than forty-eight hours, complaints for breach of certificate were specially excepted, and the *inducie* for such complaints consequently remained as originally fixed at not less than six free days. This shews that in any complaint for breach of certificate the six days' *inducie* was considered necessary or proper, and such complaint was in that respect to be treated differently from all other complaints based upon other contraventions of the Public-House Acts. I am therefore of opinion that the proper *inducie* not having been given in the case before us, the complainer was never legally convened before the Magistrate at all, and that the whole proceedings, including the conviction, were inept. As that is a sufficient ground for setting aside the conviction complained of, it is unnecessary to consider the other objections which have been stated to it.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

THE COURT suspended the conviction.

JAMES PURVES, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

No. 8.

Jan. 8, 1896.
Moffat v. Shaw.

ALEXANDER JAMES HARDY MOFFAT, Complainer.—*Cullen.*
JOHN SHAW (Inspector of Poor of the Parish of Kilbarchan), Respondent.—*A. S. D. Thomson.*

Sentence—Separation of competent portion of sentence from incompetent—Warrant to recover penalty by poinding—Vaccination (Scotland) Act, 1863 (26 *and* 27 *Vict. cap.* 108), *secs.* 18 *and* 25.—The Vaccination (Scotland) Act, 1863, sec. 18, enacts that persons guilty of the offences therein specified should be liable in a money penalty, and failing payment to imprisonment. Section 25 enacts that it shall be lawful for the Sheriff upon conviction for such offence to decern and adjudge the offender to pay the penalty incurred, with expenses, and to grant warrant for imprisonment for a period not exceeding two months until such penalty and expenses should be paid.

A conviction and sentence of a contravention of the above Act sentenced the accused to payment of a fine and expenses, and continued,—"And in default of immediate payment thereof, grants warrant for recovery of the said sums by poinding of his goods and effects, and summary sale thereof on the expiration of not less than forty-eight hours after such poinding, without further notice or warrant, and appoints a return or execution of such poinding and sale to be made within eight days from this date, under certification of imprisonment for the period of ten days in default of payment or recovery of the said sums, with the expenses of diligence, before the time allowed for such report."

In a suspension the prosecutor admitted that the warrant for poinding was *ultra vires*, but maintained that, *quoad ultra*, the sentence was valid and ought to be upheld.

The Court *suspended* the conviction *simpliciter*, holding that it was impossible to separate the warrant to poind from the remainder of the sentence so as to leave a sentence which was valid in terms of the Act.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Trayner.

ON 1st October 1895 Alexander James Hardy Moffat, residing at St George's Terrace, Bridge of Weir, was convicted in the Sheriff Court at Paisley, at the instance of the Inspector of Poor of the parish of Kilbarchan, of a contravention of the Vaccination (Scotland) Act, 1863, the conviction and sentence being in the following terms:—"In respect of the judicial confession of the said Alexander James Hardy Moffat, convicts the said Alexander James Hardy Moffat of the offence charged, and therefore adjudges him to forfeit and pay the sum of ten shillings sterling of modified penalty, with the sum of twenty shillings of expenses, payable to the prosecutor, to be applied as law directs, and in default of immediate payment thereof, grants warrant for recovery of the said sums by poinding of his goods and effects, and summary sale thereof on the expiration of not less than forty-eight hours after such poinding, without further notice or warrant, and appoints a return or execution of such poinding and sale to be made within eight days from this date, under certification of imprisonment for the period of ten days in default of payment or recovery of the said sums, with the expenses of diligence, before the time allowed for such report."

Moffat brought a suspension, in which he pleaded;—The suspension sought should be granted in respect that the warrant to poind and sell contained in the sentence is illegal and incompetent.*

* The Vaccination (Scotland) Act, 1863 (26 and 27 Vict. cap. 108), sec. 18, enacts that if any person refuses to allow the operation of vaccination to be performed in terms of the Act, or if the parent or other person having

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Argued for the complainer;—The sentence was plainly incompetent as it stood, and it was not within the class of cases in which an incompetent sentence was held valid *quoad* such portion as was competent, on the ground that that portion was separable from the incompetent portion. The respondent was in this dilemma:—If the whole sentence from the words "and in default of immediate payment" to the end were held as deleted, then there remained only a sentence imposing a money penalty with expenses, and that was not the sentence which the Act required, and so was incompetent on that ground. It was nothing to the purpose that such a sentence might be less onerous than the statutory sentence; the duty of the Judge was to pronounce the sentence required by the Act, neither more nor less. If, on the other hand, only the words referring to poinding were deleted there would no doubt remain a sentence of imprisonment, but not the sentence of imprisonment which the Sheriff-substitute had imposed, for under his sentence imprisonment was conditional on the failure to recover by poinding, not only the penalty and the expenses of the conviction, but also the expenses of the diligence. Such a change would not be the deletion of an incompetent portion of a sentence, but the substitution of a new sentence for that actually imposed.

Argued for the respondent;—It was not disputed that *quoad* the warrant to poind, the sentence could not stand. It was settled, however, that where a sentence was in part valid and in part invalid the valid portion, if separable from the remainder, might stand, although the remainder was suspended.[1] That principle applied here. If the whole sentence from the words "and in default of immediate payment" were deleted, the sentence, so far as it went, became perfectly valid; no doubt there was no alternative of imprisonment, which the statute contemplated there should be, but it was not for the complainer to object to the absence of that. Further, by merely deleting all reference to poinding, there would remain a bare sentence of imprisonment, to which *per se* no objection could be stated.

Lord Justice-Clerk.—There is no doubt that in this case a mistake has been made by inserting in the sentence a warrant for the recovery of the penalty and expenses by the civil diligence of poinding and sale, which is not authorised by the statute founded on, and counsel for the respondent frankly admitted that unless he could separate the sentence into indepen-

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charge of any child, refuses to allow such operation to be performed on the child, "he shall for every such offence be liable to a penalty not exceeding twenty shillings, and failing payment, to be imprisoned for any period not exceeding ten days."

Section 25 enacts that all penalties imposed by the Act may be recovered by summary complaint in writing to the Sheriff at the instance of the inspector of the poor, "and it shall be lawful for the Sheriff to convict the offender, and upon such conviction, to decern and adjudge the offender to pay the penalty incurred, as well as such expenses as the Sheriff shall think fit, and to grant warrant for imprisoning the offender until such penalty and expenses shall be paid: Provided always that such warrant shall specify the amount of such penalty and expenses, and shall also specify a period at the expiration of which the party shall be discharged, notwithstanding such penalty or expenses shall not have been paid, and shall in no case exceed two months."

[1] Snaddon v. Spence, June 30, 1862, 4 Irv. 200; Stuart v. Macniven, Feb. 27, 1891, 2 White, 627, 18 R. (Just. Cases) 36.

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dent parts the conviction could not stand. I am of opinion that this is not a case where we can uphold one part of the Sheriff's judgment while we quash the other as unwarranted. The Sheriff here has a statutory duty to perform. The complaint proceeds upon a certain statute, and that statute lays down the course to be followed when the accused has been convicted of an offence. The Statute 26 and 27 Vict. c. 108, sec. 18, after providing that the penalty for such offence shall be a fine not exceeding twenty shillings, and failing payment imprisonment for not more ten days, in a subsequent section (sec. 25) provides that it shall be lawful to the Sheriff, upon conviction, "to decern and adjudge the offender to pay the penalty incurred as well as such expenses as the Sheriff shall think fit, and to grant warrant for imprisoning the offender until such penalty and expenses shall be paid: Provided always that such warrant shall specify the amount of such penalty and expenses, and shall also specify a period at the expiration of which the party shall be discharged, notwithstanding such penalty or expenses shall not have been paid, and shall in no case exceed two months." There are thus two things which the Sheriff's sentence must do; it must name the amount of the penalty and expenses to be paid, and a time during which the accused may be imprisoned on failure to pay these sums. It may be that the Sheriff in his discretion may make the sums to be paid and the term of imprisonment almost illusory, but he must pronounce a sentence with those two elements in it.

The only remaining question then is, whether we can find such a sentence here separable from that part of the judgment which grants warrant of poinding and sale. For I have no doubt whatever that if in a sentence which contains one part which is legal and competent there is further a part which it was outwith the power of the Sheriff to pronounce, then we have it in our power to uphold the competent part, and quash the part which was *ultra vires* of the Sheriff. That has been decided in a variety of cases, and I require only to refer to one in which the Sheriff, in sentencing a man found guilty of the crime of perjury, pronounced a sentence of imprisonment, and added a decerniture of infamy which a Sheriff could not by law pronounce. In that case this Court held that it could competently quash the sentence of infamy, and leave that of imprisonment standing.[1] In the present case the judgment of the Sheriff convicts the accused and sentences him to pay a fine of 10s. and 20s. of expenses, and then follows the part which it is maintained is separable, viz., "and in default of immediate payment thereof, grants warrant for recovery of the said sums by poinding of his goods and effects, and summary sale thereof on the expiration of not less than forty-eight hours after such poinding without further notice or warrant, and appoints a return or execution of such poinding and sale to be made within eight days from this date." Then follows the warrant for imprisonment in these terms,—"Under certification of imprisonment for the period of ten days in default of payment or recovery of the said sums, with the expenses of diligence, before the time allowed for such report." Now, here the default in payment of the penalty and expenses of

[1] See Roberts v. Henderson, Oct. 25, 1882, 10 R. (Just. Cases) 5, 5 Coup. 118.

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process is coupled with default in payment of the expenses of diligence, and the imprisonment is coupled with failure to pay all these before the time allowed for reporting the execution of the diligence. The part of the sentence relating to imprisonment cannot therefore be fairly read as separable from that relating to the poinding. It may be possible to form a sentence which would read grammatically if we were to strike out all words referring to the poinding, but that is not enough. It is a mere accident that we can thus get a grammatical sentence, and what we do get would not be the sentence of imprisonment pronounced by the Sheriff. These two parts of the Sheriff's sentence are so mixed up together that it is not for us to pick out the one from the other. They must therefore stand or fall together, and as that would leave a sentence which does not contain all the statutory requirements, I move your Lordships to quash the conviction.

LORD M'LAREN.—I concur. The objection taken is clearly one of substance, and not merely of form. In the enforcement of the penalty the statute requires that the more humane and more effective alternative of imprisonment for a short period should be adopted in preference to the civil remedy of poinding, which might be ruinous to a poor man. The policy of the Legislature is illustrated by the provisions of the Summary Jurisdiction Act, 1881, whereby power is given to the Sheriff or Magistrate to modify the penalty, and to prescribe payment by instalments, the intention being that the Sheriff should not impose on a working-man a higher penalty than he would be able to pay without unnecessary hardship to his family. Now, when the statute authorises imprisonment as the only remedy for wilful refusal to pay the penalty, excluding the civil process of poinding and sale, which might result in the breaking-up of the defender's home, the defender is very well entitled to come here and object to the validity of a warrant for poinding. The whole conviction and sentence in this case therefore falls, because I am unable to see how we can separate the warrant for poinding from the parts of the sentence which are accordant with the statute.

LORD TRAYNER.—I concur. I only desire in addition to emphasise the point that the warrant in this case is distinctly in excess of that authorised by the statute. The accused is not only decerned to pay the fine and expenses of process in terms of the statute, but is also found liable in the expenses of a diligence, which the statute has never authorised to be used, and of the expenses of which it therefore says nothing. I agree that the unwarrantable part of the sentence is not separable from the rest.

THE COURT pronounced the following interlocutor:—"Pass the bill, suspend the conviction and sentence complained of *simpliciter*: Find the complainer entitled to expenses, both in this Court and in the inferior Court," &c.

DAVID DOUGAL, W.S.—F. J. MARTIN, W.S.—Agents.

No. 9.

Jan. 8, 1896.
Simpson v. Proctor.

WILLIAM SIMPSON, Appellant.—*Clyde.*
GEORGE PROCTOR (Burgh Prosecutor, Keith), Respondent.—*Ingram.*

Public Health—Slaughter-houses—Place of deposit for carcases of horses—Licence—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 285.—The Burgh Police (Scotland) Act, 1892, sec. 285, enacts,—"It shall not be lawful to use any place within the burgh for the slaughtering of horses, or as a place of deposit for the carcases of the animals, unless and until every such place is licensed by the Commissioners."

The proprietor of premises within a burgh, which were not licensed in terms of the above section, appealed against a conviction of having used the premises as a place of deposit for the carcase of a horse, in contravention of the section. It was proved that the appellant carried on the business of horse slaughterer in premises beyond the boundaries of the burgh. On the occasion libelled the carcase of a horse belonging to the appellant had been conveyed into the burgh from a farm about twenty-three miles distant, and was left for the night in his unlicensed premises within the burgh. Next morning the carcase was taken to the appellant's premises outside the burgh. The carcase was so deposited with the knowledge of the appellant, and in accordance with his general instructions. The carcases of other horses had on previous dates been so deposited when carried a long way, or when it was late.

The Court *sustained* the appeal, holding that the facts stated as proved did not in law justify a conviction.

Observed (*per* Lord M'Laren) that a different result might have been reached if it had been proved that the appellant used the premises within the burgh as a place where carcases were kept for a considerable time or in considerable numbers.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Trayner.

ON 28th October 1895 William Simpson, manure manufacturer, Douglasbrae, near Keith, was charged in the Police Court at Keith on a complaint at the instance of the Burgh Prosecutor, setting forth that the accused "did, on the 23d and 24th days of October 1895, use a close at the rear of his premises in Fife Street, Fife-Keith, aforesaid, as a place of deposit for the carcase of a horse, said place not being licensed by the Commissioners of Police for the burgh of Keith," contrary to the Burgh Police (Scotland) Act, 1892, sec. 285.*

Simpson pleaded not guilty, but was convicted, and was dismissed with an admonition.

He obtained a case. The case set forth the following facts as proved:—"(1) That the appellant was manager of William Simpson & Company, Limited, incorporated under the Companies Acts, 1862, who carry on the business of horse slaughterers at their licensed premises at Douglasbrae,† a place near Keith, but beyond the boundaries

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 278 to 287, are headed collectively "*Slaughter-houses*," and section 285 is in these terms:—"It shall not be lawful to use any place within the burgh for the slaughtering of horses, or as a place of deposit for the carcases of the animals, unless and until every such place is licensed by the Commissioners, who are hereby authorised to give and recall such licence at pleasure, and it shall not be lawful to carry or convey within the burgh any dead horse unless in a covered cart or waggon, or unless the dead carcase be sufficiently covered; and any person who shall offend against this enactment shall be liable to a penalty not exceeding £10, and a further penalty not exceeding £2 for every day on which such offence shall continue."

† These premises were licensed under the Prevention of Cruelty to Animals Act, 1850 (13 and 14 Vict. cap. 92).

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of the burgh of Keith; that on 23d October 1895 a dead horse belonging to the said William Simpson & Company, Limited, was conveyed from the farm of Balnoon, Forgue, a distance of twenty-three miles, by George Morrison, carter in the employment of the said William Simpson & Company, Limited, and residing at Fife Street, Fife-Keith, in a cart belonging to the said William Simpson & Company, Limited, and having a cover thereon, to the premises in Fife Street, Fife-Keith, belonging to the said Limited Company, and deposited within a cart-shed in a close there, and kept there in said cart from 8 P.M. on said 23d October until 7 A.M. the next morning, when it was removed to the Douglasbrae premises.

"(2) That the said dead horse was deposited with the knowledge of the appellant, and in accordance with the general instructions given by the appellant, as manager of said Limited Company, to the said George Morrison.

"(3) That the carcases of other horses had, on previous dates, been so deposited, when carried a long way or when late.

"(4) That the said premises in Fife Street, Fife-Keith, are situated within the burgh of Keith, and are not licensed for the slaughtering of horses or the deposit of their carcases."

The following was the question of law stated:—"Whether the facts stated as proved constitute an offence, and justify the conviction, on a right view of the law applicable to them?"

Argued for the appellant;—The section did not apply to the facts here found proved. "Place of deposit" for the carcases of horses meant a place habitually used for the purpose of depositing the carcases of horses in numbers at a time. All that had been proved was that on the occasion in question, and on some previous occasions, the appellant had used the premises within the burgh as a place for leaving carcases of horses which had been carried a long way, or when it was late. The carcases were truly *in transitu*, and the branch of the section which required to be complied with was that relating to the carriage of dead horses, not that relating to places of deposit. It was not suggested that leaving the carcase for the night in the premises within the burgh constituted a public nuisance, but if that question had been raised it would be a question under the Public Health Act.

Argued for the respondent;—It might be conceded that an isolated instance of leaving the carcase of a horse in a place within the burgh would not constitute that place a place of deposit in the meaning of the Act; but the case here proved was something very different. The facts shewed that the appellant was in the habit of leaving the carcases of horses at this place within the burgh whenever it suited his convenience to do so. It was, in short, a regular adjunct of his other establishment, and as such was a place of deposit within the meaning of the Act. The statute ought to be liberally construed, for it was in the public interest that places where dead horses were habitually left should be under police control.

LORD M'LAREN.—This is an appeal against a conviction following on a complaint by which the appellant is charged with using a close at the rear of his premises in the burgh of Keith as a place of deposit for the carcase of a horse, said place not being licensed by the Police Commissioners, contrary to section 285 of the Burgh Police Act, 1892. The case is brought here under the Summary Prosecutions Appeals Act, and it does not shew

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any very material interest in the parties concerned, as the appellant, although convicted of the contravention with which he was charged, was dismissed with an admonition. Neither is there any general question of law submitted for our consideration. The only question stated is,—"Whether the facts stated as proved constitute an offence, and justify the conviction, on a right view of the law applicable to them?" I suppose that means that we are to put ourselves in the position of the magistrates and say whether their decision was right. I should like to reserve my opinion on the question whether magistrates are bound to state a case for the Appeal Court when the only question is whether the conviction was properly arrived at upon the evidence. But such a case is often stated, and here the parties are agreed in desiring our judgment.

The point in the case is, whether, under the provision in the Burgh Police Act, to which I am about to refer, the temporary stoppage of a carcase of a horse at an unlicensed place constitutes a deposit of the carcase. The clause, it should be observed, occurs in a subdivision of the Act of Parliament which is headed "Slaughter-houses." Among the clauses thus headed is the 285th section, which provides that "it shall not be lawful to use any place within the burgh for the slaughtering of horses, or as a place of deposit for the carcases of the animals, unless and until every such place is licensed by the Commissioners, who are hereby authorised to give and recall such licence at pleasure, and it shall not be lawful to carry or convey within the burgh any dead horse unless in a covered cart or waggon, or unless the said carcase be sufficiently covered." The section goes on to provide the penalty for contravention. Now, I think that the place referred to in that section is a place in which animals are to be placed either when they have been slaughtered, or when they are brought there to be slaughtered, or to be disposed of as slaughtered animals are usually treated. It is clear that what is meant is a place of deposit which is used as an adjunct to the slaughter-house. The section I have just read deals with the question of the conveyance of dead horses, so that we have both cases dealt with, the case of conveyance and the case of deposit. In the latter case a licence is required, in the former all that is necessary is that the cart or the carcase should be covered. There is no other restriction applicable to the case of transit.

Now, on the facts as stated here, the carcase was on its way from the farm where the horse died to a manure establishment, and the deposit in Keith was merely for a temporary purpose, because it was too late in the evening to proceed further. It does not, in my judgment, affect the question that the same thing had been done before. It would, however, affect my judgment very materially if it were proved that the appellant was using a place within the burgh as a place where animals were kept for a considerable time, or in considerable numbers—if, in short, the appellant was using a place within the town as a place of deposit or adjunct to his slaughter-house. Nothing that we decide will affect such a case.

But I do not understand that the facts here stated were intended to raise such a case, but rather to raise the question whether it is lawful to leave a dead horse, while in transit, in a place that is unlicensed. On the facts as stated I think that the conviction cannot be sustained.

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It has, indeed, been suggested that the enactment ought to be interpreted liberally in order to further the object of the Act, which is the maintenance of the public health. But in construing a statute which contains 518 sections I cannot readily assume that anything has been left out for the sake of brevity which we are entitled to supply, and as the offence charged does not come within the words of the statute I think the conviction ought to be quashed.

LORD TRAYNER.—I agree with your Lordship in holding that this appeal ought to be sustained. I do not think that the section on which the complaint is founded is at all applicable to the facts stated to us here.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced the following interlocutor:—"Answer the question in the case in the negative: Sustain the appeal: Reverse the determination of the inferior Judge, and decern: Find the appellant entitled to expenses, which modify to ten guineas," &c.

CHARLES GEORGE, S.S.C.—ALEXANDER MUSTARD, S.S.C.—Agents.

No. 10.

Jan. 8, 1896.
M'Vean v. Jameson.

MALCOLM M'VEAN, Appellant.—*Abel.*
ANDREW JAMESON, Respondent.—*Cook.*

Procedure—Appeal—Case stated—Competency—Time—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 *and* 39 *Vict. cap.* 62), *sec.* 3.—Applications under section 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, to the inferior Judge to state a case for appeal, must be made within the three days provided by that section, even where the last of the three days is a Sunday.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Trayner.

ON Thursday 24th October 1895 Malcolm M'Vean, ploughman, Ballagan, Strathblane, was, on the complaint of Andrew Jameson of Leddriegreen, convicted by the Sheriff-substitute at Stirling (Buntine), of a contravention of the Day Trespass Act (2 and 3 Will. IV. cap. 68) on the lands of Leddriegreen, and fined 20s. with expenses.

On Monday 28th October M'Vean applied to the Sheriff-substitute to state a case under the Summary Prosecutions Appeals (Scotland) Act, 1875. A case was stated, but under protest that it was incompetent on the ground that the application to the Sheriff-substitute to state a case had not been made within three days of the conviction in terms of section 3 of the Act.*

* The Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. cap. 62), sec. 3, enacts,—"On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst, by himself or his agent applying in writing within three days after such determination to the inferior Judge to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of a superior Court of law, as hereinafter provided; and on any such application being made, the following provisions shall have effect:—

"1. The appellant shall not be entitled to have a case stated and delivered to him unless within the said three days he shall—(1) Lodge in the hands of the Clerk of Court a bond with sufficient cautioner for answering and abiding by the judgment of the superior Court in the appeal, and paying the costs should any be awarded by that Court, or otherwise, in the discretion

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At the hearing on the appeal the respondent insisted in the objection to the competency of the appeal, and argued;—The application to have a case stated was made more than three days after the determination of the Sheriff-substitute, and therefore was too late. In point of fact the bond of caution had also been lodged too late, as it was not lodged until 2d November, but the respondent did not insist in that objection, as the bond of caution had been received on the understanding that it would be regarded as timeous if the Court were of opinion that the notice was timeous. It was settled in England, on the construction of similar statutes, that Sunday was to be computed as one of the days for giving notice, even although it was the last day.[1] In Scotland too it had been held that Sunday was to be counted in the matter of consignation, if at least it was not the last of the three days, for if it was the last it rather appeared that consignation on the following Monday would be in time, consignation being an act requiring the concurrence of the Clerk of Court.[2] Sending an application was different; that a party could do of his own motion, and he might use the post on Sunday, which would be a sufficient compliance with the Act.[3] When the last of the days of grace fell on a Sunday, a bill was due and payable on the Saturday preceding.[4]

Argued for the appellant;—The application for a case stated was timeous here. The statute required three things to be done, viz.,—sending an application to the Sheriff for a case, finding caution or consigning in the hands of the Clerk of Court, and paying the Clerk's fees. The respondent practically admitted that the two latter conditions would be timeously fulfilled if performed on the Monday, and the same rule ought to apply to the sending of the application to have a case stated.[5]

Lord Justice-Clerk.—The competency of this appeal turns upon the question whether if the last of three days allowed by statute for performing a statutory act be a Sunday, and the act itself might have been performed by the litigant either upon the Saturday or upon the Sunday, the requirement of the statute is met by the performance of the act upon the Monday.

Where a document requires to be lodged in the hands of the Clerk of Court at his office, it is matter of decision that where the last day allowed for the lodging happened to fall on Sunday, then it was sufficient if it were done on the Monday. But on the other hand abundant authority was quoted from the bar indicating that where a mere notice requires to be given, as in this case, a Sunday falling within the days within which notice must be given is to be counted, and it is no answer to the objection of "no

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of the inferior Judge, shall consign in the hands of the Clerk of Court such sum as may be fixed by the inferior Judge to meet the penalty awarded, if any, and the said costs of the superior Court; (2) pay the Clerk of Court his fees for preparing the case."

Then followed other provisions not necessary to be here quoted.

[1] Reg. v. Justices of Middlesex, 1844, 7 Jur. 396; Peacock v. The Queen, 1858, 4 C. B. N. S.—(Scott's Reps.) 264; Rowberry v. Morgan, 1854, 9 Excheq.—(Wels., Hurls., and Gord.) 730.

[2] Hutton v. Garland, June 13, 1883, 10 R. (Just. Cases) 60, 5 Coup. 274.

[3] Charleson v. Duffes, June 10, 1881, 8 R. (Just. Cases) 34, 4 Coup. 470.

[4] Byles on Bills, 15th ed. 276.

[5] Russell v. Russell, Nov. 12, 1874, 2 R. 82; Craig v. Jex-Blake, March 16, 1871, 9 Macph. 715, 43 Scot. Jur. 363.

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notice" to say that the last day was a Sunday, and that notice was given on the Monday. Counsel for the appellant, however, pressed upon us that the notice of appeal required in cases like the present is to be treated as part and parcel of a set of requirements which the statute says shall be performed within three days, and that some of these requirements could not be performed on Sunday; that the lodging of caution and paying the fees of the Clerk of Court were to be performed simultaneously with the giving of the notice of appeal, and had been held to be timeously made if made on the Monday. Now, it may be quite reasonable that the lodging of caution and paying of fees on the Monday should be held to be sufficient compliance with the statute, for neither of these acts can be completed by the litigant without the co-operation of the official of Court, which cannot be obtained on Sunday. But I am unable to see that the same rule can be applied to the giving of notice of appeal, which requires no formality, and which, so far as the litigant is concerned, may be completed by the posting of a notice in the post-office on Saturday or Sunday.

It therefore seems to be quite plain that if the statute says notice shall be given within three days, and these days expire on Sunday, the notice is not duly given by being handed to the sheriff-clerk on the Monday following. I am therefore of opinion that this appeal is incompetent, and must be dismissed.

LORD M'LAREN.—When some step of judicial procedure has to be performed by the litigant within a definite number of days fixed by statute, and the last day is a Sunday, our decisions have sanctioned the completion of the step on the Monday, where the step is one which requires the co-operation of the Clerk of Court or other official, as the giving in of a report or document of any kind. These decisions would cover the necessity of finding security and paying the fees of Court. But where the act is something which the litigant can do at his own hand—where he has it in his power to complete the act so far as his own share in it is concerned without the co-operation of a second party, as in the case of the notice required—I see no reason why Sunday should be discounted. If the litigant wishes to have the full time allowed for deliberation, he may still have that, because the post-office is open to him on Sunday, and again, if he has scruples, and objects to posting a letter on Sunday, he has the option of giving his notice on the Saturday. I think that the decisions in reference to notice of dishonour of bills of exchange are in point, and they lead to the conclusion I have stated.

I am therefore of opinion that we must sustain the objection to the competency of this appeal so far as founded on the notice of appeal not having been given in due time.

LORD TRAYNER concurred.

THE COURT pronounced the following interlocutor:—"Having heard counsel on an objection stated to the timeousness of the application made to the inferior Judge to state a case, sustain said objection, dismiss the appeal, and decern: Find the respondent entitled to expenses," &c.

J. A. CAIRNS, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

No. 11.

Jan. 8, 1896. Kennedy v. H. M. Advocate.

WILLIAM KENNEDY, Complainer.—*Guy.*
HER MAJESTY'S ADVOCATE AND ANOTHER, Respondents.—*C. N. Johnston, A.-D.*

Proof.—At the trial of a butcher before a Sheriff and a jury for reset of theft of sheep, the agent for the accused proposed to prove that the man who had stolen the sheep libelled had sold other stolen sheep to other butchers who had bought *in bona fide* ignorance that the sheep had been stolen. In a suspension *held* that the Sheriff had rightly disallowed this line of evidence.

Theft—Reset—Conviction of reset on a charge of theft—Specification—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 59.—The Criminal Procedure (Scotland) Act, 1887, sec. 59, enacts,—"Under an indictment for . . . theft . . . a person accused may be convicted of reset."

A person was tried before a Sheriff and a jury on an indictment which set forth that the accused did, "between 6th and 12th October 1895, from a field or fields on the farm of Marchhill, in the parish and county of Dumfries, belonging to John Blackley, cattle-dealer, residing there, steal" three sheep.

The jury returned this verdict,—"Find the accused guilty of reset of theft."

In a suspension, *held* that the conviction was not bad for want of specification.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Trayner.

ON 2d December 1895 William Kennedy, 6 Queensberry Street, Dumfries, was tried in the Sheriff Court at Dumfries before the Sheriff-substitute (Campion) and a jury, on an indictment at the instance of Her Majesty's Advocate, the charge against the accused being "(1) that you did, on 28th September 1895, in and near the burgh of Lochmaben, in the county of Dumfries, from a flock of sheep then under the charge of, and being driven by, John Burnie junior, presently a prisoner in the prison of Maxwelltown, steal two half-bred lambs; and (2) between 6th and 12th October 1895, from a field or fields on the farm of Marchhill, in the parish and county of Dumfries, belonging to John Blackley, cattle-dealer, residing there, steal a bred lamb, two cheviot ewes, and a cross-bred lamb."

The following verdict was returned:—"The jury find the first charge not proven, and upon the second charge find the accused guilty of reset of theft."

The Sheriff-substitute pronounced a sentence of six months' imprisonment.

Kennedy brought a suspension against the Lord Advocate, and Charles Steuart Phyn, the procurator-fiscal.

The complainer stated that John Burnie junior, mentioned in the indictment, had been convicted on his own confession of the theft of sheep; that the complainer "bought the animals with the theft of which he was charged from the said John Burnie junior *in bona fide* and in the full belief, for which he had reasonable ground, that they were the lawful property of the said John Burnie junior. On each occasion, before buying the sheep, he asked Burnie if they were his own, or if he had authority to sell them. A reply in the affirmative was given on each occasion, and this was not disproved by the prosecution at the trial. . . . . Two of the sheep which the said John Burnie junior pleaded guilty to stealing had been offered by him for sale, and had been sold by him to" A B, a butcher whom the complainer named and designed. "The said John Burnie junior had

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pleaded guilty to the theft of the animals, with the theft of which the complainer was in the said indictment charged."

"The first witness examined by the respondent Mr Phyn for the prosecution was the said John Burnie junior. The complainer's agent proposed to prove that the said John Burnie junior had been in the habit of stealing sheep and other animals and selling them to butchers as his own. In particular he proposed to put questions to the said John Burnie junior with a view to eliciting this evidence. In particular he asked the said John Burnie junior the following questions:—'Did you sell two black faced ewes to' A B? and 'Did you tell him at that time that these ewes were your own property?' The respondent Mr Phyn objected to the questions and to this line of evidence, and the Sheriff-substitute wrongously and illegally sustained the objection."

The complainer further stated,—"The respondent Mr Phyn at the close of the evidence requested the Sheriff-substitute to charge the jury that it was competent for them to give a verdict of reset of theft. This the Sheriff-substitute did," and the jury returned the verdict above quoted. "Notwithstanding that reset of theft was not charged in the indictment, the verdict did not specify in what way or at what time and place the complainer had committed the said crime, or what things or articles he had been guilty of resetting."

The complainer pleaded;—The sentence complained of should be suspended and liberation granted, with expenses, in respect of (1) the refusal of the said Sheriff-substitute to allow competent evidence in exculpation; and (2) the verdict being disconform to the indictment and wanting in necessary specification.

Argued for the complainer;—(1) The questions which had been disallowed were competent with the view of shewing that the complainer had bought the sheep in ignorance that they had been stolen, which was certainly a complete defence to a charge of reset. To prove that other butchers had in complete *bona fides* bought sheep from Burnie, which he had stolen, might not go very far to establish the complainer's innocence, but it was a relevant piece of evidence, and a conviction would be suspended if a competent question had been disallowed, although the Court might think that the answer might not have influenced the jury.[1] In any case the questions were competent as going to the credibility of the witness Burnie. (2) Prior to the passing of the Criminal Procedure Act, 1887,* a conviction of reset upon a charge of theft was bad, and that Act in no way altered the rule that either in the indictment or in the conviction there must be a specification of the time, place, and manner of the offence. Here there was no specification at all.

The respondents were not called upon on the first point. On the second they argued that the indictment and the verdict read together contained a sufficient specification of the offence.

LORD JUSTICE-CLERK.—There are two points in this case. The first point,

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[1] Allison's Practice, ii. pp. 28-29, and case of *Ferguson* v. *Lindsay*, there cited.

* The Criminal Procedure Act, 1887 (50 and 51 Vict. cap. 35), sec. 59, enacts,—"Under an indictment for robbery, or for theft, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, a person accused may be convicted of reset."

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with regard to the rejection of evidence, is in certain respects peculiar. The questions which it was proposed to put could not affect the credibility of the witness, because the witness was admittedly a thief. There was thus no question of character involved, and what it was proposed to do was to prove that the witness had been in the habit of stealing sheep and selling them to butchers as his own. I am inclined to think that in general I should allow a party to put the question to a witness whether he had been convicted of a crime, but I should not allow a party to bring evidence to contradict the answer which the witness gave, because it is a well-established rule that when you ask questions of a witness in order to damage his character and therefore his credibility, you cannot bring extraneous evidence to prove that his answers to these questions were untrue. The reason of this is plain. Were it otherwise, then instead of one trial you might have four or five to ascertain the guilt or innocence of witnesses of specific crimes. In this case, however, the question would have brought the accused no further forward in his defence even if he had got an answer in the affirmative from the witness, and I have therefore no doubt that this ground of suspension must be repelled.

The second point raised was, that while the prisoner was charged with theft, he was convicted of reset of theft. This course was admittedly a competent one for the jury to take, and the Judge directed them quite properly that if they found that the prisoner had obtained the sheep knowingly from one who had stolen them, they could find him guilty of reset of theft. Some observations had been made on the form of the verdict. Now, I think that caution ought to be exercised in these cases as to the form of the verdict, because the charge is one of theft and the conviction one of reset. But here I think the verdict is quite sufficient under the provisions of the Criminal Procedure Act, 1887. What the prisoner is charged with is the theft of certain sheep; what he is convicted of is reset of theft. You may read the indictment in the light of the provisions of the Criminal Procedure Act, 1887, as a charge that he did reset these sheep, well knowing them to be stolen, and I think the course taken by the jury was perfectly competent, and that no exception can be taken to the verdict as recorded. I therefore move your Lordships to refuse the suspension.

Lord M'Laren.—The first objection to this conviction is, that a question which the agent for the panel proposed to ask one of the witnesses for the Crown was disallowed. I think it is impossible to read the statement of what took place without seeing that the evidence which it was proposed to obtain was that the witness had been in the habit of stealing sheep and selling them to butchers as his own. That being the object of the question, I am of opinion that the question was properly disallowed. If, however, it is said that the object of the question was to affect the credibility of the witness, I think there are two answers to be made to that. The first is, that if you read the statement of the complainer fairly it is clear that that was not the intention of the question as put. The second answer is, that, in my opinion at least, the credibility of the witness could not be affected by it. If, indeed, the witness had prevaricated as to his being a thief, the question might have been allowed. But in this case, where it was admitted he was

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a thief, I think the interrogation of the witness with respect to previous acts of theft was rightly disallowed.

On the second question I agree with your Lordship. When the effect of the verdict is to convict the prisoner of a crime of a lesser degree than that with which he is charged, I agree that it would be improper to find him guilty as libelled. It is also true that where the charge is one of theft, a verdict of reset must be in some way applied to the particular facts. A better verdict might have been to find the prisoner guilty of reset of theft, in that he received the sheep libelled knowing them to be stolen. Nevertheless, I think that the verdict as recorded, taken along with the complaint, applies the finding of the jury to the facts of the case with sufficient clearness. The test is whether the verdict as recorded is a sufficient minute of the finding of the jury to enable the Judge to pronounce sentence, and the clerk of Court to draw up the conviction. On both points I concur in holding that the appeal should be dismissed.

LORD TRAYNER.—I concur with your Lordships. I think the first objection necessarily falls, because the question which it was proposed to put was quite irrelevant. As regards the second objection, I hold that the verdict was a competent and sufficient answer to the question put by the indictment, that is to say, by the indictment read in the light of the provisions of the Criminal Procedure Act, 1887. I agree that we should refuse the suspension, though I should like to say that I think that caution is necessary in the framing of verdicts in such cases.

THE COURT pronounced this interlocutor:—"Refuse the bill, and decern: Find the respondents entitled to expenses," &c.

CLARK & MACDONALD, S.S.C.—CROWN AGENT—Agents.

No. 12.

Jan. 9, 1896. Dingwall v. Davidson.

ARTHUR DINGWALL, Complainer.—*W. Thomson.*
ALEXANDER DAVIDSON (Procurator-Fiscal to the Justice of Peace Court, Dumfries), Respondent.—*Younger.*

Sentence—Conviction—Expenses—Summary Procedure (Scotland) Act, 1864 (27 *and* 28 *Vict. cap.* 53), *Schedule K, Form* 3.—A conviction and sentence in the form of Schedule K, No. 3, of the Summary Procedure (Scotland) Act, 1864, *suspended*, on the ground that it adjudged the accused, in default of immediate payment of the penalty imposed, to be imprisoned for fourteen days, "unless the said penalty and expenses shall be sooner paid," while no award of expenses had been pronounced against the accused.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Trayner.

ON 31st October 1895 Arthur Dingwall, horse-slaughterer, Moss-park, Dumfries, was charged in the Justice of Peace Court, Dumfries, on a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and Criminal Procedure (Scotland) Act, 1887, at the instance of the Procurator-fiscal, setting forth that the accused, on a date and at a place specified, did cruelly ill-treat a horse, "in contravention of the 1st section of the Act of Parliament 13 and 14 Victoria, chapter 92, entituled an 'Act for the more effectual prevention of cruelty to animals in Scotland,' whereby the said" accused is "liable to a penalty not exceeding five pounds, and failing payment to imprisonment in terms of the Summary Jurisdiction (Scotland)

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Act, 1881."* The complaint did not contain a prayer for expenses.

The accused pleaded not guilty, but was convicted.

The conviction was in the following terms:—"At Maxwelltown, the 31st day of October 1895 years.—The Justices, in respect of the evidence adduced, convict the said Arthur Dingwall of the contravention charged, and therefore adjudge the said Arthur Dingwall to forfeit and pay the sum of two pounds of penalty, and in default of immediate payment thereof adjudge him to be imprisoned in the prison of Maxwelltown for the period of fourteen days from the date of his imprisonment, unless the said penalty and expenses shall be sooner paid, and grant warrant to officers of Court to apprehend Arthur Dingwall and convey him to the said prison, and to the keeper thereof to receive and detain him accordingly."

Dingwall paid the fine, and thereafter brought a suspension, pleading, *inter alia*,—"The question of whether or not the complainer is to suffer imprisonment depends upon his paying expenses which have not been asked for nor found due, and which have not been ascertained."†

Argued for the complainer;—The Justices had no power to find expenses due—certainly no statutory power. Section 1 of the Pre-

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* The Act for the Prevention of Cruelty to Animals, 1850 (13 and 14 Vict cap. 92), sec. 1, enacts that "any person who shall from and after the passing of this Act cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal, shall be guilty of an offence, and shall for every such offence be liable in a penalty not exceeding £5."

† The Act for the Prevention of Cruelty to Animals, 1850 (13 and 14 Vict. cap. 92), sec. 8, enacts,—"In every case of a conviction under this Act, when the sum imposed as a penalty, together with costs (if any) awarded by any magistrate for or in respect of any offence against the provisions of this Act, shall not be paid immediately upon the conviction, or within such time as the convicting magistrate shall in the exercise of his discretion appoint and limit, it shall be lawful for such magistrate, and he is hereby required, to adjudge the offender to be imprisoned for any term not exceeding two calendar months unless payment be sooner made."

The Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53) enacts (sec. 18, subsec. 3),—"In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to forfeit a penalty, and in default of payment thereof to be imprisoned for a period limited to a certain time, at the expiration of which he shall be entitled to liberation, although the penalty has not been paid, the judgment of the Court shall be in the form No. 3 of Schedule K."

Form No. 3 of Schedule K is as follows:—"The justices [*or* justice, *or* sheriff, *or* magistrate], in respect of the judicial confession of the said *J. K.* [or of the evidence adduced], convict the said *J. K.* of the contravention [*or* offence] charged [*or state to what extent he is guilty*], and therefore adjudge him to forfeit and pay the sum of £ of penalty [*or* of modified penalty, *where there is power to modify*], [with the sum of £ of expenses, *where expenses may be awarded*]; and in default of immediate payment thereof [*or, if time be allowed, say*, within days from this date], adjudge him to be imprisoned in the prison of for the period of from the date of his imprisonment, unless the said sum [*or* sums] shall be sooner paid, and grant warrant to officers of Court to apprehend him and convey him to the said prison, and to the keeper thereof to receive and detain him accordingly."

vention of Cruelty to Animals Act did not mention expenses, and section 8 assumed a power but did not confer it. But assuming that the Justices had such a power they had not here exercised it. They had not found the complainer liable in expenses, and yet according to the terms of the conviction he became liable to imprisonment unless he paid an indeterminate sum in name of expenses, which had not been found due. If he had gone to prison he could not have been released by payment of the penalty merely; the governor of the prison could only walk by his warrant; he was neither bound nor entitled to go behind it.

Argued for the respondent;—This was a case of mere clerical blunder—the blunder of not striking a pen through the printed words "and expenses" in the form of conviction used by the Justices. Such a blunder did not vitiate the conviction.[1] The complainer had suffered no prejudice, as he had paid the fine; but even if he had gone to prison and had then wished to be released on payment of the penalty, the reference to expenses would have caused no difficulty. The governor of the prison would have seen that it was a plain blunder. The true reading was "said penalty" and "said expenses," and it was clear on the face of the conviction that there were no "said expenses."

LORD TRAYNER.—A variety of objections have been taken to this conviction, with most of which I do not think it necessary to deal, because in my opinion the objection founded on the terms of the conviction with regard to the expenses is sufficient for the decision of the case. The finding of the Justices is to adjudge the accused to pay a fine of £2, "and in default of immediate payment thereof, adjudge him to be imprisoned in the prison of Maxwelltown for the period of fourteen days from the date of his imprisonment, unless the said penalty and expenses shall be sooner paid." Now, I think that the validity of that finding must be regarded as at the time at which it was pronounced, and that it is not affected by anything which afterwards took place. The statute under which it was pronounced (the Prevention of Cruelty to Animals Act) provides in very distinct terms that any person found guilty of a contravention of the first section thereof shall be liable to a penalty not exceeding £5. Under the Summary Procedure Act, 1864, imprisonment is made competent on default in payment of the fine. But neither in the complaint is there any prayer for expenses, nor is there any authority for such a prayer in the statutes. Whether the magistrates had an inherent power to award expenses I do not stop to inquire, for if they had they did not exercise it. They found the prisoner liable in a penalty of £2, without any mention of expenses, and they sentenced him to be imprisoned for fourteen days unless the said penalty "and expenses" were sooner paid. That is a warrant to the keeper of the prison to detain the complainer until he has paid the penalty and expenses,—that is, until he has done something which the magistrates had no power to ordain him to do. I think that is a sufficient ground for granting this bill of suspension. It may be said that this is a mere matter of form, but in these cases where personal liberty is concerned form is substance. We cannot too jealously guard against judgments or interlocutors of

[1] Gallie v. Ferguson, Nov. 21, 1883, 11 R. (Just. Cases) 13, 5 Coup. 365.

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inferior Courts which interfere with the liberty of the lieges or ordain them to be incarcerated in prison. I am therefore for granting the prayer of this note.

LORD M'LAREN.—I concur, and only wish to add a sentence to prevent this judgment from being regarded as a precedent in cases under another class of penal statutes. If a statute imposes a penalty, and then authorises, as an alternative, a warrant for imprisonment, it would be quite within the scope of precedent to separate the conviction into two parts—the sentence and the warrant of imprisonment for enforcing the sentence—and to sustain the sentence, even if the warrant was radically defective. Here the sentence is perfectly good; the only mistake is that the magistrates ordain the prisoner to be kept in prison until he pays the penalty and expenses, when, as a matter of fact, no expenses had been found due. But in this case I agree with Lord Trayner that although the Prevention of Cruelty to Animals Act ordains no special course of procedure, yet the prosecution is under the Summary Procedure Act, 1864, which contains a warrant for imprisonment as a necessary part of the conviction. The conviction would not be good without such a warrant, although if the fine is paid it may turn out to be merely a matter of form. The objection is certainly very critical, but it has been held, both here and in England, that where personal liberty is concerned form is substance, and I think this is a case for applying that principle.

LORD JUSTICE-CLERK.—I concur. I agree with Lord M'Laren that the warrant for imprisonment is not separable from the rest of the conviction. It is difficult to suspend a conviction upon a matter of form, but on the whole I agree that this warrant is essentially illegal and that the conviction cannot stand.

THE COURT pronounced the following interlocutor:—"Pass the bill: Suspend the conviction and sentence complained of *simpliciter*: Find the complainer entitled to expenses, which modify to ten guineas."

WHIGHAM & COWAN, S.S.C.—JOHN DOBIE, Solicitor—Agents.

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Oliver v. London.

THOMAS PAUL OLIVER, Appellant.—*Johnston—Clyde.*
ALEXANDER LOUDON (Procurator-Fiscal for Justice of Peace Court, Ayr), Respondent.—*W. Campbell—Hunter.*

Public-House—Hotel Certificate—Contravention—Guest of bona fide Traveller—Public-Houses Acts Amendment (Scotland) Act, 1862 (*25 and 26 Vict. cap.* 35).—A hotelkeeper supplied two glasses of liquor on a Sunday to a *bona fide* traveller for the refreshment of two friends of the *bona fide* traveller, who were themselves neither *bona fide* travellers nor lodgers in the hotel. The hotelkeeper knew that the liquor was to be consumed by the friends. It was paid for by the *bona fide* traveller.

Held that the hotelkeeper had not committed a contravention of his certificate.

HIGH COURT.
Lord Justice-Clerk.
Lord M'Laren.
Lord Trayner.

ON 21st October 1895 Thomas P. Oliver, hotelkeeper, Royal Hotel, Main Street, Prestwick, Ayrshire, was charged in the Justice of Peace Court at Ayr, on a complaint at the instance of the procurator-fiscal, which set forth that the accused, "who holds a certificate for the sale

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of exciseable liquors in said hotel, did on Sunday, 18th August 1895, sell or give out therefrom one half glass of whisky to William Dawson, coachman, residing at Orangefield Cottage, Prestwick, and one glass of beer to James Brisbane, cabdriver, residing at Main Street, Prestwick, aforesaid, the same not being for the accommodation of lodgers or travellers, contrary to his said certificate and the Public-Houses Acts Amendment (Scotland) Act, 1862." *

The accused was convicted and fined £1, 1s.

He obtained a case.

The case stated:—"It was proved that on the Sunday afternoon in question, the day being good, George Highland, coachman, Coodham, Ayrshire, who was a former fellow-servant of the appellant at Auchincruive, and had been on intimate friendly terms with him for ten years, walked from Coodham, which is six miles distant from Prestwick, with the express purpose of visiting the appellant and also calling at Orangefield, five miles from Coodham and one mile from Prestwick, to see the said William Dawson, also a friend of the appellant and Highland. Highland arrived at Orangefield about three o'clock, and after spending the afternoon with Dawson, the two walked to the Royal Hotel, Prestwick, a mile distant from Dawson's house, arriving there about half-past seven o'clock p.m., when the appellant entertained them to supper and refreshments as his friends and guests. After spending the evening with the appellant, Highland, about half-past nine o'clock, asked the appellant to get a pony and trap to take them home, at a posting establishment adjoining the Royal Hotel, belonging to Mr John D. Gemmell, posting-master, for whom hiring orders are left at the Royal Hotel. The appellant saw the said James Brisbane, the man in charge of the posting establishment, and gave him the order for the conveyance to Orangefield and Coodham. Brisbane, who had been driving about almost the whole day, having been at Mauchline, about ten miles distant, up to half-past six o'clock, had just come into the stables from a hire at Golf Park, Prestwick, where he had been engaged from seven o'clock, and he told the appellant he would let him know when the trap was ready. Brisbane got the trap ready in a short time and went into the hotel to intimate he was ready, when Highland, who had known Brisbane for a long time, and had been made aware that he had been driving about all day, asked if he would take a refreshment, and also offered a refreshment to Dawson, which they accepted. Accordingly Highland

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* The Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), sec. 2, enacts that the forms of certificates contained in schedule (A) to the Act annexed should come in place of the forms in prior use.

Schedule (A) No. 1, being the "form of certificate for inns and hotels," authorises the person named in the certificate to keep the inn and hotel specified for the sale of exciseable liquor under, *inter alia*, the following conditions, viz:—That he "do not keep open house or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after eleven of the clock at night of any day, with the exception of refreshment to travellers, or to persons requiring to lodge in the said house or premises, and do not keep open his house for the sale of exciseable liquors, or permit or suffer any drinking therein, or on the premises belonging thereto, or sell or give out the same on Sunday except for the accommodation of lodgers and travellers."

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ordered and paid for a half glass of whisky for himself, a small whisky for Dawson, and a glass of beer for Brisbane, and the liquor was consumed in the presence of the policeman, James Kelly, who, in plain clothes, had followed Brisbane into the hotel. The appellant, who was thereupon charged with a breach of his licence certificate, replied that he *bona fide* thought he was within his rights, and did not think what he had done was wrong, seeing that Highland was his guest and a *bona fide* traveller."

The following questions of law were stated:—"(1) Whether Highland, who was a *bona fide* traveller, and entitled to a refreshment at said hotel for himself on the Sunday in question, but who was not a lodger therein, was entitled to entertain to exciseable liquors Dawson and Brisbane, who were not *bona fide* travellers or lodgers in said hotel? (2) Whether, in the circumstances above stated, the appellant was guilty of a contravention of his certificate?"

Argued for the appellant;—The holder of a hotel licence did not commit a breach of his certificate by supplying liquor to a lodger in his hotel on a Sunday, or after the hours of closing, although he knew that the liquor was for guests of the lodger who were not themselves lodgers or *bona fide* travellers.[1] The same principle applied to liquor supplied to the friends of a *bona fide* traveller. A hotelkeeper was entitled to sell a reasonable quantity of liquor to a *bona fide* traveller, and the Court had declined to say that two quart bottles of whisky was an unreasonable quantity to supply to two *bona fide* travellers.[2] It must be borne in mind that a sale of whisky by a hotelkeeper was just an ordinary contract of sale, which gave the seller no right to control the buyer in the use made of the thing sold. It came to this, then, if the conviction was good, that where a *bona fide* traveller bought say a glass of whisky as if for himself and then gave it to a friend who was not a *bona fide* traveller, there was no breach of certificate if the hotelkeeper was ignorant that the whisky was intended for the friend, but if the hotelkeeper knew that the whisky was for the friend, then he was bound, in compliance with his certificate, to refuse to supply it. Such a construction would reduce the Act to an absurdity by opening the door to endless evasion. The true view was that the hotelkeeper had nothing to do with the purpose for which the traveller bought the liquor, and had only to see that the quantity supplied was no more than was reasonable. The Act expressed no distinction between lodgers at a hotel and travellers, and no distinction could be drawn in fact; both were guests at the hotel, and if a lodger at a hotel might entertain his friends with a reasonable quantity of liquor, so also might a traveller. It was in accordance with the ordinary usages of people, and was therefore reasonable, for a traveller to give liquor in such circumstances as were proved in the present case; entertaining a whole village was another matter—few people did that.

Argued for the respondent;—The appellant was prohibited by the terms of his certificate from selling or giving out liquor on Sundays, "except for the accommodation of lodgers and travellers." That

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[1] Gemmell v. Black, Oct. 27, 1882, 10 R. (Just. Cases) 17, 5 Coup. 150; Murray v. Macdougall, Feb. 7, 1883, 10 R. (Just. Cases) 42, 5 Coup. 215; Boyd v. M'Jannet, May 21, 1879, 6 R. (Just. Cases) 43, 4 Coup. 239; Pine v. Barnes, 1887, L. R., 20 Q. B. Div. 221.

[2] Welsh v. Stewart, May 28, 1886, 13 R. (Just. Cases) 61, 1 White, 125.

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meant for the lodger's or traveller's own personal use, and not for the use of his friends. There was no case in Scotland in which it had been decided that a hotelkeeper might, after hours or on Sunday, sell liquor to a lodger in the hotel or a traveller, when such liquor was to be consumed by one who was neither lodger in the hotel nor traveller. Further, a traveller was in a different position from a lodger in a hotel. The lodger made the hotel his home for the time—it might even be his only home—and it was reasonable that he should be able to entertain his friends on Sundays or after the hours of closing; to a traveller these considerations did not apply. All that he could reasonably expect to get was personal refreshment on his journey. Were it otherwise a whole village might get liquor on Sunday by the simple process of getting a friend to come from some distance and buy it for them.

LORD JUSTICE-CLERK.—There can be no question that the man who bought the liquor in the present case was a *bona fide* traveller. Now, in the Act of Parliament *bona fide* travellers and lodgers are put in the same class, and no distinction is drawn between their rights so far as the statute is concerned. It has been decided that a lodger is entitled *bona fide* to entertain his friends in the hotel where he is lodging,—that is to say, he has been held to be entitled to buy liquor which he intends to use by giving to his friends, who might not be entitled under the statute to buy it for their own use. Now, in this case an endeavour is made to draw a distinction between the accommodation allowed by statute to a *bona fide* traveller and that allowed to a lodger. I am unable to see any ground, either under the statute or in reason, for such a distinction. A *bona fide* traveller comes to a hotel and requires accommodation for a day or part of a day, and he is entitled, as refreshment or accommodation, to have liquor served to him just as a lodger is; he is entitled to order what liquor he requires, and to use that liquor as he thinks proper, subject always to this, that he must not merely be in a plot to do that which would not be within the expression "*bona fide*." That is a question of fact in each case to be dealt with by the magistrate, and does not arise here. I see no danger that can arise of any such evasion of the Act being legalised—as was suggested by the respondent's counsel—in holding that a *bona fide* traveller who *bona fide* purchases liquor in a hotel for the purpose of giving it to his guests is in no different position from a lodger. It is, of course, the duty of the magistrate to consider the facts, and if the facts are not consistent with *bona fide* service of a traveller, to convict. I am therefore of opinion that the conviction must be quashed.

LORD M'LAREN.—The appeal which we are considering appears to me in every way a suitable case to be brought before us, because it raises a question of the construction of the Public-House Statute of 1862, or rather of the meaning of the certificate which is incorporated with the statute, and forms part of it. Everything that can be stated in support of the conviction has been well put before us, but I am clearly of opinion that the conviction on the facts stated cannot be sustained.

The statute, while prohibiting generally, for reasons of public policy, the keeping of open house on Sunday, has introduced an exception, also for

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public convenience, in favour of persons who are lodgers or *bona fide* travellers needing refreshment or accommodation at a hotel. It seems to me impossible to draw a distinction between the case of a lodger and that of a traveller who makes the hotel a temporary resting-place. It is merely a question of degree. One passes from the case of a man who hires his apartments by the week to the case of a person who takes a bedroom and stays for a single night, and then there comes the case of the man who orders his room, not being sure whether he will be able to proceed on his journey or will have to pass the night in the hotel. We have the man who comes for dinner, and the man who comes to take a glass of beer. No line can be drawn separating the various modes in which hotel entertainment may be given into two classes. Accordingly, the words of the certificate, as I read them, draw no such distinction, but the terms "traveller" and "lodger" are used in the same collocation, and everything that can be predicated of the one is applicable to the other.

Now, when the certificate is expressed so as to enable the hotelkeeper to supply liquor for the refreshment or the accommodation of an inmate of the hotel, I think that "accommodation," in the fair sense and meaning of the word, includes the giving of refreshments to friends. It is difficult to see what other meaning can be attached to it, and the reason for allowing that is obvious. If the traveller is entitled for his own accommodation to order any quantity of liquor he pleases, it would be very unjust to the hotelkeeper, who is obliged by the conditions of his licence to sell, if he should be made responsible as for breach of certificate because the person to whom he sold the liquor allowed a friend to share it with him, the hotelkeeper having no power to prevent him. It is quite plain that the one exception necessarily drew along with it the other. The law cannot require the keeper of licensed premises to supply liquor to inmates without necessarily relieving him of responsibility as to how that liquor is to be consumed. Of course, I am not here considering a case of evasion, because I entertain not the smallest doubt that in such a case the magistrates will be entitled to convict. In the present case there is no reason to doubt—the fact is stated in the case—that the liquor was paid for by the traveller.

The appellant was entitled to enter into the contract of sale—indeed, he was in a manner bound to do so, as being keeper of a public place of entertainment, and it seems to be quite immaterial whether the liquor supplied was consumed wholly by the traveller, or was in part consumed by persons whom he chose to treat as his friends.

I am therefore of opinion that this conviction must fall.

LORD TRAYNER.—I concur. It seems to me that the question turns on whether the appellant was entitled to sell liquor to Highland. Now, I not only think that he was entitled to sell, but that he was bound to sell to Highland as a *bona fide* traveller. Highland was there in the exercise of rights as *bona fide* traveller, and as such was entitled to order what refreshment he desired, which the hotelkeeper, as keeper of a public place of entertainment, was bound to supply him; but when the hotelkeeper had sold to Highland what Highland was entitled to order, I regard the hotelkeeper's interest in and connection with the sale as at an end, and he had

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no responsibility for the manner in which the traveller, who had lawfully bought refreshment, disposed of it. With your Lordships, I desire distinctly to state that in coming to this conclusion I do not give any countenance whatever to a case of a traveller getting drink in a way merely intended to evade the statute under cover of being a *bona fide* traveller. There is no such suggestion in the present case, and I concur that the conviction must be quashed.

THE COURT pronounced the following interlocutor:—"Answer the first question in the case in the affirmative, and the second in the negative: Sustain the appeal: Reverse the determination of the inferior Judge, and decern: Find the appellant entitled to expenses, which modify to ten guineas," &c.

JAMES PURVES, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

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JOHN BONNAR, Appellant.—*Salvesen—T. B. Morison.*
WILLIAM WALKER (Burgh Prosecutor, Paisley), Respondent.—*Dundas—James Clark.*

Police—Street Betting—Assembling on street for purpose of betting—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 393.—The Burgh Police (Scotland) Act, 1892, sec. 393, enacts, that "if any two or more persons assemble together in any street or open place within the burgh for the purpose of engaging in lotteries, betting, or gambling, each of such persons shall be liable" in a penalty.

A person convicted of a contravention of this enactment appealed on a case which stated—that the appellant was a bookmaker; that on the occasion specified in the complaint he was walking up and down one of the streets of the burgh; that a young man, whose name was not disclosed, "joined the appellant and handed him a piece of white paper. The appellant looked at it and put it" into his pocket. "The young man then handed him two or three pieces of money, apparently silver, which the appellant also put in his pocket"; that the appellant was apprehended and the young man disappeared; that on being searched there was found on the appellant's person fifty-four "betting lines," telegrams, a sporting paper, a note-book containing the names of horses, and about £28 in money; and that what took place between the appellant and the young man "was in accordance with the mode in which street betting is carried on."

The Court *quashed* the conviction, holding that the facts proved did not amount to assembling on the street for the purpose of betting.

Opinion (*per* Lord M'Laren) that the two or more persons contemplated as assembling together are persons who are identified as being together for the prosecution of the same purpose, viz., the making gain out of the public.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Trayner.

ON 25th November 1895 John Bonnar, clerk, residing in Well Street, Paisley, was charged in the Police Court at Paisley, on a complaint at the instance of the burgh prosecutor, setting forth that the accused, "upon the 23d day of November 1895, did assemble with a man, to the complainer at present unknown, in High Street, within the burgh of Paisley, for the purpose of betting, contrary to the Burgh Police (Scotland) Act, 1892, particularly section 393 thereof." *

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 393, enacts,—"If any two or more persons assemble together in any street or open place within the burgh for the purpose of engaging in lotteries, betting, or gaming, each of such persons shall be liable to a penalty not exceeding forty shillings."

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Bonnar objected to the relevancy of the complaint, and the objection having been repelled, pleaded not guilty. He was convicted of the contravention charged and fined 40s., with the alternative of fourteen days' imprisonment.

He obtained a case. The facts stated in the case were:—"The appellant is known in Paisley as a bookmaker, and has been so known for years. On Saturday, the 23d of November last, he had been walking several times up and down High Street of Paisley (*i.e.*, westward and eastward) with another bookmaker named George Cathcart, and on one of their walks eastward (*i.e.*, towards the Cross) the appellant stopped at twenty minutes to two o'clock P.M. in High Street, at the western corner of Storie Street, which opens off High Street southward. Cathcart passed on. A young man, twenty-one or twenty-two years of age, whose name was not disclosed during the trial, joined the appellant and handed him a piece of white paper. The appellant looked at it, and put it in his left trousers pocket. The young man then handed him two or three pieces of money, apparently silver, which the appellant also put in his pocket. On seeing this two police-constables, who had been watching from a house window opposite, went to the street. They saw the appellant before them going eastward. The young man had disappeared. The constables followed the appellant eastward in High Street. They then apprehended him at the door of the Globe Hotel, charging him with betting in High Street, and requiring him to go with them to the police-office. Cathcart was near, and the appellant shouted to him to go and tell the old man. This referred to the appellant's father, who was near, and is also known as a bookmaker. Neither on apprehension nor in the police-office did the appellant make any reference to his position, or offer any explanation, except saying on apprehension, 'Every dog shall have his day.' On reaching the police-office, and being searched there at ten minutes to two o'clock, there were found on the appellant's person the following articles and moneys, viz.:—Fifty-four betting lines (these were in his left trousers pocket), a *Sporting Chronicle*, ten telegrams (three of them addressed Bonnar, Paisley—seven of them old and three of the date of the apprehension), a note-book containing names of horses, a balance-sheet and a pencil, £15 in notes, £2, 10s. in gold, and £11, 3s. 5½d. in silver and copper. A Manchester race was run on the day in question, and among the lines referred to were a number referring to fifteen out of eighteen horses named for that race. On 23d November 1895, and previous to the appellant's apprehension, a bundle of lines and some money were handed to him in High Street, opposite the Drill Hall, about 300 yards west, by a man named John Robertson, a labourer. What was sworn to as having taken place between the appellant and the young man was in accordance with the mode in which street betting is carried on."

The following were the questions of law:—"(1) Was the complaint relevant? (2) Did the facts proved as above stated warrant the conviction?"

Argued for the appellant;—It might be that the complaint was relevant, but at all events the facts found proved did not justify a conviction. These facts were in substance that the appellant and another man had met on the street for a moment, and had entered into a transaction of some sort. The magistrate, no doubt, must have been of opinion that it was a betting transaction, for he had convicted, but there was no sufficient evidence that that was the nature

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of the transaction; it might have had nothing to do with betting, or it might have been the payment of a bet already made. Assuming, however, that what took place was a betting transaction, the conviction could be justified only if the statute prohibited all betting on the street. But if two friends happened to meet on a street and there made a bet on some matter of chance, could it be suggested that they had contravened the Act? and if they had not done so, wherein did the appellant's case differ? It was true that the magistrate had found that the appellant was a bookmaker, but the Act said nothing about bookmakers. What it prohibited was the assembly of any two or more persons on a street for the purpose of betting. In no reasonable meaning of the language could the facts here found proved be described as the assembly of two persons for the purpose of betting. If the Legislature had intended to prohibit all betting on the streets, it could very easily have said so.

Argued for the respondent;—If nothing more had been proved than that two persons had accidentally met on the street, and there made a bet, it might be conceded that they would not have contravened the Act. But a great deal more had been proved. The appellant was by profession a betting man, and was certainly on the street on the occasion libelled for the purpose of betting. If, then, anyone came up to him for the purpose of making a bet with him, there was an assembly of two persons for the purpose of betting within the meaning of the Act; whether in any given case the persons met for the purpose of betting was a question of fact for the magistrate, and the Court would not interfere with his determination if there was evidence sufficient in law to support it. Here there was such evidence. No doubt the meeting was of very short duration, and there was no direct evidence as to what precisely took place between the two. But it was just the kind of evidence to be expected in such cases. If it was not sufficient to justify a conviction it would be practically impossible to get convictions under the Act at all.

LORD JUSTICE-CLERK.—I think that this is a case in which there was not evidence entitling the magistrate to pronounce the decision which he did. It is true, as Mr Dundas said, that in cases of this kind it might be difficult to get evidence, but that is no reason for convicting in a case in which there is not legal evidence to justify a conviction. In this particular case all that was proved was that the accused was in the street, and that a young man came up to him, handed him a bit of paper, and then handed him some money, which he put into his pocket. It was not proved that they had any conversation whatever, but it was said that what passed was a betting transaction. Let it be assumed that it was. Was it an assembling in the street for the purposes of lotteries, betting, or gaming? That it might have been a meeting on the street the whole essence of which was a betting transaction is clear; but it is also clear, and it was admitted in argument, that two persons may meet in the street and there have a betting transaction, and yet not "assemble" in the sense of the statute for that purpose. The whole thing might have taken only a moment to transact. Let us suppose that this young man had made up his mind to have a bet on a particular race, and being on his way to the office of the appellant, for the purpose of handing him the paper and the money, had met him in the street, and there handed him a paper and money, could anyone say that

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that was an assembly in the street for the purposes of lotteries, betting, and gaming? I do not think that they could, unless it is to be held—as it certainly was not contended here—that every betting transaction in a street constituted an assembly in the street between the two persons who exchanged the bet. It is true that there is evidence here to justify the magistrate in holding that one of the parties to this transaction is a man whose business is betting, but I do not see how this can make any difference in the colour which the facts have unless a bet in the street between two persons, neither of whom is proved to be engaged in the business of betting, constitutes an assembly in the street for the purpose of betting. I think that the statute must have been intended to meet something different from that. As to the propriety of allowing any betting at all in the street, or of allowing any betting at all in society, I say nothing. The Legislature has not thought proper to interfere absolutely with the right of the subject if he chooses to make a bet. Betting is not illegal, although the Legislature has said that bets cannot be enforced in a Court of law. But for excellent reasons the Legislature has enacted that certain modes of carrying on betting transactions should be illegal, and here the statute says that the assembly of two or more persons in a street for the purposes of betting shall be illegal. I think that in construing such a statute as this we must read it in a reasonable sense, and hold that by "assembly" something more is meant than the meeting of two people on the street—casual it may be—and the momentary exchange of a bet between them. I am for quashing the conviction.

LORD M'LAREN.—I think that we cannot answer the first question in the negative, because the complaint appears to me to be relevant. I agree with the view which your Lordship has announced with reference to the second question, but I should like to say that I do so entirely upon the construction of the section of the Burgh Police Act founded on. We know, of course, that there are persons who make it their business to take the money of the public on account of bets. These persons are to a certain extent tolerated by law, but it may be a very proper thing that, if such persons go about the streets soliciting bets, they should be made liable to penalties. There are Acts of Parliament specially directed against betting-houses, and I rather think that it has been proposed in Parliament—although probably on account of technical difficulties the proposal has not been carried into effect—to extend these Acts to the effect of prohibiting betting altogether in public places. If I could come to the conclusion that the 393d section of the Burgh Police Act is directed against the practice of a single person going about the streets soliciting bets, I should hesitate to say that there is not, on the facts stated, evidence sufficient to support the conviction, because it is proved that the man is a betting-man by trade, and there is proof of that in the papers which were found in his pocket; further, the transfer of money and a paper from the one to the other, unexplained by any exculpatory evidence, would, I think, if the statute applies to the case, be sufficient to support the conviction. It would be a matter of impression whether the magistrate was right in holding that the offence of being in the street for the purpose of betting had been proved, and I should have

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difficulty in saying that he might not reach that conclusion on the facts stated. But when I look at the language of the clause I find that the clause contemplates the case of two or more persons conspiring together for the purpose of drawing the public into "lotteries, betting, or gaming." I cannot attach any other meaning to the words "if any two or more persons assemble together" in the street for such purposes. In a certain very remote sense it may be said that a man who gives his money on the street to a betting-agent is in the street for the purpose of betting, but he is certainly not there for the purpose of betting in the same sense as the betting-agent is there. It seems to me that the two or more persons whom the statute contemplates as assembling together are persons who are identified as being together for the same purpose,—that is to say, for the prosecution of the same purpose—the making gain out of the public. I should therefore think it unsafe, and contrary to the principles of construction of penal statutes, to hold that the person imposed upon—whose money is taken for a bet—is to be treated as one of an assembly of two or more persons for the purpose of betting. He is the person who suffers from the practice which the statute is supposed to condemn. I think, on the facts as stated, that the man who paid the money, even supposing it was on account of a new bet, was not there for the purpose of betting in the sense of the statute, but was going on his ordinary business, and was taken advantage of by the betting-man. My opinion is that the conviction is not supported by the statute.

LORD TRAYNER.—I have very great doubt whether the provision of the statute upon which this complaint is based applies or is intended to apply to the particular kind of case that is set forth in the *species facti* before us. I cannot say, however, that I have given the construction of the statute such consideration as to enable me to express a deliberate opinion upon that point. But I have a very distinct opinion upon the other point, and it is to the effect, that in all the facts found proved by the magistrate there is nothing to warrant a conviction. I think that there is nothing in the evidence leading necessarily to the conclusion that these two persons met on the street for the purpose of betting; on the contrary, I think that the evidence is quite consistent, in every item and particular, with the transaction between these two persons being something other than a betting transaction. I agree, therefore, that the second question ought to be answered in the negative.

THE following interlocutor was pronounced:—"Answer the second question in the case in the negative: Sustain the appeal: Reverse the determination of the inferior Judge, and decern," &c.

MACPHERSON & MACKAY, W.S.—F. J. MARTIN, W.S.—Agents.

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Carlin v. Malloch.

JOHN CARLIN, Complainer.—*Macaulay Smith.*
JAMES MACGREGOR MALLOCH (Burgh Prosecutor, Govan), Respondent.—*Shaw—Cullen.*

Complaint—Indecent Exposure—Specification—Relevancy. — A person was charged upon a complaint which set forth that "he did . . . on a

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boat in the River Clyde . . . wilfully, indecently, and in a shameless manner expose his person" to a person designed. The accused was convicted of the "crime charged."

In a suspension the Court set aside the conviction on the ground that neither the complaint nor the conviction shewed the facts upon which the charge was rested.

Procedure—Verbal Citation—Person with known address—Oppression.—Observed per cur. that when a person charged with a police offence has a known place of residence, it is oppressive to bring him before a magistrate without serving upon him a copy of the complaint (unless he is apprehended *in flagrante delicto*).

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

ON 10th December 1895 John Carlin, boatman, Govan, was charged in the Police Court, Govan, at the instance of the Burgh Prosecutor, upon a complaint which set forth that he "did, on the seventh day of December 1895, on a boat in the River Clyde, between Govan Ferry and Highland Lane Ferry, in the burgh of Govan, wilfully, indecently, and in a shameless manner, expose his person to Mary O'Dwyer, wife of Thomas O'Dwyer, labourer, residing in Albert Street, Govan." No statute was referred to.

The accused pleaded not guilty, and after evidence led he was convicted, the conviction bearing,—"The Magistrate, in respect of evidence adduced, finds the accused guilty of the crime charged."

Carlin brought a bill of suspension.

The complainer stated that on 7th December he was in his boat 60 feet from the Govan side of the Clyde, when he stood up to pass urine, with his face to the Partick side, 80 yards distant; that hearing a voice from the Govan side he turned round, but could see no one; that on 10th December a policeman visited him at his house and verbally requested him to appear at the Police Court upon the following day. The policeman stated that all he knew was that a woman had some complaint against him. "No notice was given to him that he was to be placed at the bar charged with any offence."

Argued for the complainer;—(1) The complaint was irrelevant. There was no specification of the manner in which the complainer was alleged to have indecently exposed his person,[1] or as to what part of his person he had indecently exposed. (2) The conviction was bad. The complainer had a known place of residence, and a warrant for his apprehension should have been issued, or a copy of the complaint should have been served upon him.[2]

Argued for the respondent;—(1) The complaint was framed in the language used to describe the offence in subsection 1 of section 380 of the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55). It was quite sufficient to specify generally the offence, leaving the actual facts to appear in the evidence adduced at the trial. (2) The answer to the objection to the regularity of the proceedings was that the accused appeared and stated no objection to the mode of citation.

LORD JUSTICE-CLERK.—In the view which I take of this case it is not necessary to decide the question which has been raised as to the competency of the procedure adopted. But I should like to make the observation that it appears to me a rather oppressive and far from praiseworthy proceeding to tell a law-abiding citizen against whom an information is lodged to come to the Police Court, and then bring him up on a criminal charge, without

[1] M'Kenzie v. Whyte, Nov. 14, 1864, 4 Irvine, 570.
[2] Stewart v. Lang, Nov. 23, 1894, 1 Adam, 493, 22 R. (Just. Cases) 9.

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either a complaint or a warrant. In these cases anything which even savours of oppression should be carefully avoided.

But I do not need to go into that in this case. Here what the accused was charged with was "that he did, on the seventh day of December 1895, on a boat in the River Clyde, between Govan Ferry and Highland Lane Ferry, in the burgh of Govan, wilfully, indecently, and in a shameless manner, expose his person to Mary Smith or O'Dwyer." There is in that no specification whatever of the manner in which he exposed his person, and it was conceded in argument that this offence might be committed in different ways—different, that is, not only as to the manner, but as to the heinousness of the act. Here we have merely a general statement that he exposed his person. It may be, as was pointed out by Lord Young in the course of the argument, that in some cases where the complaint is very generally expressed, the terms of the conviction may shew what is the actual offence which, in the opinion of the convicting magistrate, has been committed, and in such cases the conviction may be sustained, as we would not subject a Police Court complaint to the same strict criticism which we apply to a High Court indictment. But in this case we have no specification of the offence which was committed, either in the complaint or in the conviction. And it is most necessary in such cases as this, where a conviction may be destructive to a man's whole future, that the nature of the offence charged should be exactly stated.

I have therefore no difficulty in holding that we have here no relevant complaint. It is not sufficient to use the general words of the statute; some specification of the offence is necessary, so that we may be enabled to judge whether the Magistrate was right in holding that the facts amounted to indecent exposure.

LORD YOUNG.—The complainer is designed as a boatman, residing in Sharpe Street, Govan. He is a householder, and therefore the police, knowing his residence, ought, I think, to have taken the course usual in cases where the accused has a known residence, of serving him with a copy of the complaint. I do not say that that is the only proper course. If a man is apprehended in the street, taken in the act of committing an offence, he may be brought up in a summary manner without the service of a complaint. There was here, however, no reason for omitting service.

Then, when the accused appeared, and the complaint was read over to him, he was only told that he was charged with wilfully and indecently exposing his person in the presence of Mrs O'Dwyer. There is no information as to what distance separated them when he did so. According to his own statement it was sixty feet; according to the information of the police it was less than half that distance. But even thirty feet is a considerable distance, especially with intervening water.

I agree with your Lordship in holding that as a rule it is necessary to have, either in the complaint or in the conviction, or in the two taken together, a statement of the facts which the convicting Magistrate has held to constitute the crime for which he inflicts punishment. There is nothing here to tell us what the accused actually did. There may be a variety of ways of exposing the person, and some of them may be punishable and

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others not, and in the absence of information it is impossible to feel confident, and therefore it is unsafe to assume, that the Magistrate necessarily took the right view of what constitutes a criminal offence. He may have been right, but the statement here does not enable us to judge whether he was or not.

I therefore concur in thinking that the conviction is bad, because it convicts the accused of an offence, but does not enable us to decide whether or not what he did constituted that offence or merited punishment. And when a conviction leaves it in doubt whether the accused has really committed a punishable offence, suspension is an allowable remedy.

For these reasons I concur with your Lordship in thinking that the conviction should be set aside.

LORD TRAYNER.—I agree. I only wish to add, with somewhat more emphasis than your Lordships, my disapproval of the proceedings of the police in this case. I think it is oppressive in a case where the accused is not taken red-handed or *in flagrante delicto*, and where he is a man who has a residence which is well known to the authorities, to apprehend him and bring him up before the Magistrates without first serving upon him a copy of the complaint.

THE COURT suspended the conviction and sentence complained of *simpliciter*.

ROBERTSON & WALLACE, S.S.C.—MARCUS J. BROWN, S.S.C.—Agents.

No. 16.

Feb. 7, 1896. Cameron v. Buchan.

WILLIAM CAMERON, Appellant.—*Johnston—Salvesen.*
WILLIAM BUCHAN (Procurator-Fiscal for Peeblesshire), Respondent.—*Shaw—Baxter.*

Public-House—"Hawking spirits"—Relevancy of complaint—Specification—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 35), *secs.* 16 *and* 37.—A complaint charged the accused with an offence against the Public-Houses Acts Amendment (Scotland) Act, 1862, and particularly section 16 thereof,* in so far as upon a date and at a place specified "he did hawk one pint of spirits to" A B.

Held that the complaint was irrelevant, in respect it did not state whether the offence was committed by selling spirits, or by offering spirits for sale.

Public-House—"Hawking spirits"—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 16.—A hotelkeeper was charged with a contravention of section 16 of the Public-Houses Acts Amendment (Scotland) Act, 1862, in so far as he did, on 23d November 1895, hawk one pint of spirits to A B. It was proved that the accused, on 22d November, called at A B's house and solicited an order for spirits; that A B gave him an order for one pint of rum, and that this was delivered to him next day, 23d November, by the accused upon the public road.

Held that the facts proved did not support the charge of hawking.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

ON 3d January 1896 William Cameron, hotelkeeper, Biggar, was

* The Public-Houses Acts Amendment Act, 1862, sec. 16, enacted,—"Every person hawking spirits or other exciseable liquors shall thereby be guilty of an offence. . . ."

Section 37.—". . . The word 'hawking' shall mean and include trafficking in or about the streets, highways, or other places. . . ."

"The expression 'trafficking' shall mean and include bartering, selling, dealing in, trading in, exposing, or offering for sale."

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charged in the Justice of Peace Court upon a complaint which, *inter alia*, set forth that he "has contravened the Public-Houses Acts Amendment (Scotland) Act, 1862, more particularly section 16th thereof, in so far as he did, on the 23d day of November 1895, on the public road leading from Broughton to Tweedsmuir, between Mossfennan Lodge and No. 1 hut on the railway works of the Edinburgh and District Water Trust,—(First) Hawk one pint of spirits (namely, rum or other exciseable liquor) to James Greig, foreman, residing at No. 1 hut aforesaid."—[Here followed six similar charges.]

In regard to the above charge the Justices found it proved:—"That the appellant, on 22d November 1895, called at the railway works near No. 1 hut on James Greig, before designed, and asked him to give an order for liquor—that Greig ordered a pint of rum and got it delivered to him next day by the appellant on the public road near Mossfennan Lodge—and that it was delivered in conformity with the order and then paid for."

"In regard to all the counts.—That a waggonette, in charge of the appellant, and containing the supplies delivered on the 23d, was kept standing on that occasion on the public road for about two hours, between the said hut No. 1 and the pay hut near Mossfennan Lodge. That the appellant, either when obtaining orders or executing them, inquired specially the names of the persons who so ordered or received liquor. That it was not proved that the appellant had with him on the 23d any more liquor than that actually delivered, though it was proved, as above stated, that he had more than had been ordered."

The Justices in respect of the evidence adduced convicted the accused.

Cameron obtained a case, which set forth the facts proved as stated above.

The question of law for the opinion of the Court was:—"(2) Whether the facts stated as proved constitute an offence and justify the conviction on a right view of the law applicable to them?"

Argued for the appellant;—(1) The complaint was irrelevant from want of specification. The bare use of the word "hawk" was not sufficient. Under section 37 of the Act of 1862 "hawking" meant "trafficking," and "trafficking" had several meanings, and the appellant was entitled to know of which of these he was accused.[1] (2) What the appellant had done here was not "hawking," but merely the legitimate exercise of his trade. He was quite entitled to solicit orders and to execute them next day. The section of the Act under which the conviction was obtained in the English case of *Pletts* v. *Campbell*[2] was unlike section 16 of the Act of 1862.

Argued for the respondent;—(1) "Hawk" exciseable liquors denoted one offence, and was the statutory word. The complaint therefore was not wanting in specification. (2) The appellant was practically hawking spirits as a pedlar, and the Legislature intended to check this practice.[3]

LORD JUSTICE-CLERK.—I must say I think that this is a kind of case in which, where a charge is to be made under a statute such as this of

[1] Carr v. Neilson, Jan. 23, 1894, 1 Adam, 351, 21 R. (Just. Cases) 29.
[2] Pletts v. Campbell, 1895, L. R., 2 Q. B. 229.
[3] Pletts v. Campbell, 1895, L. R., 2 Q. B. 229; Stallard v. Marks, 1878, 3 Q. B. D. 412.

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"hawking," there should be some specification of what the offence is which is charged. There are undoubtedly cases, and one or two of them were referred to in the course of the debate, in which several things may be held just to be descriptions of the same thing committed in different ways, and in these cases it has been held that it is not necessary for the prosecutor to specify which he charges, but that he may state alternative ways, leaving it to come out upon the facts in which alternative way the accused committed the crime, and the conviction would not require to specify which alternative the accused was convicted of, they not being truly alternative charges. But the alternatives here are, on the face of them, true alternatives, and there is no need to point out more than this, that most undoubtedly a "completed sale" and an "offering for sale" are necessarily two very distinct things.

I think the real question here is, however, whether what is stated to us as having been proved amounts to the offence of hawking at all. I put it to counsel for the prosecutor in the course of the argument, whether in every case where a respectable dealer in exciseable liquors, licensed to sell them, gets orders at the houses of his customers and executes these orders, he is in the view of the prosecutor liable as for an offence; and counsel admitted that his argument must bring it up to that if the quantity of liquor ordered and supplied were a retail quantity.

Now, I cannot conceive for one moment that any Act of Parliament was intended to effect so extraordinary and oppressive a result as that, which would in fact prevent any licensed grocer, say in Princes Street, from receiving an order for two or three bottles of beer at the house of his customer and delivering them next day or that afternoon. On the face of it the word "hawking" does not indicate anything of that kind. We know what in ordinary language the word "hawking" implies—that the man who does it carries his goods with him, either in a sack or in a box of some kind, or in a vehicle, and offers those goods for sale as being the wares which he carries with him for sale. Thus, for example, any person who carried a jar of whisky with him, and went about from cottage to cottage offering to sell people a gill of whisky out of the jar, would unquestionably be hawking spirits. But I cannot say that any definition of hawking that I ever heard of should lead to this result, that where people are living scattered all over a countryside, they are never to obtain a supply by sending an order for it unless they send that order in writing, and have the liquor delivered to them absolutely inside licensed premises. If customers give an order, which of course may be given verbally, I should be inclined to hold that the sale was effected by the order being received by the proprietor of the establishment within the premises. Such an order for whisky or beer may be delivered to the licensed dealer by his servant, who has gone his rounds for the convenience of the customers, and of course in such a case convenience of the customers is in the interest of the dealer, because if he did not deliver liquor for the convenience of his customers they would go to someone else with their custom. It seems to me most extravagant to hold that a transaction such as that falls within the provision of the statute that a person hawking liquor shall be liable as for an offence.

LORD YOUNG.—There are seven charges, or as they are called here counts,

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in this complaint, but I am of opinion that we cannot distinguish between them—that the whole seven must be dealt with in the same way and disposed of upon the same grounds. It is therefore sufficient to take one, and I take the first. The charge is that the respondent in the Court below, the appellant here, "did on 23d November hawk one pint of spirits (namely, rum, or other excisable liquor) to James Greig, foreman, residing at No. 1 hut aforesaid,"—and going back to the "aforesaid," it appears to be No. 1 hut on the railway works of the Edinburgh and District Water Trust. Now, the Justices informed us that what they found proved with reference to this is that the appellant on 22d November 1895,—that is, the day before the date of the charge,—called at the railway works near No. 1 hut on James Greig, before designed, and asked him to give an order for liquor, that is to say, solicited an order for liquor; that Greig ordered a pint of rum, and got it delivered to him next day—that is, the day on which the hawking is alleged to have been committed by the appellant—on the public road near Mossfennan Lodge, and that it was delivered in conformity with the order and then paid for. The questions which we have to determine are—first, whether the charge which I have read, of hawking, is relevant; and second, whether these facts, which the Justices tell us they found proved, or proved to their satisfaction, substantiate that charge.

Now, upon the first question I am disposed to agree with your Lordship that it is not sufficient to say that at a certain time and place a party did "hawk" a pint of rum. I think it is at least more satisfactory that it should be stated wherein the hawking consisted. On the facts which the Justices found proved, they were of opinion that the hawking consisted in delivering the spirits, a completed sale of which had been made the day before. Now, in order to judge of the case and the law applicable to the facts, I think it very desirable that it should be stated in the complaint wherein the prosecutor alleges that the hawking, which he charges as an offence, consisted. Here there was a sale on the 22d—for I need hardly point out that, according to every rule of law, if a man solicits an order for any commodity whatever, and gets an order, and accepts it, that is a completed sale as between him and the party with whom he deals. If a pint of rum, or any amount of rum, or any quantity of any other saleable commodity, is ordered, and the order is executed at an agreed-on price, or at the market price, that is a sale of the article. I do not need to consider here whether the sale of this rum amounted to hawking, because that is not charged. The hawking alleged here is upon the following day, when the sale was implemented by the seller delivering the article sold to the buyer.

Now, I do not think that is hawking. I am not considering any case of transgression of the licensing laws, or transgression of certificates to a publican or public-house keeper, and therefore I lay all that out of view. I am merely considering this—whether a party selling anything at a customer's residence, whether inside or at the door, is a hawker, necessarily a hawker, completing a contract of sale, by soliciting and obtaining and accepting an order. Now, I do not think that is hawking; but as I have said, we do not need to consider that here, for he is not charged with selling. It is the delivery, upon a subsequent occasion, of the goods which had, I must

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assume,—for the contrary is not alleged or charged,—been quite legitimately sold the day before, or the week before.

LORD TRAYNER.—I concur. I do not think the facts which the Justices have held proved amount to hawking, or indeed anything like hawking. Therefore I think the conviction should be set aside.

THE COURT answered the question in the negative.

JAMES PURVES, S.S.C.—BUCHAN & BUCHAN, S.S.C.—Agents.

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Green v. Leith.

JOHN GREEN, Complainer.—*Ure—Clyde.*
ROBERT S. W. LEITH (Procurator-Fiscal of Caithness-shire), Respondent.—*Sol.-Gen. Murray—Ferguson, A.-D.*

Fishing—Sea-Fishing—Beam-Trawling—Fishery Board—Statute—Bye-law—Ultra vires—Herring Fishery (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 7.—The Herring Fishery (Scotland) Act, 1889, sec. 7, enacts, that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law."

Held that under this section the Fishery Board had merely a discretionary power to prohibit trawling in particular areas within the line specified, and therefore that a bye-law issued by the board prohibiting trawling throughout the whole area within the line was *ultra vires.*

Fishing—Sea-Fishing—Fishery Board—Statute—Bye-law—Complaint—Penalty—Herring Fishery (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 7—*Sea Fisheries Regulation (Scotland) Act*, 1895 (58 *and* 59 *Vict. cap.* 42), *sec.* 10.—The Herring Fishery (Scotland) Act, 1889, sec. 1, prohibits the use of beam-trawling or otter-trawling within three miles of any part of the coast of Scotland. Section 7 enacts (subsection 1) that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling or otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire"; and (subsection 2) that any person fishing in contravention of such bye-law should be liable to a fine not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence.

In 1892 the Fishery Board issued a bye-law prohibiting beam-trawling or otter-trawling within the limits specified, and setting forth that any person acting in contravention of the bye-law should be liable to a fine not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence.

The Sea Fisheries Regulation (Scotland) Act, 1895, sec. 10, repealed sec. 7, subsec. 2, of the Act of 1889, and substituted for the penalties there provided a fine not exceeding £100, and failing payment imprisonment for a period not exceeding sixty days.

A person was convicted of a contravention of the bye-law on a complaint which set forth that the accused was liable in a penalty not exceeding £100, and failing payment to imprisonment, and prayed for the imposition of the penalties provided by the Act of 1895.

Held, in a suspension, that whether the penalty ought to have been specified in the bye-law or not, as it was in fact specified, and as the complaint was founded on the bye-law, the conviction fell to be quashed, as the penalty prayed for was in excess of that specified in the bye-law.

* Decided Jan. 7, 1896.

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Lord Justice-Clerk.
Lord M'Laren.
Lord Kincairney.

ON 5th December 1895 John Green, master of the steam-trawler "Countess," was charged in the Sheriff Court at Wick, on a complaint at the instance of the Procurator-fiscal, setting forth that the accused "did on 12th October 1895, at a part of the sea off the coast of Caithness, in Scotland, with Lothbeg Point bearing north 85 degrees west, and Donald Mountain bearing north 52 degrees west, and distant from Clythness eleven miles or thereby, and within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, he being then the person actually in command of the said steam-trawler, and not in the service or possessing the written authority of the Fishery Board for Scotland, use the method of fishing known as beam-trawling or otter-trawling for taking sea fish in contravention of bye-law No. 10 made by the said Fishery Board for Scotland under the powers conferred on the board by the Sea Fisheries (Scotland) Amendment Act, 1885, the Herring Fishery (Scotland) Act, 1889, and the Herring Fishery (Scotland) Act, 1890, dated at Edinburgh, 27th September 1892, confirmed by Her Majesty's Secretary for Scotland, 22d November 1892, and published in the *Edinburgh Gazette* of 25th November 1892, an extract from the said *Edinburgh Gazette* being produced herewith; whereby the said John Green is liable on conviction to a fine not exceeding £100, in terms of section 10 (4) of the Sea Fisheries Regulation (Scotland) Act, 1895, and failing immediate payment, to imprisonment for a period not exceeding sixty days, or to such penalty and imprisonment as your Lordship may fix in terms of the 6th section of the Summary Jurisdiction (Scotland) Act, 1881."

The complaint prayed the Sheriff to convict the accused of the contravention charged, and "to adjudge him to suffer the penalty provided by the said Sea Fisheries Regulation (Scotland) Act, 1895, section 10 (4)."

Green stated the following preliminary objections to the relevancy of the complaint:—

"1. That the provisions of section 7 of the Act of 1889 (52 and 53 Vict. cap. 23), are inconsistent with, repugnant to, and are repealed by the provisions of subsections 1, 2, and 3 of section 10 of the Act of 1895 (58 and 59 Vict. cap. 42).

"2. That in any event the penalties prescribed in subsection 4 of section 10 of the Act of 1895 are not exigible for an offence against section 7 of the Act of 1889.

"3. That in view that bye-law No. 10 specifically prescribes the penalties for an offence under section 7 of the Act of 1889, this (*a*) renders the bye-law invalid; or (*b*) prevents the exaction of the penalties prescribed by subsection 4 of section 10 of the Act of 1895."

The Sheriff-substitute (Mackenzie) repelled the objections, and Green then pleaded not guilty, but was convicted and fined £50, with the alternative of thirty days' imprisonment.

He brought a suspension.

The bye-law in question and the material portions of the statutes founded on are quoted in the immediately succeeding report of the cases of *Wilson* v. *Rust* and *Wilson* v. *Mackenzie*, and the report of the arguments there shews sufficiently the nature of the arguments in the present case.

LORD JUSTICE-CLERK.—This is a somewhat complicated case, but the consideration of two of the points which have been argued before us will, I think, be sufficient for our decision on the validity of this conviction.

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In this case the prosecution was founded upon a bye-law passed by the Fishery Board upon the narrative of powers conferred on them by the Statute 52 and 53 Vict. cap. 23, and conviction was pronounced in respect that the accused had been proved to have used a beam or otter-trawl within the area defined by that bye-law. Now, under that bye-law, in the third section of it, intimation was given by the public authority which had the right to make the bye-law, that any person acting in contravention of it should be liable, on conviction under the Summary Jurisdiction Acts, to a fine not exceeding £5 for the first offence. That is the penalty as laid down in the bye-law, which having been confirmed by the Secretary for Scotland became, if valid, equivalent to an Act of Parliament, and no part of that bye-law has been repealed or set aside by any subsequent statute or legally enacted bye-law. But under an Act of Parliament passed in 1895, that clause of the Act of 1889 under which the bye-law itself was passed by the Fishery Board, and which authorised a penalty of the same amount as that set forth in the bye-law, was repealed, and the words of subsection 4 of section 10 of the Act of 1895 are to be read as coming in place of subsection 2 of section 7 of the Act of 1889, to this effect, that the magistrate finding a panel guilty of a contravention of a bye-law passed in terms of subsection 1 of section 7 of the 1889 Act, may sentence him to pay a penalty of £100 with the alternative of sixty days' imprisonment. It is true that the complaint referred in terms to the amending section of the Act of 1895, and prayed for the larger penalty thereby provided, but that does not, in my opinion, obviate the objection taken by the complainer here, that under the bye-law it is expressly provided that any person guilty of contravening it shall be liable in a penalty not exceeding £5 and to nothing more for a first offence. That it would have been competent for the Fishery Board to have made a new bye-law, either giving effect to the penalty laid down in the Act of 1895, or omitting any reference to a penalty, may quite well be; but where a prosecution is brought under a bye-law which has never been repealed, and which expressly intimated to those who might offend against it that the penalty to which they would be liable was of a certain amount, that the prosecutor should found on that bye-law and conclude for a greater penalty than is therein expressly set forth, would, I am of opinion, lead to great oppression, and is therefore quite inadmissible. In the case of a statutory offence the gravity of the crime is measured by the amount of the penalty which the Legislature has enacted may be imposed on the party found guilty, and to libel a contravention of a bye-law, which bye-law has been so expressed as to certiorate an offender what he was liable to suffer, and then to tell the accused that he is to be punished in an entirely different degree under a subsequent Act of Parliament, would, I think, lead to grave oppression.

That would be sufficient for the decision of this case, but there is another question raised which seems equally clear, and that is, that where authority is given by an Act of Parliament to a public body, within an area defined by the Act of Parliament, to prohibit an otherwise legal act in an area or areas to be defined by the bye-law passed in conformity with the powers so conferred, it is not a proper or competent exercise of such powers for that public body to pass a bye-law prohibiting the act within the whole area

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defined by the statute conferring the powers. Power to prohibit within certain areas to be defined by the bye-law, means that they may select such area or areas within the locality named by statute, but that in doing so they must use their discretion, and apply their minds as to what areas are to be included within the prohibition, and what areas left free within the locality over which their powers extend. It is not a proper exercise of such a power to prohibit the act within the whole locality. I would have come to this view even if we had no precedent to go upon, but I am of opinion that the *Rothesay*[1] case quoted to us is in point. There the magistrates, in the exercise of a precisely similar power affecting the closing of public-houses in a given locality, in form no doubt selected an area within that locality, but in fact by fixing the boundary of that area so as to include the whole parts of the locality to which the statute actually could apply in a practical sense they made a bye-law affecting the whole locality, and the House of Lords held that to be an illegal exercise of the powers conferred.

Upon these two grounds I think this suspension must be sustained, and therefore I shall not give any opinion on the other and more complicated questions raised.

LORD M'LAREN.—This is a conviction under a complaint which charges a contravention of a bye-law made in 1892 by the Fishery Board for Scotland, and no other offence is charged except a contravention of that bye-law. We have the bye-law before us, and its operative provisions are the second and third. The second professes to define an area in terms of powers conferred on the Fishery Board by Act of Parliament. The third section proceeds to impose a fine not exceeding £5 for the first offence, and £20 for a second or subsequent offence. It appears to me that, on the two grounds which your Lordship has stated, the bye-law is not in terms of the Act of Parliament. It is just as difficult to maintain the second section as the third, though the objections to them are necessarily different. The objection to the second section is, that while the power vested in the Fishery Board was a power to prohibit beam-trawling within selected parts of a larger district, the Fishery Board has not in fact made the selection prescribed by the statute, but has declared the whole district over which their powers extended to be subject to absolute prohibition. It appears to me that the case is in all respects similar to the objection taken to the order of the magistrates in the *Rothesay*[1] case, and the reasoning of Lord Cairns is applicable to this case, because the principle is that a power to make exceptions to a general law in relation to selected areas cannot be extended so as to bring the entire district or territory within the exception. If, indeed, this had been a power given to an individual, or it might be to a public body, for the regulation of internal affairs of the individual or body corporate, any exercise of the power within and up to the statutory limits would have been legal; but it cannot be questioned that the power given to the Fishery Board is a power to be exercised for public objects motived by considerations of utility, and depending on facts to be ascertained. It is plainly implied that the Board is to consider what are the areas within this large district of open

[1] Macbeth v. Ashley, June 20, 1873, 11 Macph. 708, April 17, 1874, 1 R. (H. L.) 14.

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sea in which beam-trawling would be prejudicial to the industry of fishing. It would also be for the Fishery Board's consideration how far a general prohibition could be made effectual in view of the claims which might be made by the subjects of other states to exercise the right of fishing in the open sea. These are delicate and possibly conflicting considerations which the Fishery Board was bound to take into account, and which are altogether ignored in the bye-law, which, as I have said, amounts to a universal prohibition of beam-trawling within the entire district. I think that is a bad exercise of their discretionary power, and consequently that the prohibition is altogether null.

But even if the prohibition had been properly made in the exercise of the statutory powers, I am of opinion that the Fishery Board had no power to enforce their prohibition by a penalty, and am not aware that Parliament has ever delegated the power of declaring penalties for new offences to local authorities or subordinate departments. No case of that kind has been cited, and I know of none. Parliament has always prescribed the penalty for the contravention of its legislative provisions, and the present statute is no exception to the rule. The Statute of 1889 itself makes the contravention of the bye-law a penal offence, defines the penalty by the 2d subsection of section 7, and leaves nothing to be done by the Fishery Board except to enforce the penal provision by a prosecution if they think proper. In the Act of 1895 Parliament declared that the penalty instead of being £5 should be £100, and if the Fishery Board had left the penalty clause alone, the new statute would of course have taken effect upon the bye-law. But as the board had chosen to make a penalty clause, the result is that persons charged with a contravention of the bye-law are in this dilemma—that when they are referred to the bye-law the penalty is £5, but when they are referred to the statute the penalty is £100. I do not think that an accused person can be convicted upon an indictment, the conclusions of which are, as they are in this case, altogether ambiguous. The result is, in my opinion, that the bye-law of 1892, not being in terms of the statute, is ineffective, and that no conviction can follow upon it, and therefore that the suspension must be sustained and the conviction quashed.

Lord Kincairney.—I concur, and have little to add. This is a prosecution for breach of a certain bye-law made by the Fishery Board under powers conferred by the Act 52 and 53 Vict. cap. 23, 1889, the third clause of which limits the penalties for contravention of it to £5 for the first offence, and £20 for any subsequent offence—yet the conviction complained of imposes a penalty of £50. Now, the specification of a penalty may not be appropriate in such a bye-law; and no doubt it would be incompetent to impose by a bye-law a penalty which the statute has not authorised. But it is not so clear that such a bye-law may not effectually limit the penalty for a breach of it to a definite amount, if within the amount authorised by the statute; and I cannot hold that a prosecutor can be heard to plead that any part of a bye-law on which his complaint is founded can be disregarded as *ultra vires* or held *pro non scripto*. Hence I think that this bye-law, if authoritative at all, must be held, for the purposes of this suspension, to fix the maximum penalty for contravention, unless it has been altered, revoked,

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or repealed. It has not been altered or revoked by the Fishery Board. It retains all the authority which the Fishery Board did or could confer on it. We have not been informed that it has been expressly repealed or altered by Act of Parliament. It is true that by a subsection of the Fisheries Regulation Act of 1895 it is provided that a person contravening a bye-law referred to in that Act,—that is to say, a bye-law to be made under authority of that Act,—shall be liable to a penalty not exceeding £100, and that by a singular method of legislation this subsection has been lifted bodily and placed in the Act of 1889 in room of subsection 2 of section 7 of that Act; so that it is in the anomalous position of being a subsection in both Acts, although it cannot mean the same thing in the one Act as in the other. But while subsection 2 of section 7 of the Act of 1889 is repealed, the bye-law is not repealed, which presumably it would have been if that had been intended; and I think that the Act of 1895 and the bye-law must be read together, and read consistently, if that be possible; and I rather think it is possible, although it may not be easy, to read them consistently, and for this reason, that the maximum penalty mentioned in the bye-law is within the maximum penalty authorised by the statute; and if that be so, the bye-law remains the authoritative expression of the maximum penalty for contravention if it be authoritative at all. However that may be, I agree with your Lordship in the chair that if a bye-law such as this announces a maximum penalty for a breach of it, that penalty cannot be exceeded in a conviction.

On the second and more important point my opinion is not so confident; still on that point also I concur with your Lordships, and in the reasons which your Lordships have given. I think that the bye-law founded on has not been made in the due exercise of the power and discretion conferred on the Fishery Board by the first subsection of section 7 of the Act of 1889. That subsection does not prohibit trawling over the very extensive space within the line mentioned,—a space which includes the Moray Firth, but extends very far beyond what can properly be considered as a firth, and includes parts of the ocean at a great distance from the shore,—but only in an area or areas within that space to be defined by bye-laws, and it seems to me that what the Board had to do was to define areas along the coast within that extensive space, having regard to local conditions, in a manner which may be held to be exemplified by the schedule appended to the Act. In the cases scheduled the Legislature has itself defined the areas over which the Act is to operate. In regard to the much larger space described in section 7, it has not done so, but has left it to the Fishery Board to divide that space into similar areas.

The former ground of judgment is, however, sufficient to warrant us in quashing this conviction.

THE COURT pronounced the following interlocutor:—"Having considered the bill and heard counsel for the parties, pass the bill, suspend the conviction and sentence complained of *simpliciter*, and decern: Find the complainer entitled to expenses both in this Court and in the inferior Court," &c.

ALEXANDER MORISON, S.S.C.—CROWN AGENT—Agents.

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Wilson v. Rust.

CHARLES WILSON (Procurator-Fiscal of Aberdeenshire), Appellant.—*Sol.-Gen. Murray—Ferguson, A.-D.*
WILLIAM RUST, Respondent.—*Ure—Clyde.*

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CHARLES WILSON (Procurator-Fiscal of Aberdeenshire), Appellant.—*Sol.-Gen. Murray—Ferguson, A.-D.*
ANDREW MACKENZIE, Respondent.—*Ure—Clyde.*

Fishing—Sea-Fishing—Beam-Trawling—Fishery Board—Statute—Bye-law—Ultra vires—Herring Fishery (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 7.—The Herring Fishery (Scotland) Act, 1889, sec. 7, enacts that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law."

Held (by a majority of a Court of seven Judges, *diss.* the Lord Justice-Clerk and Lord M'Laren) that it was within the powers of the Fishery Board under this section to issue a bye-law prohibiting beam-trawling in the entire area within the line specified.

Macbeth v. *Ashley*, June 20, 1873, 11 Macph. 708, April 17, 1874, 1 R. (H. L.) 14, *distinguished.*

Green v. *Leith*, Jan. 7, 1896, *supra*, p. 50, *overruled.*

Fishing—Sea-Fishing—Fishery Board—Statute—Bye-law—Complaint—Penalty—Herring Fishery (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 7—*Sea Fisheries Regulation (Scotland) Act*, 1895 (58 *and* 59 *Vict. cap.* 42), *sec.* 10.—The Herring Fishery (Scotland) Act, 1889, sec. 1, prohibits the use of beam-trawling or otter-trawling within three miles of any part of the coast of Scotland. Sec. 7 enacts (subsec. 1) that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling or otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire"; and (subsec. 2) that any person fishing in contravention of such bye-law should be liable to a fine not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence.

In 1892 the Fishery Board issued a bye-law prohibiting beam-trawling or otter-trawling within the limits specified, and setting forth that any person acting in contravention of the bye-law should be liable to a fine not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence.

The Sea Fisheries Regulation (Scotland) Act, 1895, sec. 10, subsec. 1, enacts that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling or otter-trawling shall not be used in any area or areas under the jurisdiction of Her Majesty within thirteen miles of the Scottish coast"; and subsecs. 4 and 5 repeal sec. 7, subsec. 2, of the Act of 1889, and substitute for the penalties there provided a fine not exceeding £100, and failing payment imprisonment for a period not exceeding sixty days.

Held (1) that the portion of the bye-law relating to penalties ought not to have been included in the bye-law, and was to be regarded as nothing more than a superfluous intimation by the Fishery Board of the statutory penalties incurred by a contravention of the bye-law at the date when the bye-law was framed; (2) that the bye-law, in so far as it prohibited beam-trawling or otter-trawling within the line from Duncansby Head to Rattray Point, remained in force notwithstanding the passing of the Act of 1895; and (3) that after the passing of the Act of 1895 the penalties incurred on conviction of a contravention of the bye-law were those specified in that Act, and not those specified in the Act of 1889.

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Lord M'Laren.
Lord Kinnear.
Lord Trayner.
Ld. Kyllachy.

Therefore (1) where a complaint set forth that the accused was liable to a penalty not exceeding £100, and, failing payment, to imprisonment for a period not exceeding sixty days, and prayed for the imposition of the penalty provided by the Act of 1895, *held* that the complaint was well laid; but (2) where a complaint set forth that the accused had incurred a penalty not exceeding £5, and prayed for the imposition of the penalty provided by the bye-law and by the Acts of 1889 and 1895, *held* that the complaint was incompetent.

Green v. *Leith*, Jan. 7, 1896, *supra*, p. 50, *overruled*.

IN February 1896 William Rust, master of the steam-trawler "Pride of the Humber," and Andrew Mackenzie, master of the steam-trawler "Maggie Walker," were charged in the Sheriff Court at Aberdeen on separate complaints at the instance of Charles Wilson, W.S., procurator-fiscal, setting forth that they had been guilty of a contravention of bye-law No. 10 made by the Fishery Board for Scotland under the Sea Fisheries and Herring Fishery Acts.*

In Rust's case the complaint set forth,—"That William Rust, master or skipper on board the steam-trawler 'Pride of the Humber,' No. 231, of Hull, at present in Aberdeen, did, on 25th January 1896, at a part of the sea off the coast of Caithness, in Scotland, seven and a-half miles or thereby south-east-by-south of Ord of Caithness, by cross bearings Clythness bearing north-east-by-north and Ord of Caithness north-west-by-north, and within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, he being then the person actually in command of the said steam-trawler, and not in the service or possessing the written authority of the

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* Bye-law No. 10, dated 27th September 1892, and confirmed by the Secretary for Scotland 22d November 1892, was in the following terms:—

"Bye-law (No. 10) made by the Fishery Board for Scotland under the powers conferred on the Board by the Sea Fisheries (Scotland) Amendment Act, 1885, the Herring Fishery (Scotland) Act, 1889, and the Herring Fishery (Scotland) Act Amendment Act, 1890.

"(I.) The bye-law (No. 8) made by the Fishery Board for Scotland, under date 19th July 1890, and confirmed by the Secretary for Scotland on 19th November 1890, is hereby revoked.

"(II.) Whereas by the Act 52 and 53 Vict. cap. 23, being the aforesaid Herring Fishery (Scotland) Act, 1889, it is enacted that the Fishery Board for Scotland may, by bye-law or bye-laws, direct that the method of fishing known as beam-trawling or otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined 'in such bye-law,' it is hereby declared that the foregoing provision shall apply to the whole of the area above specified.

"(III.) Within the aforesaid area as above defined no person, unless in the service or possessing the written authority of the said Fishery Board for Scotland under the hand of the secretary thereof, shall at any time, from the date when this bye-law shall come into force, use any beam-trawl or otter-trawl for taking sea fish; and any person acting in contravention of this bye-law shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding £5 for the first offence, and not exceeding £20 for the second or any subsequent offence; and every net set or attempted to be set in contravention of the present bye-law shall be forfeited, and may be seized and destroyed, or otherwise disposed of by any superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts, all in terms of the said Acts.

"(IV.) This bye-law shall come into force from and after the date of its confirmation by the Secretary for Scotland."

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Fishery Board for Scotland, use the method of fishing known as beam-trawling or otter-trawling for taking sea fish, in contravention of bye-law No. 10, made by the said Fishery Board for Scotland, under the powers conferred on the Board by the Sea Fisheries (Scotland) Amendment Act, 1885, the Herring Fishery (Scotland) Act, 1889, and the Herring Fishery (Scotland) Amendment Act, 1890, dated at Edinburgh 27th September 1892, confirmed by Her Majesty's Secretary for Scotland 22d November 1892, and published in the *Edinburgh Gazette* of 25th November 1892, a copy of the said *Edinburgh Gazette* being produced herewith; whereby the said William Rust is liable on conviction to a fine not exceeding £100, in terms of section 10 (4) of the Sea Fisheries Regulation (Scotland) Act, 1895, and failing immediate payment, to imprisonment for a period not exceeding sixty days, or to such penalty and imprisonment as your Lordship may fix, in terms of the sixth section of the Summary Jurisdiction (Scotland) Act, 1881."

The complaint prayed the Sheriff to convict the accused of the contravention charged, and to adjudge him to suffer "the penalty provided by the said Sea Fisheries Regulation (Scotland) Act, 1895, section 10 (4)."

In Mackenzie's case the complaint was *mutatis mutandis* in the same terms, except that it concluded,—"whereby the said Andrew Mackenzie is liable on conviction to a fine not exceeding £5, in terms of the said bye-law and of section 10, subsection (4), of the Sea Fisheries Regulation (Scotland) Act, 1895, as substituted for section 7, subsection (2), of the Herring Fishery (Scotland) Act, 1889, or to such penalty as your Lordship may fix, in terms of the sixth section of the Summary Jurisdiction (Scotland) Act, 1881"; and prayed the Sheriff to adjudge the accused to suffer "the penalty provided by the said bye-law, and by the said Herring Fishery (Scotland) Act, 1889, and the said Sea Fisheries Regulation (Scotland) Act, 1895, section 10 (4)."

Rust's case was called on 6th February, when he stated the following objections to the relevancy and competency of the complaint, viz.:—

"1. That the bye-law founded on is invalid in respect it is *ultra vires* of the Fishery Board and not a legal exercise of their discretion under section 7, subsection 1, of the Act of 1889 (52 and 53 Vict. cap. 23), in so far as it professes to prohibit beam-trawling within the whole area of sea enclosed by a line drawn from Duncansby Head to Rattray Point.*

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* The Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), sec. 6, enacts,—"(1) It shall not be lawful to use the method of fishing known as beam-trawling or otter-trawling within three miles of low-water mark of any part of the coast of Scotland, nor within the waters specified in the schedule hereto annexed, save only between such points on the coast or within such other defined areas as may from time to time be permitted by bye-laws of the Fishery Board for Scotland, and subject to any conditions or regulations made by those bye-laws. . . ."

Sec. 7 enacts,—"(1) The Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section, but no such bye-law shall be of any validity until it has been confirmed by the Secretary for Scotland. (2) Any person who uses any such method of fishing in contravention of

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"2. That the provisions of section 7 of the Act of 1889 are inconsistent with, repugnant to, and are repealed by the provisions of subsections 1, 2, and 3 of section 10 of the Act of 1895.

"3. That the complaint is illegal and incompetent in respect it concludes for penalties which are not authorised by the bye-law alleged to have been contravened.

"4. That in any event the penalties prescribed by subsection 4 of section 10 of the Act of 1895 (58 and 59 Vict. cap. 42) are not exigible for an offence against section 7 of the Act of 1889.

"5. That in view that bye-law No. 10 specifically prescribes the penalties for an offence under section 7 of the Act of 1889, this (*a*)

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any such bye-law shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding five pounds for the first offence, and not exceeding twenty pounds for the second or any subsequent offence; and every net set, or attempted to be set, in contravention of any such bye-law may be seized and destroyed or otherwise disposed of as in the sixth section of this Act mentioned."

The Sea Fisheries (Scotland) Act, 1895 (58 and 59 Vict. cap. 42), sec. 10, enacts,—"(1) The Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used in any area or areas under the jurisdiction of Her Majesty, within thirteen miles of the Scottish coast, to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section. Provided that the powers conferred in this section shall not be exercised in respect to any areas under Her Majesty's jurisdiction lying opposite to any part of the coasts of England, Ireland, or the Isle of Man, within thirteen miles thereof. (2) No bye-law under this section shall be confirmed by the Secretary for Scotland until he shall have directed a local inquiry to be held in the district adjoining the part of the sea to be included in the bye-law; at which inquiry all persons interested shall be heard, whether resident in the district or not; and notice of such inquiry shall be sent to all committees of sea-fishery districts in the United Kingdom. (3) Provided that no area of sea with the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882. (4) Any person who uses any such method of fishing in contravention of any such bye-law shall be liable on conviction, under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds, and failing immediate payment of the fine to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of any such bye-law may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts. Provided always that, if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure. (5) Subsection two of section seven of the Herring Fishery (Scotland) Act, 1889, is hereby repealed, and the provisions of the foregoing subsection shall be and are hereby substituted therefor. (6) Failing payment by a certain date named in the conviction of the fine imposed upon the person or persons convicted, decree therefor may be pronounced against the owner or owners of the offending vessel or boat, and upon such decree being pronounced the person or persons convicted shall be relieved therefrom and from all penalties attaching thereto."

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renders the bye-law invalid; or (*b*) prevents the exaction of the penalties prescribed by subsection 4 of section 10 of the Act of 1895.

"6. That the bye-law founded on is illegal and invalid in respect that the penalties and provisions in it are not in conformity with, or authorised by, the statutory provisions upon which it is professed to be based.

"7. That in any event there is now no penalty clause applicable to contravention of a bye-law made in terms of section 7, subsection 1, of the 1889 Act.

"8. That the bye-law founded on being based, or partly based, upon statutory provisions which have been repealed, is illegal and invalid."

Mackenzie's case was called on 4th February, when he stated objections to the relevancy and competency of the complaint, of which 1 to 6 were practically identical with objections 1, 2, 5 to 8 respectively, of those stated by Rust, and the last was in these terms:—"7. That the complaint is irrelevant and incompetent, in respect it concludes for a penalty which is not authorised by statute."

The Sheriff-substitute (Brown), holding that the cases were ruled by the judgment in *Green* v. *Leith*, 7th January 1896, *supra*, p. 50, sustained the first and third objections stated by Rust, and the first objection stated by Mackenzie, and dismissed the complaints as irrelevant and incompetent.

At the request of the Procurator-fiscal the Sheriff-substitute stated cases under the Summary Prosecutions Appeals Act, 1875, the questions of law in each case being (1) Whether the objections [or objection] ought to have been sustained? and (2) Whether the complaint was relevant and competent?

The cases were heard before a full bench.

Argued for the appellant;—*Green* v. *Leith*[1] was wrongly decided, and fell to be overruled. The appellant submitted in the first place that the Fishery Board had power under section 7, subsection 1, of the Act of 1889 to prohibit beam-trawling within the whole of the Moray Firth. Apart from that subsection the lieges were entitled to trawl anywhere in the Scottish seas, provided they did not trawl within the three-mile limit. The Legislature had decided that in addition to the latter prohibition there should be, where the public interest required it, a possible prohibition in every part of the whole of the Moray Firth. By section 7 the Fishery Board were empowered by bye-law to prohibit trawling within a line drawn from Duncansby Head to Rattray Point. The power thus given was a wide one. So long as they kept within that line they might protect one part and discontiguous parts or the whole of the Firth. This general power of absolute exclusion within the prescribed line was in no way restricted by the words of the section, "in any area or areas to be defined in such bye-law." The meaning of these words was obvious. The Board might in their discretion decide to exclude trawling only partially, and in that case the bye-law was to define the area or areas to which the exclusion was meant to apply. It was to be assumed that the Board had made the bye-law only after careful inquiry, and if this was within their powers, then the Court could not review it. The *Rothesay*[2] case founded upon by the respondents was decided on

[1] *Supra*, p. 50.

[2] Macbeth v. Ashley, June 20, 1873, 11 Macph. 708, 45 Scot. Jur. 440, affd. April 17, 1874, 1 R. (H. L.) 14.

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a construction of a different statute, and dealt with a different scheme of administration. The principle of the case was that a power to make exceptions to a general law in relation to selected areas could not be extended so as to bring the entire district or territory within the exception. The magistrates of the burgh of Rothesay, having the power to make an exception to the general rule of closing public-houses within the burgh, under the guise of the exception abolished the general rule, and the Court held that they had acted *ultra vires*. Here the general rule was that the waters outside the three-mile limit round the whole coast of Scotland were free to trawlers. The exception was that the Moray Firth might be closed either wholly or in particular areas. It was obvious that here the exception could not "swallow up the rule."[1] *Cadenhead* v. *Smart*[2] was equally inapplicable. There the magistrates were clearly legislating beyond their powers.

In the second place, the appellant submitted that the respondents' second objection to the competency of the bye-law was ill founded. It was said that the bye-law was inoperative because it concluded for a penalty which had been repealed by the Act of 1895 (section 10), and that no other penalty could be enforced than that set forth in the bye-law. But the bye-law should properly have said nothing about the penalty which was fixed by the Acts. Mention of the penalty was mere surplusage. The most that could be said was that the bye-law had appended to it a statement of the law which was correct at the time it was passed but was not edited up to date. It could not be pleaded that the bye-law was misleading, for *ignorantia juris neminem excusat*.

In the third place, as regarded both complaints, the appellant submitted that they were well laid. In Rust's case the complaint rightly asked for the £100 penalty, because that was the penalty prescribed by the Act of 1895, which repealed subsection 2 of section 7 of the Act of 1889, the penalty clause then applicable to a contravention of the bye-law passed under the 1st subsection of that section. In Mackenzie's case the complaint was also well laid, because the only objection to it was that it craved a £5 penalty, when it would have been competent to ask for £100.

Argued for the respondents;—*Green* v. *Leith*[3] was well decided. (1) In framing the bye-law in question, the Fishery Board had exceeded their powers. Under subsection 1 of section 7 of the Act of 1889, the board were empowered to select such single or separate area within the limits designated as they thought it expedient to close to the trawler. This area was to be defined in the bye-law. There was nothing in the wording of the section to indicate that the Legislature intended to give a power of absolute exclusion in these waters. Indeed, it was clear that the board must leave some part of the Moray Firth open to trawlers. *Cadenhead* v. *Smart*[2] and the *Rothesay* case[1] were directly in point. In the latter case the magistrates had power by statute to close public-houses in exceptional cases at earlier hours than generally established, and they exercised their power in such a manner as to subject all the public-houses in the

[1] Macbeth v. Ashley, April 17, 1874, 1 R. (H. L) 14, *per* Lord Chancellor Cairns, p. 18.
[2] Cadenhead v. Smart, Oct. 22, 1894, 22 R. (Just. Cases) 1.
[3] *Supra*, p. 50.

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burgh to those exceptional hours, thus subverting the rule under the guise of the exception. There the unit of jurisdiction was the burgh of Rothesay, just as here it was the Moray Firth within the line established by statute.

But (2) the bye-law was not operative. It specified a £5 penalty, for which section 10 of the Act of 1895 had substituted a £100 penalty. It was vain for the prosecutor to maintain that the mention in the bye-law of the penalty was mere surplusage. The bye-law was the code by which the trawler knew he had to conduct his business, and to it alone he looked for the penalty attaching to a contravention of the bye-law.

As the complaint in Rust's case charged a contravention of the bye-law, and concluded for the penalty of £100, which was in excess of the bye-law upon which it proceeded, it could not be sustained. In Mackenzie's case the complaint was also bad, because it concluded for £5, whereas the only existing penalty clause was contained in section 10 of the Act of 1895, which fixed it at £100.

At advising,—

LORD JUSTICE-GENERAL.—The first question raised by these cases is whether the Fishery Board had power to prohibit beam-trawling within the whole of what, for shortness, may be called the Moray Firth. This question depends on the construction of the first subsection of the seventh section of the Herring Fishery (Scotland) Act, 1889.

The manifest and admitted effect of that subsection is to mark out the whole of the Moray Firth as the subject of exceptional legislation from that affecting the generality of the Scottish seas. So far as the Scottish seas generally were concerned, the scheme of legislation was that there was to be an absolute statutory prohibition of beam-trawling within three miles of land, but that beyond the three-mile limit no board or other authority could interfere with the freedom of fishing. In the Moray Firth, on the contrary, there was to be, *plus* the general three-mile prohibition, a subjection of the whole sea, or to put it so as to avoid all controversy, a subjection of every part of the whole sea, to the determination of the Fishery Board as to whether beam-trawling should be allowed there.

From the frame of the section it is to be inferred that the reason why Parliament declined itself to go further by way of definition of the limits of prohibition of trawling was that it desired that an expert and local body, —to wit the Fishery Board,—should proceed to ascertain in detail to what extent what I may call the suspected district stood in need of the exercise of the enacted remedy. To my thinking this is the result of the subsection in question, viewed as a whole. But if a closer examination of the subsection be adopted, the same result is yielded. It is, of course, not a good plan of ascertaining the meaning of an enactment to first of all take it bit by bit and consider the effect of each bit. The true method is to read it as a whole and then test the conclusion arrived at by considering the proper effect of each part in relation to the whole. But having read the whole of this subsection, I think that the true meaning is that the Legislature gave to the Fishery Board *carte blanche* to prohibit beam-trawling, wherever public interest required it, so long as they did not go outside the line drawn from Duncansby Head to Rattray Point. Examining the sub-

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section analytically I find that it begins by empowering the Fishery Board to prohibit beam-trawling within the limits which I have stated. So far all is clear. But then the statute says that the Board must specify the area or areas of prohibition. Now, I think that the fair reading of these words is simply that the Board must make clear in their bye-law the geographical limits of whatever prohibition they may resolve on, so that the lieges may be in no doubt as to what is legal and what is illegal. The Board must keep inside the line from Duncansby Head to Rattray Point, but keeping within that line, they may proclaim (to use a convenient phrase) any district that they deem to require this restriction. In this view they might have proclaimed one part or two discontiguous parts of the Moray Firth, but they might also proclaim the whole. The whole, just as much as any part, is an area, and it is an area lying within, because no part of it is outside, the prescribed line of boundary. I observe, upon the word "area," that it suggests no antithesis to the whole. It is a neutral term, equally applicable to whole as to part. The only limitation is expressed, not by the word area, but by the geographical limit, on one side of which the area is to be found.

The case of *Macbeth* v. *Ashley*[1] has been referred to in support of the opposite conclusion. It is to be remarked, however, that that decision was given on a construction of a different enactment, dealing with a different scheme of administration, and expressed in different language. Under the Licensing Act which was there under consideration, no one licensing jurisdiction was singled out and designated as requiring exceptional treatment from the rest. Each licensing authority was directed to grant licences allowing liquor to be sold within what may be called the normal hours, but was permitted to consider whether within its jurisdiction some particular locality required exceptional hours. The Court of Session and the House of Lords held that the words "particular locality within" the burgh were words plainly distinguishing a part of the burgh from the whole. This conclusion, which seems entirely in consonance with the words used, was held to be largely supported by the pains taken by the Legislature in selecting these words as an improvement on the language of a previous statute which more readily admitted of the other construction. I do not think, therefore, that the *Rothesay* case establishes or illustrates any principle which can control or affect the construction of the words of this Herring Fishery Act, according to their natural meaning, as deduced from an examination of that statute.

I conclude, then, that the Fishery Board had power to prohibit beam-trawling within the whole of the Moray Firth. The next question is, whether the issue of the "Bye-law No. 10" was a valid exercise of that power, or is operative now, the objection stated being that the bye-law purports to enact a penalty which, in consequence of a subsequent statute, is not the penalty now in force.

In my opinion, the bye-law did not require to say anything about penalties, and ought not to have done so. Section 7, by its first subsection, authorises the Board to do one thing, and one thing only, and that

[1] 11 Macph. 708, and 1 R. (H. L.) 14.

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is to issue a bye-law prohibiting beam-trawling within a certain defined area or areas. It delegated nothing about penalties to the Fishery Board; on the contrary, it at once proceeded, by the second subsection, itself to enact the penalties which should attach to the contravention of any bye-law of the Board. Accordingly the penalties attach, not in virtue of anything the Fishery Board says about them, but in virtue of what Parliament says about them. The Fishery Board had no power to impose penalties, and they had equally little power, by anything they might publish, to affect or abate statutory penalties. The part of their bye-law which relates to penalties has no effect whatever, for the Board could neither make nor mar penalties. It is quite possible that any Court which convicts of a contravention might in its discretion mitigate the penalty to be imposed on someone who could make out that he did not know of the alteration of the penalty, and was misled by the bye-law; but this is all the effect which this misplaced announcement can have.

The remaining question is, what penalty, if any, is now exigible for the contravention of a bye-law duly made under subsection 1 of section 7 of the Act of 1889? I cannot profess to entertain doubt upon this point. The Act of 1895 repeals the second subsection of section 7 of the Act of 1889, and enacts that in substitution for it there shall be read a provision enacting a penalty of £100. Well now, unless we have been wrong in assuming, as all parties have done, that the penalty clause of 1889 (section 7, subsection 2) applied to a contravention of the bye-law provided in section 7, subsection 1, then I do not see how we can possibly hold that a penalty clause which is to be substituted for that of 1889 does not equally apply, unless in some other part of the Act of 1895 we find a repeal of that first subsection.

The argument advanced by the respondents' counsel, that the provision of the new thirteen-mile limit in the Act of 1895 abrogates the enactment about the Moray Firth, seems to me absolutely untenable. The statutes are to be read together—where any part of the former Act is set aside, this is done by repeal or express substitution; and the Moray Firth clause is not inconsistent with the general thirteen-mile limit, any more than it was with the old three-mile limit.

The conclusion which I come to on the whole matter is that the Moray Firth has been well closed against beam-trawling, and that the offence of trawling within the prohibited waters renders the offender liable to a penalty of £100. The complaint in the case of Rust was therefore well laid, and the appeal should be sustained. In the case of Mackenzie the complaint was not well laid, as it seeks to enforce penalties under an enactment which has been repealed. In Rust's case, therefore, the first question of law should be answered in the negative, as regards both objections sustained by the Sheriff, and the second in the affirmative. In Mackenzie's case both questions ought to be answered in the negative.

LORD JUSTICE-CLERK.—It is, I think, most satisfactory that this question, important in itself, and which has a very special interest for a large portion of our industrial community, should have received the consideration of a full bench, the more so as I understand that the opinion which has just

been expressed is that of all the Judges who did not hear the former case, and must be held to correct a decision which was arrived at by a smaller number. It would have been most undesirable that a matter on which it must now be held that the former judgment was ill founded should have been left to stand decided by an ordinary quorum of the Court. Although, therefore, I feel unable to concur in the judgment proposed in the case of Rust, which corresponds to the case formerly dealt with,—the case of *Green*[1]—I am glad that there was opportunity for reconsidering the matter, so that it might be, as it will be now, finally and authoritatively decided.

The statute which has to be considered in this case is one not for regulating procedure in regard to any matters in relation to acts in themselves of a criminal nature. It deals with a certain lawful industry, open to be prosecuted in the exercise of the ordinary rights of the citizens to fish in the waters of the sea. It has been thought expedient to restrict that liberty, and to forbid its exercise in certain parts of the sea around our coasts, the restriction being enforced by such fishing being made a criminal offence punishable by fine and imprisonment. The general rule is liberty, the exception is created by the statute and remitted to the Fishery Board for practical ascertainment. When liberty in the exercise of a lawful calling is to be curtailed by exceptional legislation, and heavy penalties, enforceable against the subject by the alternative of imprisonment, are to be imposed to ensure obedience to the new and restrictive law, it is only bare justice that the restrictive provisions should be construed as favourably to the liberty of the subject as their terms may admit of.

In this particular case, the provision which is being dealt with is one which creates an essential difference between the restrictions imposed upon the same industry in one part of the sea opposite our coast, and those which are imposed in other parts of the sea. For while elsewhere the restriction upon beam-trawling is limited to the territorial waters and certain scheduled waters of limited extent, the provision under consideration enables a public body, the Fishery Board, to impose restrictions within a part of the sea of vast extent, and extending far out into the practically open ocean for a very considerable number of miles, with the necessary result that if the Board of Fisheries exercises its power to any substantial extent, the lawful industry of beam-trawling is interfered with to a much more serious extent than can be the case throughout the other water surrounding Scotland. This, of course, must be submitted to, as the Legislature has in its wisdom seen fit so to enact. But such a case is one above all others in which, unless of necessary construction of clear words, an interpretation should not be given which will bring about a maximum of restriction on liberty.

Now, the words of the clause which your Lordship has quoted, if they were intended to express what is contended for here by the appellant, seem to me to be very ill chosen. It is to me difficult to conceive that any parliamentary draughtsman, who had to express the intention to give power to the Fishery Board to shut up the whole extent of the Moray Firth against the trawlers, should have used the form of words which is found in this clause. Reading the clause, as it must be read, without

[1] *Supra*, p. 50.

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regard to mere printers' punctuation, it seems to me to be a clause giving power to the Fishery Board to select such single area or such separate areas within the waters designated as they may think it expedient for the purpose of the Act to close to the trawler, and that it does not suggest the idea that anything beyond selection is intended. If it was intended to give a power which would enable the administering body to suppress trawling altogether in the whole of this part of the sea—to leave no part of this vast tract to the industry to be restricted, and thus to close this large part of the coast of Scotland to the industry altogether—it would have been easy so to express the clause. It almost looks as if pains had been taken to avoid the use of simple and clear words, on the assumption that this was intended. We are accustomed in parliamentary and legal language to such expressions as "in whole or in part," or to have a whole stated and the limiting words "or any part thereof" added. Such expressions are clear, intelligible, and unambiguous, and in ordinary form. Here the expressions used are novel and, in my judgment, ill adapted to express the idea that power was given to stop the industry of beam-trawling in all and every part of the Moray Firth. If the words will bear that meaning, it would I think be difficult to choose words which, while capable of being so read, could obscure their intent more.

I am bound now, contrary to my own view, to yield and to admit that they can be so read, seeing that it is the opinion of the large majority of this Bench that they should be so read. But I am unable altogether to assent to the view that they are not open to another construction—the construction which brings their effect more into harmony with the legislation in the matter of beam-trawling which is applied to the rest of the country. I cannot assent to the view which was put forward by the Solicitor-General, that because it might be difficult to mark off areas which would be sufficient, and carry out the desire of the Legislature, therefore large areas which did not require to be forbidden to the trawler should be closed to him, and that the Legislature intended that the great Moray Firth should be closed altogether to trawl-fishing because of any such difficulties. I must assume that Parliament did not desire to stop beam-trawling in any area in which it could not be injurious to those interests which they desired to protect, and that they did not intend that any area should be closed merely because leaving it open might raise difficulties as to the evidence necessary to prove an offence in some other area, and I see nothing strained or artificial in a construction of the words which restricts them to the defining of areas within the tract designated in the sense of selected areas by which the other interests shall be protected without the restricted industry being absolutely suppressed.

As I stated in the former case, I arrived at the conclusion which was then expressed on my own view as to how the words of the Act might be construed; but if they may be so construed then it is plain that they must be so construed. For an Act converting what is in itself lawful into a crime in particular circumstances must be read in the most restricted sense its words are capable of bearing. I must add that the *Rothesay* case—*Ashley* v. *Macbeth*[1]—seemed to me to be in point. No

[1] 1 R. (H. L.) 14.

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doubt the word "particular" occurs in the Act in that case, but I do not think that the view of the Lord Chancellor proceeded on any hypercritical dealing with the words. It proceeded upon a broad principle, which I think is applicable to this case, that where a power is given to a public authority to exercise a discriminating judgment, and to deal exceptionally to what is the general law, that power is not legitimately exercised by making it practically to apply to the whole area within which the discriminating power is to be exercised. At the same time I feel bound to say that I feel there is considerable force in the view your Lordship has expressed in criticism of the applicability of that case as a precedent. Still I think it is in any view valuable as indicating that restrictive legislation is to be strictly and critically dealt with, and in that view of it its applicability to this case is not in my view doubtful.

The other point regarding the subsection of the bye-law which professes to impose a penalty of £5 is not of much consequence, as of course any difficulty can easily be got rid of by the rescinding of the subsection, and I confess I am at a loss to understand why this has not been done, instead of raising another case to try the question—the question thus being whether they may not go on to prosecute for very high penalties, while they still keep in their bye-law a provision inconsistent with such penalty being exacted. But I must say that my view is, that where a body has conferred upon it what are practically statutory powers, as is done in this matter by empowering the Fishery Board to do that which in ordinary circumstances could only be done by Act of Parliament, anything which it enacts or professes to enact cannot be held to be mere surplusage in a question of public prosecution, if it tends to mislead in essential particulars those who may become liable to prosecution. In such a case as this it is practically the Fishery Board who are the prosecutors, as the procurator-fiscal necessarily takes up these cases to enforce and carry out what appertains to this Government Department. And if steps are taken by such a Department, which practically tend to entrap members of the public, by misrepresenting the Department's powers and giving notices which are misleading, such a course may make it an injustice to deal with a person accused upon a different footing than that which has been imposed upon him by the responsible public body. I doubt if such an objection can in every case be dealt with by enforcing the maxim that everyone is bound to know the law. It is an equally sound maxim that there can be no justice where those in places of authority mislead the citizen as to his position. But it is unnecessary to deal with that matter, for the reason which I have stated already. It is plainly the only fair course for the Fishery Board to have any bye-law which it has published at once rescinded when such bye-law is contrary to an Act of Parliament subsequently passed.

I concur with your Lordship in thinking that in the case of Mackenzie, there being no statutory authority for the penalty there concluded for, the appeal should be dismissed. In the case of Rust I must dissent from the judgment which is proposed.

LORD KINNEAR.—I agree with the Lord Justice-General for the reasons his Lordship has given.

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I by no means dissent from the view which was expressed in *Green's*[1] case, that the Legislature has not conferred upon the Fishery Board an arbitrary discretion to prohibit trawling in any part of the Moray Firth they please, but has imposed upon them a duty to discriminate, and to prohibit trawling in the waters which have been brought within their discretion in so far only as in their judgment such prohibition may be expedient or necessary for the purposes for which their statutory powers are conferred. But we must assume that a board to which Parliament has committed such very important functions has done its duty, and that the bye-law in question is not an arbitrary prohibition, but is the expression of the deliberate judgment of the proper authority on all the conflicting considerations which it was proper to take into account, and which, of course, are much better known to the Fishery Board which framed the bye-law, and to the Minister who confirmed it, than they can possibly be to this Court. The only question for us to consider is whether the bye-law when it is brought into comparison with the Act of Parliament is or is not in excess of the powers of the Board. The only limit which Parliament has laid upon the exercise of those powers in so far as regards the area over which they extended is defined by a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire. I am unable to find anything in the clause from which to infer that the area to be defined by the Board is in no event to exhaust the entire area within the line drawn by the Act, and in every event to leave some undefined stretch of water within the line free and open to trawlers. The Act allows two alternatives to the Board. They may either define several separate and distinct areas within the line, and in that case some part of the Firth—more or less in extent—will necessarily be excluded from the definition, and will therefore be open water, or else they may define the entire area, and in that case, which is the alternative the Board has adopted, there is no limit to the area they may define, except the line from Duncansby Head to Rattray Point. If the area they have defined goes beyond that line they have exceeded their powers. If it is within the line it is not for this Court to consider whether it does or does not exclude water which, as a question of sound policy, ought not to have been closed, or which cannot be effectually closed against trawlers. But it is manifest that it does not at any point transgress the line laid down by the Act, and therefore it is within the power conferred upon the Board.

I agree that when new powers are conferred by Parliament upon an executive board or on a local authority to make ordinances for any public purpose, it is not enough to say that the letter of such ordinances does not violate the strict language of the empowering enactment if in substance it is contrary to the expressed intention of the statute. The case of *Macbeth* v. *Ashley*[1] is a valuable illustration of that principle. But then in that case Parliament had laid down a general rule for licensing magistrates, and had authorised them to depart from it only in particular cases, where a different and exceptional arrangement might be required. It was held to be a violation of the statute that magistrates, under colour of making specific regulations for particular cases, but without in fact giving any con-

[1] *Supra* p. 50.

[1] 11 Macph. 708, and 1 R. (H. L.) 14.

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sideration to the special circumstances which might differentiate one case from another, should apply to the entire district under their control the treatment which Parliament meant to be exceptional, to the practical abrogation of the general rule. I cannot see that that decision is applicable to the present case. Parliament has marked out a specific area for exceptional treatment at the discretion of the Fishery Board. They are not required to lay down any general rule. But they are to determine the limits within the area marked out by Parliament to which the exceptional treatment should be confined. I find nothing in this Act to suggest that their definition is to cover a part or parts only of the area apparently submitted to their discretion as a whole.

On the second point I agree with the Lord Justice-General, and have nothing to add.

LORD M'LAREN.—After giving my best consideration to the case I cannot say that the reasons which were given in the judgment in *Green* v. *Leith*[1] for refusing effect to the bye-law of the Fishery Board have been displaced.

I assent to the proposition that the Moray Firth is marked out in the recent statute as the subject of exceptional treatment with respect to the mode of fishing; but the question remains, what is the extent of the exceptional powers which were given to the Fishery Board for the regulation of trawling?

Now, the 6th section of the Act (52 and 53 Vict. cap. 23) prohibits beam-trawling within three miles of the low-water mark on any part of the Scottish coast, and also within certain waters specified in a schedule to the Act, and if it had been intended that trawling should be prohibited within the whole range of the Moray Firth, the natural way of doing this would have been to schedule the Moray Firth, defining it, if necessary, by a line drawn from Duncansby Head to Rattray Point. Again, it would have been very easy to give the power which is supposed to be given, by empowering the Fishery Board to prohibit trawling within the Moray Firth or any part thereof. But this would have been a much stronger interference with a lawful industry than what is contemplated in the 6th section; and it is not to be assumed that Parliament would have approved of the prohibition of trawling in this large tract of open sea, especially when it is considered that the prohibition could only be enforced against British ships.

Coming now to the power actually given to the Fishery Board, under the 7th section of the Act, it appears to me that this power is carefully limited so as to exclude the supposition that the entire area might be prohibited. The section in fact marks out a double limitation of the powers of the Fishery Board. It is first said that the bye-law may direct that beam-trawling shall not be used within a line drawn from Duncansby Head to Rattray Point; and then there is the further limitation "in any area or areas to be defined in such bye-law." The prohibition then is to apply to a defined area or defined areas within the specified line, that is, within the Moray Firth as marked out by a line drawn through two points. Now, I

[1] *Supra*, p. 50.

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am unable to admit that the Moray Firth can be within itself; or, to put the case more generally, that an area to be defined within another area can be coincident with the larger area. On the contrary, I conceive that the words I have quoted are limiting words, and that under this power the Fishery Board must leave some part of the Moray Firth open to the trawling industry.

I grant that a power may be given in such terms that it may be exercised up to the limit; but then we are dealing with the intention of the Legislature in the particular case, and it seems to me that the expression "area or areas to be defined in such bye-law" must have been chosen with the intention of excluding such a comprehensive order as we are considering, and with the design of imposing on the Fishery Board the duty of defining the particular areas from which trawlers were to be excluded.

In my opinion in *Green* v. *Leith*[1] I stated that my interpretation of the statute was independent of anything that could be deduced from previous decisions; and therefore it is not displaced by shewing that the judgment of Lord Cairns in the *Rothesay* case includes elements that are not present in this case. At the same time I may say that I regard the opinion of that great lawyer as equivalent to a protest against the undue extension of statutory powers by local authorities or public boards. My opinion, of course, is given with all necessary reserve, because I understand that a majority of the Court is of opinion that the bye-law is within the scope of the statutory definition.

LORD TRAYNER.—I concur so entirely in all that your Lordship in the chair has said that any opinion separately expressed by me must needs be more or less repetition. But as the question before us is one of public importance and interest I may state briefly the view which I take of it.

By the Act of 1889, section 7, the Fishery Board were authorised, by bye-law issued by them, to direct that the methods of fishing known as beam-trawling and otter-trawling should not be used within a line drawn from Duncansby Head to Rattray Point "in any area or areas to be defined in such bye-law." In pursuance of this authority the bye-law No. 10 now in question was duly issued, by which the Fishery Board prohibited trawling "in the whole of the area above specified." It is objected to this bye-law that it exceeds the power conferred by the statute in respect that it has prohibited trawling within the whole area, whereas the statute (as is contended) only contemplated and authorised such prohibition in part thereof —"any area or areas"—defined by the bye-law. I agree in thinking that this contention cannot be sustained. The fair reading of the statutory provision, as it appears to me, is that the Fishery Board may, if it thinks fit, direct that trawling is not to be allowed within the prescribed line at all, and that accordingly a bye-law to that effect was within their competency. The absolute exclusion of trawling within the prescribed line was, I think, the primary purpose of the statutory provision, provided always that the Fishery Board was of opinion that such absolute exclusion was the proper course to adopt. The words "in any area or areas to be

[1] *Supra*, p. 50.

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defined in such bye-law" were not restrictions on the general power which the earlier words, in my opinion, conferred, but were merely meant to point out the duty of the Fishery Board in the event of their coming to the conclusion that trawling was not to be absolutely, but only partially, excluded within the prescribed line. In the case of partial prohibition it was right that the bye-law should define the area or areas to which it was meant to apply, as otherwise it would be impossible for those persons engaged in trawling to know when and where they were violating the bye-law, or when and where they were within the permission to trawl. If the earlier part of the clause authorised, as I think it did, the prohibition of trawling over the whole area within the prescribed line, I cannot read the words which immediately follow as limiting that general power; to do so would be to read one part of the clause as to some extent inconsistent with the other. But such a construction as I have adopted admits of the whole clause being read in harmony. The power to exclude absolutely is given, but if not absolute but partial prohibition were resolved on, then the parts to which the prohibition applied were to be defined. I think the bye-law in question was in all respects conform to the terms and requirements of the Act.

It is said that the terms of the statute imply that the prohibition of trawling should not extend over the whole prescribed area, not only because of the words "in any area or areas," &c., but because the prohibition is to refer to an area "within" the line drawn from Duncansby Head to Rattray Point; and that anything within another is necessarily less than that other. Your Lordship has already pointed out that if the words of the statute are to be so critically examined, they do or may describe the whole area, it being certainly an area not outside of the prescribed line, and therefore within it. But I think it may also be said that the word "within" was not intended to indicate limitation, so much as to afford description, and its use, in the immediate connection in which it is used, appears to me to make this plain. There is a line drawn from one well-known point to another, both on the coast. When trawling is prohibited within that line, I think it means trawling between that line and the coast, the water coastward from the line being within or inside of the line, and the water seaward being not within but outside the line.

If I am right in the view I have expressed, the distinction between this case and the case of *Ashley* v. *Macbeth*[1] (founded on by the respondents) is obvious. In *Ashley's* case there was no general power of early closing conferred upon the magistrates. The general rule as to closing was prescribed by statute, and magistrates were only authorised in any "particular locality" to alter the statutory provision. The statute afforded the rule—the magistrates might make exception to it. In this case, the statute leaves the general rule to be laid down by the Fishery Board, requiring only that whatever the Board shall determine in reference to the application of that rule shall be made clear in any order they may issue.

It is said, however, that the bye-law in question has ceased to be operative because the section of the Act of 1889 under the authority of

[1] 11 Macph. 708, 1 R. (H. L.) 14.

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which it was issued, has been repealed. That is a mistake. The first subsection of the 7th clause of the Act of 1889, by which the Board are authorised to issue bye-laws, has not been repealed either directly or by implication. The second subsection of that clause has been repealed, but that subsection deals only with the penalty incurred by a contravention of the bye-law, not with the bye-law itself; and in place of the subsection so repealed another clause has been enacted.

And this brings me to notice the only other objection maintained by the respondents to the bye-law which requires attention. In the bye-law we are dealing with there was a clause intimating that anyone contravening the same would be liable in a penalty not exceeding £5 for a first offence, and not exceeding £20 for any subsequent offence. That was a correct statement of the statutory penalty as the law stood at the date when the bye-law was issued, but is incorrect as the law now stands. The penalty now incurred by a contravention of the bye-law is a sum not exceeding £100. In these circumstances the respondents maintain that the bye-law is inoperative, because the only penalty mentioned in the bye-law having been repealed, the bye-law contains no sanction, and that under this bye-law no other penalty could be concluded for or enforced except that which the bye-law has set forth.

This argument proceeds upon the view that the intimation of the penalty to be incurred by contravention of the bye-law is a part (and indeed essential part) of the bye-law itself. This, however, is not so. The Fishery Board had no authority to make any bye-law about the penalty. That was fixed by statute in 1889 as it was again by the statute in 1895. The clause in the bye-law regarding the amount of the penalty was of no authority; it was nothing more than a mere notice of what the statute had then fixed, and was no more a part of the bye-law than if it had been appended as a note to the bye-law, or been published separately from it. The altogether unauthorised statement about the penalty did not invalidate the bye-law as authorised by statute. As I have said, it was no part of the bye-law.

Nor is the bye-law without sanction. The Act of 1895 repealing the formerly existing penalty clause has enacted another which is "substituted therefor." We have therefore a good bye-law with a statutory sanction, and for a contravention of the one the other may be concluded for and enforced.

The result of my opinion is that the complaint against the respondent Rust is both competent and relevant, and that the objections taken thereto should have been repelled. The complaint against Mackenzie was, I think, incompetent, as it concluded for a penalty other than the statutory penalty.

LORD ADAM and LORD KYLLACHY concurred in the opinion of the LORD JUSTICE-GENERAL.

THE following interlocutors were pronounced:—

In the case of Rust—"Answer the first question in the case in the negative, and the second question in the affirmative:

Sustain the appeal: Reverse the determination of the inferior Judge: Find no expenses due." No. 18.

In the case of Mackenzie—"Answer both questions in the case in the negative: Dismiss the appeal, and decern: Find the respondent entitled to expenses," &c. Feb. 29, 1896. Wilson v. Rust. Wilson v. Mackenzie.

CROWN AGENT—ALEXANDER MORISON, S.S.C.—Agents.

THOMAS GEORGE TEESDALE, Complainer.—*Salvesen—W. Thomson.* HER MAJESTY'S ADVOCATE AND ANOTHER, Respondents.—*Sol.-Gen. Murray—C. N. Johnston, A.-D.* No. 19. Mar. 17, 1896. Teesdale v. H. M. Advocate.

Conviction—Verdict—Alternative charge and general conviction—Post-Office Offence—Stealing or secreting letters—Post-Office Offences Acts Consolidation Act, 1837 (*7 Will. IV. and* 1 *Vict. cap.* 36), *sec.* 26.—The 26th section of the Post-Office Offences Acts Consolidation Act, 1837, enacts "that every person employed under the Post-Office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy, a post letter" shall be guilty of a high crime and offence.

Held that the alternative statements in this enactment were not statements of proper alternative offences, but were only specifications of different modes in which the statutory offence might be committed, and therefore that a general verdict of guilty as libelled on an indictment setting forth that the accused did "steal or secrete a post letter," contrary to the Act, was a good verdict.

ON 15th November 1895, Thomas George Teesdale, lately telegraph messenger in the post-office at Dalbeattie, was tried in the Sheriff Court at Kirkcudbright before the Sheriff-substitute (Lyell) and a jury, on an indictment at the instance of the Lord Advocate, the charge against the accused being "that on the 12th day of August 1895, being employed under the Post-Office, you did, in the Post-Office at Dalbeattie aforesaid, steal or secrete a post letter containing a postal order for 10s. 6d., contrary to the Act 7 Will. IV. and 1 Vict. cap. 36, sec. 26." * HIGH COURT. Lord Justice-Clerk. Ld. M'Laren. Lord Kincairney.

The jury returned this verdict:—"The jury, by a majority, find the panel guilty as libelled, but strongly recommend him to the leniency of the Court on account of his age and the temptation thrown in his way by easy access to the post letters, and his previous good character."

The Sheriff-substitute pronounced a sentence of imprisonment for two calendar months.

Teesdale brought a bill of suspension and liberation against the Lord Advocate and the procurator-fiscal, and was liberated *ad interim* on caution.

He pleaded;—The charge in the indictment being an alternative one and the conviction being a general one, the complainer is entitled to have the sentence quashed, and to liberation.

After hearing the parties,[1] the Court made avizandum on 7th January 1896.

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* The Post-Office Offences Acts Consolidation Act, 1837 (7 Will. IV. and 1 Vict. cap. 36), sec. 26, enacts—"And be it enacted, that every person employed under the Post-Office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy, a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall" be punishable as therein stated.

[1] *Authorities cited by the Complainer.*—Murray v. M'Dougall, Feb. 7,

No. 19. At advising,—

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LORD JUSTICE-CLERK.—The case before us relates to the department of the Post-Office, in regard to which the Legislature has passed highly penal enactments for the protection of the public against dishonesty on the part of the officials employed. Every such case is of great importance, both because of the obvious necessity of safeguarding the public against criminal interference with correspondence, for the transmission of which Parliament has given a monopoly to the department, and also because of the severity of the punishments which have been authorised to prevent such criminal interference. It is therefore important that any legal decision to be given upon any substantial question relating to the carrying out of the Post-Office Acts should be given only after most mature and careful consideration. When the present case was heard it was thought desirable that the practice in similar cases should be looked into before it was decided, and accordingly this has been done; and along with your Lordships I have anxiously considered both the argument and the precedents, and it is satisfactory to know that the conclusion at which I arrived concurs with that of both your Lordships upon your own consideration of the case, and has been confirmed by final consultation. It is the same conclusion which seemed to me to be the right one at the close of the debate, and although a somewhat unusually long time has been allowed to elapse since that debate, I do not think that this is cause for regret in the circumstances, for the reason I have already stated.

It is by section 26 of the Post-Office Statute enacted,—"That every person employed under the Post-Office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy, a post letter shall . . . be guilty . . . of a high crime and offence," punishable as there stated.

The present question really is whether these different statements are truly alternative to one another, so that a charge setting forth that the accused did "steal" or "secrete," being in the form of the words alternative, a general verdict of guilty is bad, and a sentence following upon it must be quashed. That such is the law in regard to any case in which a general verdict is returned where what are truly alternative charges are made is beyond doubt. If a person was accused, say of theft or alternatively of reset under the old form of indictment, a general verdict of guilty as libelled would have been inept, for it would be impossible to know of which of two crimes the accused was convicted, and he could not logically be convicted of two inconsistent crimes upon the same *species facti;* and accordingly under the old form of indictment a charge which set forth such words as these:—You did wickedly and feloniously steal and theftuously away take, or did reset and receive the said watch, well knowing the same to have been stolen—would have been hopelessly irrelevant and inconsistent with

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1883, 10 R. (Just. Cases) 42, 5 Coup. 215; Reaney v. Maddevar, Nov. 22, 1883, 5 Coup. 367; Bell v. M'Phee, July 18, 1883, 10 R. (Just. Cases) 78, 5 Coup. 312. *Authorities cited by the Respondents.*—O'Neill v. Campbell, July 18, 1883, 10 R. (Just. Cases) 76, 5 Coup. 305; Macnaughton v. Maddevar, Nov. 12, 1884, 5 Coup. 509; **Maxwell v. Marsland, Jan. 28, 1889, 16 R. (Just. Cases) 48, 2 White, 176.**

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established practice, as stating practically in one charge two different crimes which could not be proved by proof of the same facts. Where the prosecutor was uncertain whether his evidence would substantiate theft or reset he was under the necessity of stating the alternatives in separate charges prefacing the second alternative by the words "or otherwise." It was this setting forth of complete alternative charges which led to indictments being often drawn out to inordinate length in order to meet the contingency of the evidence tending to prove one kind of crime of dishonesty rather than another, an inconvenience which was obviated by the Criminal Procedure Act of 1887, under which a verdict may be returned on an indictment for one kind of dishonest appropriation, of guilt of another crime of dishonesty, as, for example, a conviction of reset where the charge is one of theft. But for that enactment, indictments stating alternatives specifically would still be necessary, and the alternatives would require to be set forth in separate charges. Now, when we look at the practice which has been followed in cases under the Post-Office Statute, we find that the practice under the old law before 1887 has not been to state the different forms of crime under such a section as that we are dealing with as separates charges. On the contrary, the invariable practice has been to state any alternatives in the words of the statute in one charge. So far back as the year 1840 I find that in an indictment against *George Munro*[1] the charge stated "you did steal or did embezzle or secrete the said letter." This was a case before the High Court, the quorum of which then was a bench of three Judges. There was no objection taken, and a general plea of guilty was accepted and sentence pronounced. Again, in 1842, in the case of *Daniel Peddie*,[2] the accused was charged that he did "steal, embezzle, or secrete, or wilfully detain or delay." There also no objection was taken, and an interlocutor of relevancy pronounced, and a plea of guilty, without the words "stealing or embezzling," thus leaving the charge as one of secreting or wilfully detaining or delaying, was accepted and followed by sentence. Then in 1856, in the case of *Henry Goldwye*,[3] indicted in the High Court before a bench of three Judges, the charge stated, "you did wickedly and feloniously steal, or, for some wicked purpose to the prosecutor unknown, did embezzle or secrete." Here the indictment having been found relevant, the accused pleaded generally to this and other charges. These are specimen cases of many which have occurred during the space of more than half a century which has elapsed since the Post-Office Statute was passed, and it does not appear that till very recently any question of relevancy was raised, or objection to conviction taken, on the ground that the charges were not stated as proper alternatives, or that a general conviction following on such charges could not be made ground for sentence as being a general conviction on alternative charges. It is not until 1888 that any trace is to be found of objection to such a charge under the statute. The objection was taken in that year in the case of *Joseph M'Gregor*,[4] and was answered by a statement of universal practice, and as this could not be disputed the objection was accordingly repelled.

It is thus plain that indictments containing the alternative statements in

[1] 2 Swinton, 498. [2] 1 Broun, 238. [3] 2 Irv. 494. [4] 1 White, 211.

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the statute have been sustained as constituting a relevant charge of the statutory offence under the section in question, and that it has thus been recognised that these are not truly charges of an alternative nature, but only specifications of different modes in which the statutory offence may be constituted. Further, it has also plainly been held in practice that a general verdict on such a charge is a good verdict, on the ground that if the tribunal is satisfied that a letter has been criminally treated, and thus not handed on by the official in proper course for delivery to the addressee, but criminally stopped in its course, the statutory crime has been committed in one or other of the modes specified, it being a matter of no consequence which was the mode, and a prosecutor not being required to substantiate what was the particular mode.

That such has been the established practice in the case of a statutory offence which has been very often made the basis of prosecution in the Supreme Court, would in my judgment be sufficient ground for holding that the question had been considered and authoritatively dealt with in the past, and that the course taken upon it should not be lightly interfered with, even if upon an abstract view it might be thought that there were grounds for doubting the soundness of the established practice. But I feel bound to say that the practice seems to me to be sound in itself. The purpose of the Legislature in making these enactments was to protect the correspondence of the citizens from being tampered with in any way by the officials through whose hands it had to pass, and to make it a high crime and offence to do any act of any kind, and let the motive be what it might, whether theftuous, malicious, or only unconscientious, or the result of carelessness or laziness, which should stop or delay the regular transmission of post letters from the persons committing them to the post-office officials to the persons to whom they were addressed. It is the dealing with a letter contrary to duty undertaken which is the offence, and the various expressions used in the statute only express varieties of action by which the statutory offence may be committed. Under the statute they are all equally heinous, and evidence which will satisfy the tribunal that the statutory offence has been committed is sufficient for conviction of that offence, although there might be doubt or obscurity as to the question which was the exact detail of the mode of committing it, as, for instance, between stealing or secreting, as in this case, or detaining or destroying. The accused may be the only person who knows the exact mode in which he has criminally dealt with the letter. The purpose is to prevent post letters being stopped in their course of transit for delivery, with intention, and it is sufficient that the evidence leaves no doubt that by one or more of the acts specified the guilt of contravening the statute has been incurred.

I am therefore of opinion that this suspension should be refused.

LORD M'LAREN and LORD KINCAIRNEY concurred.

THE COURT pronounced this interlocutor:—"Refuse the bill, and decern."

THOMAS M'NAUGHT, S.S.C.—CROWN AGENT—Agents.

MRS JANE LEE OR SMITH, Complainer.—*W. Thomson.*
GEORGE NEILSON (Procurator-Fiscal of Glasgow Police Court), Respondent.—*Lees—J. B. Young.*

No. 20.

Mar. 18, 1896.
Smith v. Neilson.

Fortune-telling—Complaint—Relevancy—Statutory Offence—Intent to deceive—Act 5 Geo. IV. cap. 83, sec. 4—Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), sec. 15.—The Act 5 Geo. IV. cap. 83, by its 4th section (which was extended to Scotland by the 15th section of the Prevention of Crimes Act, 1871), enacts that "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," shall be deemed a rogue and a vagabond within the meaning of the Act, and shall be punishable as therein provided.

A woman was charged in a Police Court with a contravention of the above enactment, in so far as she did, at a time and place specified, "pretend to tell the fortunes of" a person named "who was thereby induced to pay to the said accused" the "sum of sixpence." The accused was convicted of the contravention "as libelled," and brought a suspension.

The Court *quashed* the conviction, holding that the complaint was irrelevant, in respect that it did not set forth that the accused had pretended to tell fortunes with intent to deceive and impose on any one.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

ON 4th February 1896 Jane Lee or Smith, residing at 42 New City Road, Glasgow, was charged in the Northern Police Court, Glasgow, on a complaint at the instance of the Procurator-fiscal, setting forth that she "has contravened the Prevention of Crimes Act, 1871, particularly section 15 thereof; and the Act passed in the fifth year of the reign of King George the Fourth, chapter 83, particularly section 4 thereof, as amended and made applicable to Scotland by the said Prevention of Crimes Act, 1871,—in so far as the said Jane Lee or Smith (1) did on 25th January 1896, within the premises occupied by George Smith, her husband, at 42 New City Road, Glasgow, pretend to tell the fortune of Jane Allan, of 26 George Street, Glasgow, who was thereby induced to pay to the said Jane Lee or Smith the sum of sixpence; and (2)," then followed another charge in similar terms, "whereby the said Jane Lee or Smith is liable to be deemed a rogue and vagabond within the meaning of said Acts, and to be committed to prison with hard labour for any term not exceeding three calendar months." *

The accused objected to the relevancy of the complaint. The objection was repelled. She then pleaded not guilty, but was convicted "of both charges of pretending to tell fortunes, being a contra-

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* The Act 5 Geo. IV. cap. 83, sec. 4, enacts that every person committing anyone of a variety of offences, thirteen in all, should be deemed a rogue and a vagabond, and on conviction be punishable as therein stated. Among these offences was the following:—"Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects."

The Act 5 Geo. IV. cap. 83, was, by section 22 thereof, declared not to extend to Scotland, but by section 15 of the Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), section 4 of the Act 5 Geo. IV. cap. 83, was extended to Scotland in language which was held so to extend the whole of section 4, and not merely the portion specially dealt with in section 15 of the Prevention of Crimes Act—See *M'Lean* v. *Murdoch*, Dec. 23, 1882, 10 R. (Just. Cases) 34, 5 Coup. 193.

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vention of the Act fifth George the Fourth, chapter 83, particularly section 4 thereof, and the Prevention of Crimes Act, 1871, particularly section 15 thereof, all as libelled," and was decerned "to be a rogue and vagabond within the meaning of the said Acts," and fined ten shillings and sixpence, with the alternative of seven days' imprisonment.

She brought a suspension, pleading, *inter alia*, that the complaint was irrelevant, in respect that "section 4 of 5 Geo. IV. cap. 83, only makes it an offence to tell fortunes if any of Her Majesty's subjects be deceived or imposed on. There is no statement in the said complaint, nor in the said conviction, that the said subjects were deceived or imposed on. The complaint and conviction do not disclose an offence known to the law."

The respondent maintained that the words in the statute "deceive and impose on any of His Majesty's subjects," qualified only the portion beginning "or using any subtle," &c., and not the words "pretending or professing to tell fortunes," which, *sua natura*, implied deceit, and imported an offence in itself.[1]

LORD JUSTICE-CLERK.—There have been several objections taken to this conviction, but there is only one which I think it necessary to notice. Under the 4th clause of the Act of Parliament of 1824, which is now part of the law of Scotland, it is enacted that "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," shall be guilty of an offence. The complaint here was objected to on the ground that it is irrelevant in respect that while it alleges against the accused that she did pretend to tell the fortune of a particular person, it is not alleged that she did so with intent "to deceive and impose." Now, it was argued—and there is a great deal to be said for the argument—that the Act might be read on this footing, that these words "to deceive and impose" refer only to the latter part of this subsection of the clause "or using any subtle craft, means, or device by palmistry or otherwise," and that the pretending to tell fortunes is a crime by itself, implying that there was an intention to deceive and impose, and that therefore there was no need for these words as applicable to the first part of this section. I am inclined to read these words "to deceive and impose" as applicable to the whole of this subsection. I see no reason in the form of the words for holding that it is not. If that be so, then a complaint, charging a person merely with pretending or professing to tell fortunes, omits what the statute has put in as part of what is necessary to be proved, and therefore part of what must be averred. I think that here the complaint should have contained an allegation of the intent to deceive and impose. On that ground it seems to me that the complaint is bad, and that we ought to quash the conviction.

It is not a matter of very serious moment, for this is only a single case, and for the future it is only a question of adding five or six words to the complaint. I am quite clear that if the words "with intent to deceive and

[1] Monk v. Hilton, 1877, L. R., 2 Exchcq. Div. 268; Penny v. Hanson, 1887, L. R., 18 Q. B. Div. 478.

impose" had been added the complaint would not have been open to objection.

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LORD YOUNG.—I confess that from the moment I read it I thought that this charge was bad, and that therefore the conviction was bad. We were informed that this is the first prosecution in Scotland for pretending to tell fortunes. The 4th clause of the Act of George IV., it is said—and I have no doubt accurately—was made applicable to Scotland twenty-five years ago, but it was not till 1882 that it was decided—and then not without difficulty—that the whole of the clause was made applicable to Scotland.[1] During these twenty-five years this is the first instance of any prosecution of the kind, and I should almost venture to express the hope that it may be the last. It is, of course, true that a professed fortune-teller may commit roguery or knavery through the exercise of that profession just as anyone else may commit a roguery or knavery. But when you have a case of a professed fortune-teller committing roguery or knavery against those who require—that is, really deceiving and imposing upon weak people who require—the protection of the law, the charge ought to state that what he did was knavish or roguish, and amounted to an offence. It has never been imagined, so far as I ever heard, or thought, that writing, publishing, or selling books on the lines of the hand, or even on astrology—the position of stars at birth and the rules on which astrologers proceed in telling fortunes therefrom—I say I have never heard that publishing or selling such books is an offence, or that reading such books and telling fortunes therefrom is an offence. Roguery or knavery might be committed that way, but it would be a special case.

There is the word "pretend" used, but the case for the prosecutor here is that it is not necessary that there should be an intent to deceive and impose upon. Indeed, everything here is consistent with the fact that the person who told the fortune had no belief in the thing herself, and knew that the person who gave 6d. had no belief in the thing either. That was the prosecutor's view, we are told by the counsel who represents him, and that was the view on which the conviction proceeded. So that it really comes to this, that anyone telling fortunes by reading the lines on the hand is guilty of roguery and vagabondry, and liable under this section to its penalties. I think that that is extravagant, and I therefore repeat that as this is the first conviction of the kind in twenty-five years, I hope it will be the last attempted. When I say this, I am not in any way suggesting that a spae-wife or anyone else may not through that means commit knavery and deception, and so be liable to punishment.

LORD TRAYNER.—I think the view which your Lordship in the chair has expressed is sufficient for the decision of the case, and in that view I concur, and I have nothing to add.

THE COURT pronounced the following interlocutor:—"Pass the bill, suspend the conviction and sentence complained of, and decern: Find the complainer entitled to expenses, which modify to ten guineas," &c.

R. G. BOWIE, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

[1] See M'Lean v. Murdoch, 10 R. (Just. Cases) 34, 5 Coup. 193.

No. 21. HER MAJESTY'S ADVOCATE.—*Maconochie, A.-D.—A. O. M. Mackenzie.*
ELLEN ABERCROMBIE.—*Ramsay.*

May 7, 1896.
H. M. Advocate v. Abercrombie.

Murder—Child Murder—Culpable Homicide—Mental derangement short of insanity—Child-birth.—At the trial of a woman upon a charge of murdering her child by choking it immediately after its birth, the presiding Judge (Lord M'Laren) directed the jury that they were entitled to find the panel guilty of culpable homicide, if they were of opinion upon the evidence that her mental state at the time when the injury was inflicted, though not warranting an acquittal on the ground of insanity, was such as to make her only partially accountable for her acts.

Dingwall, Sept. 20, 1867, 5 Irvine, 466, *followed.*

HIGH COURT. Glasgow (Western) Circuit. Lord M'Laren.

ELLEN ABERCROMBIE, domestic servant, was indicted for the murder of her illegitimate child by choking it immediately after its birth.

She pleaded not guilty, and specially that she was insane at the date of the alleged crime.

It was proved that the accused had never had a child before, and had concealed her pregnancy and made no preparations for her confinement. It appeared from a confession made by her that the child was born during the night, that it was alive when born, that she placed her fingers either in its mouth or on its throat in order to prevent it from crying, and thereby killed it; and that she concealed the body in a box, where it was afterwards found. The appearance of the body corroborated these statements. It was also proved that accused had performed her domestic duties up to the date of her confinement without shewing any signs of mental aberration.

For the defence medical evidence was led to prove that child-birth, especially a first confinement, and when no due preparation was made, was frequently the cause of great mental disturbance amounting to insanity. There was, however, no evidence that the confinement of the accused had been of a specially difficult or painful character.

The Advocate-depute asked for a verdict of guilty of murder.

Argued for the accused;—The evidence showed that she was insane at the date of the crime charged, or if not actually insane, that she was in a state of such mental agitation as would justify a verdict of culpable homicide.[1]

LORD M'LAREN in charging the jury, after stating the import of the evidence, said:—Lord Deas went very carefully and elaborately into the subject of partial insanity as bearing on criminal responsibility, and his direction to the jury was to this effect, that where the mind of a man had been permanently weakened by alcoholic indulgence, so that he was incapable of resisting homicidal impulses, that was a circumstance which might be taken into consideration for the purpose of reducing the crime from murder to culpable homicide. It was my misfortune to have to consider a very painful case of this nature—a case where the partial mental derangement was due to a different cause; it was in fact the result of a system of persecution and maltreatment to which the man had been subjected by his fellow-workmen. In that case I advised the jury that a man whose mind had been unhinged by a long course of brutal treatment, and who suddenly turned on one of his oppressors, was not necessarily to be regarded as a wilful murderer. The state of his mind was not such as to render him irre-

[1] Dingwall, Sept. 20, 1867, 5 Irvine, 466; Granger, Sept. 14, 1878, 4 Couper, 86.

No. 21.

May 7, 1896.
H. M. Advocate v. Abercrombie.

sponsible to the law, but the jury are entitled to consider the state of the man's mind and his imperfect power of resisting the impulse in determining whether he was responsible as for a murder or only for the second degree of homicidal crime. The view suggested was taken by the jury, and a verdict of culpable homicide was returned. In the present case I fail to see anything in the history of this girl that leads me to the belief that she was either wholly or partially insane at the time of her confinement. Up to that time her conduct had been that of any ordinary servant, entirely satisfactory to her mistress. She was not eccentric or peculiar in her behaviour. The only thing in fact that attracted the attention of her mistress was the state of the girl's health, as to which she shewed some anxiety. Then you will consider whether the history of this case, and especially the amount of physical exertion the girl was able to undergo on the day after her confinement, is consistent with the theory that this was a case of very difficult or painful labour, such as might have resulted in temporary unconsciousness after giving birth to the child. All that was said on that subject, I think, by the two doctors who were examined for the prisoner—Dr Carswell and Dr Oswald—amounted to no more than this, that she might have been suffering to a degree that would cause a state of frenzy; that it might have been a case of very painful labour, and also that these nervous attacks following on a confinement sometimes arise without any apparent cause. I think I may say that it would be very unsafe to found upon these "might be's" as reasons for treating the prisoner as a person not responsible for her actions. Neither Dr Carswell nor Dr Oswald was able to point to anything in the history of the case that specially marked it out as a case where mental derangement was at all likely to have taken place. But then it is of course a characteristic of every case of confinement, and I suppose in a special degree of the first confinement of a woman, that it is a period of very acute suffering, and you will have to consider this case not only as a question of guilty or not guilty, but the question also arises whether this is to be treated as a case of murder or of culpable homicide. It is a perfectly legitimate topic of consideration that according to the evidence the act was done immediately after delivery, and apparently without premeditation, at a time when the woman would be experiencing acute physical suffering, when she was alone and without assistance, and had apprehensions as to the disclosure of her condition; and that she may have been guilty of an attack upon the person of her child, which was illegal and criminal, and yet may have done so without realising an intention of taking the life of the child. I think the view which I have last presented to you is the practical issue in the case as you will have to consider it.

THE JURY found the prisoner not guilty on the ground of insanity.

No. 22.

Mar. 18, 1896.
MacArthur v. Campbell.

ALEXANDER MACARTHUR, Complainer.—*Abel.*
ARCHIBALD CAMPBELL (Burgh Prosecutor, Oban), Respondent.—*Clyde.*

Suspension—Statutory exclusion of review—Radical irregularity in procedure—Interlocutor adjourning diet unsigned—Burgh Police Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 495.—The record of the proceedings under a

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complaint charging an offence under the Burgh Police Act, 1892, disclosed several irregularities, and the interlocutor adjourning the diet to the day on which the case was tried was not signed until after the trial and conviction of the accused. *Held* in a suspension, that the proceedings having been radically defective, the conviction was not protected from review by section 495 of the Burgh Police Act, 1892, and fell to be quashed.

Police—Regulation of Buildings—New Buildings—Notice to Commissioners—Oppression—Burgh Police Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 495.—A person erected a house in a burgh, and let it to a tenant on the condition that he should not enter into occupation until it was finished. During the absence of the landlord the tenant occupied the house without any notice having been given under section 180 of the Burgh Police Act. On the landlord's return he at once gave notice to the town-clerk that the house was ready for inspection. A prosecution was instituted against him for failure to give notice before the house was occupied, and he was convicted and sentenced to a fine of 10s. *Opinion per* Lord Young, that the prosecution was nimious and oppressive in the circumstances, and that the conviction should be set aside.

HIGH COURT. Lord Justice-Clerk. Lord Young. Lord Trayner.

ON 7th June 1895 a summary complaint at the instance of Archibald Campbell, burgh prosecutor, Oban, was executed against Alexander MacArthur, banker, Oban, setting forth that the accused had contravened the Burgh Police (Scotland) Act, 1892, section 180, by permitting a house belonging to him in Oban to be occupied before a certificate had been obtained from the surveyor.*

By interlocutor bearing date 29th July 1895 the Magistrates convicted the accused of the contravention charged and fined him 10s.

MacArthur brought a suspension, the main ground of which was based on certain irregularities in the proceedings in the inferior Court. The following is a print of the record of these proceedings:—

"At Oban, the 29th day of July 1895, in the presence of Francis Webster Cooper, Hugh M'Cowan, and James Stevenson, Esquires, the Magistrates of Police of the burgh of Oban, appeared Alexander MacArthur complained against; and the complaint being read over to him, he answers that he is not guilty." [There was no signature here.]

"*Eo die.*—The Magistrates adjourn the diet to the 24th day of June 1895, and appoint the said Alexander MacArthur to appear personally on that day at twelve o'clock noon." [Then followed the signatures of the Magistrates.]

"Oban, 24th June 1895.—The Magistrates adjourn the diet to the

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 180, enacts:—" . . . Within one month after any new house or building, or any alteration on the structure of any existing house or building, has been completed, or before such house or building or any portion thereof has been occupied, the owner or builder shall give notice to the clerk of the Commissioners that the house or building, or any part thereof, is ready for inspection before being occupied" under a penalty not exceeding £5.

Sec. 495 enacts:—"No order, judgment, record of conviction, or other proceeding whatever, concerning any prosecution instituted before the magistrates shall be quashed for want of form . . . and all judgments and sentences pronounced by the magistrate shall be final and conclusive, and not subject to suspension or appeal, or any other form of review or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the magistrate, or of such deviations in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction of the magistrate . . ."

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8th day of July next, and appoint the said Alexander MacArthur to appear personally on that day at twelve o'clock noon." [Then followed the Magistrates' signatures.]

"Oban, 8th July 1895.—The Magistrates adjourn the diet to the 29th day of July current, and appoint the said Alexander MacArthur to appear personally on that day at twelve o'clock noon." [Then followed the Magistrates' signatures.]

"The witnesses afternamed were examined" [names and designations.]

"29th July 1895. *Eo die.*—The Magistrates, in respect of the evidence adduced, convict the said Alexander MacArthur of the contraventions charged, and therefore adjudge him to forfeit and pay the sum of ten shillings of penalty. Fifty-eight words deleted before signing." [Then followed the signatures of the Magistrates.]

The interlocutor of 8th July 1895 was written on the margin, and it was admitted by the respondent that it was not signed, and averred by the complainer that it was not written, until after the conviction and sentence had been pronounced on 29th July 1895.

The complainer also averred:—The successive adjournments were made by the Magistrates *ex proprio motu* in order (as they intimated verbally) that they might obtain the opinion of counsel on a question of jurisdiction. "At the fourth diet, on 29th July 1895, it was proved that the complainer had let a house in the tenement to Malcolm M'Gregor, railway clerk, Oban, on condition that if the house was not ready at the term he should not occupy it until it was ready for occupation, and that the said Malcolm M'Gregor, without the knowledge or consent of the complainer, and when the complainer was absent from Oban, had taken up his abode in the house, and that the complainer had, on 4th June 1895 [by letter quoted in the opinion of Lord Young], given notice to the clerk to the Commissioners that the said house and another in the said tenement were ready for inspection by the Burgh Surveyor."

The complainer pleaded that the sentence complained of should be suspended, in respect, *inter alia*, that (1) it was incompetent, illegal, and oppressive for the Magistrates to make the adjournments for the reason stated by them; (2) that the adjournment on 8th July by verbal intimation from the bench without any written and duly signed minute vitiated the subsequent proceedings; (3) there was no ground in law for convicting the complainer when the tenant had taken possession of the house without his knowledge or consent.[1]

LORD JUSTICE-CLERK.—This complaint, of which I have the original before me with the proceedings following upon it, seems to be as extraordinary a document as I ever saw coming out of any Court of justice. It begins with the complaint and then there is an interlocutor of 29th July 1895 which states that certain things happened in the presence of certain magistrates. That statement is followed by an adjournment of the diet to 24th June 1895, after a plea had been taken which is not authenticated

[1] *Authorities cited by Complainer.*—Lord Advocate v. Fraser, June 1, 1852, 1 Irv. 1; Smith v. Macaulay, Nov. 26, 1846, 9 D. 190, 19 Scot. Jur. 58; Stevenson v. Watson, Feb. 7, 1857, 2 Irv. 592; M'Lean v. Falconer, June 28, 1895, 22 R. (Just. Cases) 39, 1 Adam, 564; *by Respondent*—Smith v. Graham, July 16, 1873, 45 Scot. Jur. 563, 2 Coup. 479; Burgh Police Act, 1892, sec. 495.

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unless the signature of the magistrates bearing to adjourn the Court to 24th June is also to be held an interlocutor pronounced on 29th July. There are certain other adjournments bearing to be on 24th June and 8th July, and then at a certain diet,—namely, 29th July,—the Magistrates, by another interlocutor, in respect of the evidence adduced, convict. Then the interlocutor of 8th July, adjourning the Court to 29th July, is written on the margin, but it is admitted that this interlocutor was not signed until after the interlocutor of 29th July was pronounced and the case was at an end. It is said that that interlocutor was written out, though not signed, on 8th July; but it might as well not have been written out, because it had no effect till it was signed.

A more monstrous mass of irregularities could not be conceived. One is astonished that in any Court in the country there should be so much want of care and want of sense in the keeping of records.

Now, various objections are taken, but the formidable objection to my mind is that this party, who was brought up on 29th July and then convicted and sentenced, was brought up on a complaint which on the face of it bore that it had fallen, for there was no adjournment of the cause to that date. The case of *Smith* v. *Graham*,[1] has been referred to. If anything in that case means that where an interlocutor was not pronounced at all continuing the diet the accused could be tried, and that that was a thing to which the accused could not object, I should most certainly not concur in such a decision. What the Court in that case proceeded on was this, that there was on the face of the proceedings an interlocutor adjourning the diet, and that it was not enough to vitiate this interlocutor that, in its date, the day of the month was written on an erasure. That was the point which was argued for the suspender at the bar. I have no doubt in holding that in all ordinary circumstances in any Criminal Court if it is found upon the record that the trial took place on a date to which there had been no adjournment, the conviction following on that trial must be had. Whether there may be any exceptions to that introduced by Act of Parliament is another question. Mr Clyde founds upon the Burgh Police Act, but the Burgh Police Act while it enacts in very strong terms that no conviction is to be set aside for want of form or for error in procedure, is in the same strong terms as many other Acts of Parliament; notwithstanding which, this Court, where it was plain on the face of the proceedings that they were outside all law, has always maintained the right to quash such proceedings. In my opinion, the irregularities in this case are such that it must be placed in that category, and that the conviction must be quashed.

Lord Young.—The complainer here says he let an unfurnished house, with liberty to the tenant to take possession when it was finished. But the tenant took possession of it when the complainer was absent from Oban, and when the complainer came back he found that the tenant had taken possession, and that a certificate ought to have been obtained. Accordingly, he wrote to the town-clerk:—"On my return yesterday evening I found that one of my tenants, to whom I had let a house in the tenement in Nursery Road, built by me, with entry when house finished, had taken possession,

[1] July 16, 1873, 2 Coup. 479.

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and . . . as my attention has been drawn to the Police Act, section 180, that these houses require to be certified by the burgh surveyor, I shall be obliged by your causing this to be done at once. I was unaware that this had to be done by me, so I trust there will be no delay."

I think that anyone taking the certainly harsh course of instituting a prosecution under these circumstances should make very certain that the harsh proceedings which he takes are regularly conducted. I am not sure that even if they had been so conducted I should have been prepared to sustain them under such circumstances. I think them nimious and really oppressive, and that the conviction upon them should be set aside upon that ground.

But I think there is sufficient in the irregularity of the proceedings for the decision of the case without entering on that view. The interlocutors are printed before us in the order in which they stand in the printed forms, and they begin with the latest date. It appears that on the 29th July the Magistrates adjourned the diet to the 24th June, and on the 24th June adjourned the diet to the 8th July, and then on the 8th July adjourned it to the 29th, and then on the 29th July they proceed to convict. So that these interlocutors of adjournment are between the two interlocutors of the 29th July. I think this is utterly irregular. I am not disposed to be strict to mark iniquity of a formal kind, when the proceedings have been justifiable and proper, but I cannot say that of these proceedings, and I am not disposed to think the objections merely formal. I think they are more, and I incline to agree with your Lordship that procedure upon a criminal charge on a day to which no adjournment has been made is bad and invalid, and ought not to be sustained unless under exceptional circumstances of a kind that this case does not present.

LORD TRAYNER.—I agree. I doubt whether there is anything before us here except the notes of procedure on the 29th July. The first interlocutor bears that date, and the conviction bears that date. If this is so, there could be no competent Court on the 24th June.

But apart from that, I am of opinion that there was no adjournment of the diet from the 8th to the 29th July to which we can give any effect. The interlocutor by which that adjournment is said to have been made did not exist until after the conviction was pronounced, and in these circumstances there was no process before the magistrates on the 29th July in which a judgment could be pronounced.

On these grounds, and on the other grounds stated by your Lordships, I think the conviction should be quashed. I think this was a most unnecessary prosecution.

THE COURT pronounced this interlocutor:—"Pass the bill, suspend the conviction and sentence complained of *simpliciter*, and decern: Find the complainer entitled to expenses both in this Court and in the inferior Court: Allow an account," &c.

GILL & PRINGLE, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 23.

July 16, 1896.
Buchanan v. Wilson.

WILLIAM BUCHANAN, Complainer.—*M'Lennan.*
JOHN WILSON (Procurator-Fiscal for the Justices of Kinross), Respondent.—*J. Graham Stewart.*

Complaint—Relevancy—Specification—Statutory offence—Necessity for specifying sections of statute—Breach of Public-Houses Acts and certificate.—A complaint charging a statutory offence must specify the section or sections constituting the offence unless the statute is so brief as to make such specification unnecessary.

A complaint charged the holder of a hotel certificate with having sold or given out whisky on a Sunday "contrary to the Public-Houses Amendment (Scotland) Act, 1862, and the Acts 9 Geo. IV. c. 58, and 16 and 17 Vict. c. 67, therein referred to, and the said certificate." The accused having been convicted brought a suspension. *Held* that the complaint was irrelevant in respect that it did not specify the section or sections of the Acts constituting the offence charged, and therefore that the conviction fell to be quashed.

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

ON 2d June 1896 William Buchanan, hotel-keeper, Muirs, Kinross, was charged in the Justice of Peace Court at Kinross on a complaint at the instance of the Procurator-fiscal, setting forth that the accused, "who holds a certificate for the sale of excisable liquors at Kinross, did by the hands of" his daughter and his wife, "or one or other of them, both of whom were acting under his control, and for whom he is responsible, on Sunday, the 10th day of May 1896, at his licensed premises at Muirs, Kinross, occupied by him as a hotel, sell or give out to" a person named, "who was neither a lodger in his house nor a traveller requiring accommodation, one gill of whisky, contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, and the Acts 9 Geo. IV. cap. 58, and 16 and 17 Vict. cap. 67, therein referred to, and the said certificate."

Buchanan pleaded not guilty, but was convicted "of the contravention charged," and fined £1, with the alternative of fourteen days' imprisonment.

He brought a suspension, pleading, *inter alia*, that the complaint was irrelevant in respect that it did not specify the sections of the Acts upon which the complaint was based.[1]

LORD JUSTICE-CLERK.—As has frequently been observed from this Bench in cases similar to the present, there is no absolute rule,—and in this case there is no necessity for laying down an absolute rule,—that in all complaints where a statutory offence is charged a reference must be made not only to the Act of Parliament founded on but also to the particular section or sections which have been contravened. The Act of Parliament may happen to be so brief that to refer separately to one clause may be unnecessary. A glance at the statute may shew that that is the only clause which is capable of being contravened. In such a case justice to the accused may not require special mention of the section contravened. I am equally clear that no rule can be laid down by which in reference to any Act of Parliament

[1] *Authorities cited by the parties.*—Hastie v. Macdonald, Nov. 23, 1894, 22 R. (Just. Cases) 18, 1 Adam, 505; White v. Robertson, July 17, 1891, 18 R. (Just. Cases) 56, 3 White, 245; Sharp v. Leith, Oct. 24, 1892, 20 R. (Just. Cases) 12, 3 White, 352; Hamilton v. Inglis, May 22, 1879, 6 R. (Just. Cases) 45, 4 Coup. 244; Morrison v. Morrison, June 3, 1887, 14 R. (Just. Cases) 28, 1 White, 369.

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we could say that it is not necessary to specify the actual clause which the prosecutor thinks has been contravened. But if we were to hold that such mention was unnecessary in the present case it would come to this, that in no case was it necessary to mention more than the statute, for in the present case the prosecutor has seen fit to enumerate no less than three separate statutes, each of considerable length, without giving the accused any notice of which of their many sections he has contravened. We have been referred to a series of decisions in which we have held that justice to the accused required that the sections should be named as well as the statutes. Of these a typical instance is the case of *Hastie* v. *Macdonald*,[1] where we quashed the conviction on this ground.

I think this is a case which ought to follow these decisions. It is in some respects a clearer case than any of them. We have here three Acts referred to, and in no case is there reference to any particular section, and yet we are told from the bar that only one section is at all involved in the contravention alleged.

I cannot understand why, after the repeated notice given to prosecutors from this Bench, they should still insist on omitting to mention the section they found on in charging the accused,—unless, indeed, it be this, that in some cases it is very difficult for any one to say precisely which particular section or sections are in point in the case. But that is just the case in which the accused is entitled all the more to insist on having set out on the face of the complaint the precise sections he is said to have contravened.

LORD TRAYNER.—I concur.

LORD MONCREIFF.—In the circumstances I agree that this conviction must be quashed.

It is always a matter of degree whether or not a simple reference to a statute is sufficient notice to the accused of the charge brought against him. In the present case we have a reference to three statutes, and no mention of any particular section, and on inquiry it turns out that only one section of one of the three statutes is said to have been contravened, while the other two statutes are not founded on by the prosecution at all.

Such a complaint cannot be sustained.

THE COURT quashed the conviction.

JOHN VEITCH, Solicitor—JAMES HEPBURN, S.S.C.—Agents.

No. 24.

July 16, 1896.
Gachie v. Auld.

JOHN GACHIE OR M'GACHY AND ANOTHER, Complainers.—*Guy.* WILLIAM AULD (Procurator in the Justice of Peace Court, Paisley), Respondent.—*M'Clure.*

Suspension—Irregularity in procedure—Witness—Wrong person appearing as witness.—The record of the proceedings under a summary complaint set forth that Bridget Macdonald had appeared as a witness for the prosecutor. It appeared that the woman who gave evidence under the name of Bridget Macdonald was not called Bridget Macdonald; that this witness knew nothing at first hand of the facts to which she had spoken; and that she

[1] 22 R. (Just. Cases) 18.

No. 24.

July 16, 1896. Gachie v. Auld.

had given Bridget Macdonald's evidence. In a suspension the Court *quashed* the conviction, on the ground that the record set forth as a witness the name of a person who had not been examined as a witness, and had omitted the name of a person who had been examined as a witness.

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

ON 13th May 1896 John Gachie or M'Gachy, groom, Johnstone, and Daniel Inglis, warehouseman, Houston, were convicted in the Police Court at Greenock of breach of the peace.

They brought a suspension, in which they stated:—That the minute of the evidence led under the complaint bore that Bridget Rowan or Macdonald, residing at Clunebraehead, Port-Glasgow, was examined as a witness in support of the complaint; that Bridget Rowan or Macdonald was not so examined, and did not give any evidence in support of the complaint; that when Bridget Rowan or Macdonald was called as a witness to give evidence in support of the complaint, a woman named Sarah M'Graw or M'Ardle, residing in Port-Glasgow, stepped into the witness-box, and having taken the oath, gave evidence under the name of Bridget Rowan or Macdonald; that M'Ardle was a witness for the prosecution in support of another complaint which was called on the same day; that when she appeared in Court it was then seen that she was the same person who had given evidence in support of the first complaint under the name of Bridget Rowan or Macdonald; and that on being asked to explain, she stated that she had been asked to give Mrs Macdonald's evidence, and had been told what to say.

The complainers pleaded;—The warrant or sentence complained of ought to be suspended (1) in respect that it proceeded on the pretended evidence of a witness who was not examined; (2) in respect that the minute of evidence omitted the name of Sarah M'Graw or M'Ardle, who gave pretended evidence in support of the complaint; (3) in respect that it proceeded partly on the hearsay evidence of the witness M'Ardle.

The respondent, at the hearing, admitted the substantial accuracy of the facts set forth by the complainers, but stated that until Mrs M'Ardle appeared as a witness in the second case he had had no suspicion of the mistake that had been committed.

LORD TRAYNER.—I think that this conviction cannot possibly be sustained. The record is inaccurate in two respects. It sets forth that Bridget Rowan or Macdonald was examined as a witness, when as a matter of fact it is admitted that no such person was examined; and while it is alleged that Sarah M'Graw or M'Ardle was examined, there is no entry of her name in the record. These mistakes could only have arisen in circumstances which shew, not perhaps gross irregularity, but certainly negligence on the part of the prosecutor. Such negligence should not be passed over in the case of a public prosecutor who is prosecuting persons in his district for offences which may result in the curtailment of their liberty. I think it is quite possible that injustice resulted in this case, and therefore hold that the conviction must be quashed.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

THE COURT quashed the conviction.

A. C. D. VERT, S.S.C.—JAMES F. MACKAY, W.S.—Agents.

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1895–96.

WINTER SESSION.

No. 1.

ALEXANDER LOVIE, Pursuer (Reclaimer).—*D. Dundas—Glegg.*
WALTER LUMLEY AND ANOTHER (George Alexander Baird's Trustees), Defenders (Respondents).—*Sol.-Gen. Shaw—Salvesen—Lyon Mackenzie.*

Oct. 16, 1895.*
Lovie v. Baird's Trustees.

Lease—Tenant's claim for arbiter's valuation—Counter claim by landlord under the lease—Liquid and illiquid.—In an action by an outgoing tenant against his landlord for sums ascertained to be due to the pursuer under his lease by arbiters mutually chosen, the defender pleaded that he was entitled to set off against the pursuer's claim a counter claim for interest on improvement expenditure, &c. under the lease.

Held that as the pursuer's right depended on his having implemented his obligations under the lease he was not entitled to decree *de plano*, and a proof allowed.

1ST DIVISION. Lord Kincairney.

ALEXANDER LOVIE was tenant of the farm of Towie on the estate of Auchmedden, Aberdeenshire, under a nineteen years' lease, which came to an end as regards houses, grass, and fallow land, at Whitsunday 1892. He then became entitled under his lease to be paid for grass, fallow land, and farm-yard manure at the valuation of arbiters to be chosen by him and his landlord, George Alexander Baird. Arbiters were appointed, who fixed the value at £670, 17s.

On 14th March 1895 Lovie raised an action against the trustees of Mr Baird, who had died, for payment of this sum.

The defenders did not dispute the pursuer's claim, but maintained that the pursuer was due to them the sum of £1002, 1s. 3d., under the lease in respect of arrears of rent, interest on improvement money, building, &c., and that after giving effect to certain deductions claimed by the pursuer, and giving the pursuer credit for the sum sued for in the present action, the pursuer was still due to the defenders the sum of £134, 4s. 1d.

The pursuer pleaded;—(1) The defences being irrelevant should be repelled. (3) The counter claims made by the defenders not being liquid and not being ascertainable in this process, the defences, in so far as founded thereon, should be repelled. (4) The sum sued

* Decided July 5, 1895.

No. 1.

Oct. 16, 1895. Lovie v. Baird's Trustees.

for being the sum found due by arbiters appointed by the parties, decree as craved ought forthwith to be pronounced therefor.

The defenders pleaded;—(1) The pursuer being indebted to the defenders for rents and other sums due under the lease in a larger amount than the sum sued for, the defenders should be assoilzied, with expenses. (2) The defenders are entitled to set off against the sum sued for the sums due by the pursuer in respect of his tenancy of the farm under the lease founded on. (3) The pursuer not having implemented his obligations under the lease founded on, is barred from enforcing any counter obligations incumbent upon the defenders.

On 13th June 1895 the Lord Ordinary (Kincairney) allowed the parties a proof of their respective averments, and further appointed the defenders to lead in the proof.

The pursuer reclaimed, and argued;—The sum sued for having been fixed by arbitration was a liquid claim for which the pursuer was entitled to obtain instant decree. The defenders' counter claim was illiquid, and could not be set off against the pursuer's claim.[1]

Argued for the defenders;—The obligations of both parties arose out of one mutual contract. The pursuer was barred from enforcing performance of the defenders' obligations under it as long as he refused to fulfil his own part of it.[2] The defenders' claim, if not liquid, was capable of instant verification.[3]

Lord Adam.—My opinion is that the Lord Ordinary's interlocutor ought to be adhered to. This is an action brought by a tenant of the defenders in Aberdeenshire, holding under a nineteen years' lease, which came to an end, I think, in 1892. It is one of the numerous conditions of that lease that at the expiry of the lease the outgoing tenant should be paid, according to valuation by men mutually chosen, for the value of all sown grass; for the dung made upon the farm subsequent to the time of the turnip sowing in the previous year; and for the value of labour done to the break for green crop or fallow land in that year. The lease having come to an end, a valuation took place in terms of the lease, with the result that £670, 17s. was found due by the landlord to the tenant. Liability for that sum was not disputed on the part of the defender; but then he pleads in defence to that claim certain counter claims for rent alleged to be unpaid, interest on improvement expenditure, buildings, and so on, bringing out a balance of £1002 due to him after giving deductions for all the rent paid to account, and leaving a larger sum than that alleged to be due by him. The question is, whether the landlord is entitled in this action to prove that these sums are due to him. My opinion is that he is so entitled as the Lord Ordinary has found. The claims here on the one side and on the other are mutual claims arising under the obligations of the lease. The landlord is bound to pay the sum which is sued for in this action, and so equally is the tenant bound to pay his rent and to perform the other prestations according to the

[1] Munro v. M'Geoghs, Nov. 15, 1888, 16 R. 93.

[2] Turnbull v. M'Lean & Co., *et e contra*, March 5, 1874, 1 R. 730; Macbride v. Hamilton & Co., June 11, 1875, 2 R. 775.

[3] Stewart v. Campbell, Jan. 19, 1889, 16 R. 346; Sivright v. Lightbourne, June 11, 1890, 17 R. 917.

averments on record. I think the question is just whether, as the Solicitor-General puts it, one party to the contract is to be entitled to instant payment, while at the same time he is refusing to implement his own part of the contract. I think that he is not.

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Lord M'Laren.—The claims regarding which the Lord Ordinary has allowed a proof appear to be entirely claims which arise within the lease between the late Mr Baird and his tenant,—that is to say, they are all provided for in the lease. The lease as usual stipulates for rent payable at two half-yearly terms, and then the tenant is under obligation to repay the landlord for insurances and public assessments, and to pay him interest on certain expenditure which the landlord undertakes to make for the benefit of the farm. That is classed under the head of draining, building, fencing, and land improvements. Then again, the landlord under one of the usual clauses binds himself to give certain compensation to the tenant for available improvements at the end of the lease. What has taken place is that at each half year the tenant appears to have punctually paid his rent, but apparently there have been no payments made under the other conditions of the lease, probably because the rent was the thing the amount of which the tenant knew in advance, but he could not pay the other claims under the lease until the account was rendered to him.

Now, supposing that the tenant's claims had not been constituted by arbitration, it seems plain enough that the one party could not have sued for fulfilment of the pecuniary obligations without exposing himself to be met by the counter claims, not upon the ground of compensation but on the ground that all stipulations under the same contract resolved into an account in which naturally a balance is due by the one party or the other.

The question then is, does it make any difference that the tenant has obtained an award from valuators as prescribed by the lease? I think not, and for this reason, that the arbiter who was valuing the tenant's claims had no power to deal with the matter of the landlord's claims for these annual charges that he was to receive along with his rent. The landlord having no valid objection to the arbitration very properly allowed it to go on, and allowed the claims to be valued. I think that that ought not to prejudice his right to set off his claims, which are just as clearly due, and which need no constitution except the production of the vouchers, against the sums due to the tenant, which required to be ascertained by the opinion of a skilled person.

The only other observation I wish to make is, that while perhaps in point of form this is a case where a proof should be allowed, I think if I had been dealing with it I should not have fixed a diet in the meantime, but should have called upon the defenders to put in process their vouchers, because if it appears that the proper receipts are produced for the sums charged, and these sums have never been paid by the tenant, there cannot be anything left that would be a proper subject of parole evidence. It may be, of course, that if certain items were objected to, parole evidence might be necessary in regard to these. But I have always rather demurred to the idea of sending what is properly a case of accounting to proof without in some way ascertaining what are the points upon which the parties are at issue. However,

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the interlocutor has not been objected to on that ground, and I suppose if we adhere to it there is every probability that so far as these claims can be instructed by the production of vouchers parties will dispense with other evidence.

LORD KINNEAR.—I am of the same opinion. It appears to me that the tenant's claim for the sum fixed by valuation under this contract of lease is very much in the same position as the landlord's claim for the fixed rent under a contract of lease, and therefore that the question now in dispute between the parties must be determined by the principle laid down by Lord Fullerton in the case of *Graham* v. *Gordon*, June 16, 1843, 5 D. 1207, at p. 1211, which has been followed over and over again since, where his Lordship said that a claim for rent is not liquid in the same sense as a sum in a bond, because it is a payment in consideration of something to be done under a contract, and therefore if the obligations in respect of which the payment is to be made have not been performed, the demand for payment cannot be said to constitute a liquid claim. I think the tenant's position in this case is exactly the same as the position of the landlord in the case figured. He is entitled to have payment of the value of the stock in question, but that is a payment in consideration of the performance of his own obligations under the contract. If either party to a contract of this kind, having against the other a claim for a definite sum of money fixed by the contract, has not performed the obligations incumbent upon him in consideration of which that payment is made, that is a very good answer to an action such as we are now considering.

I agree with your Lordships that there is a case here which must be made the subject of inquiry, and that no decree can be given against the landlord until the pecuniary claims against the pursuer have been finally adjusted. I also agree with the hope expressed by Lord M'Laren that parties may see their way to avoid unnecessary expense in a case of this kind. But that is not a question for us, and as there is no sufficient ground to entitle us to interfere with the discretion of the Lord Ordinary, his judgment must stand.

The LORD PRESIDENT was absent.

THE COURT adhered.

MACPHERSON & MACKAY, S.S.C.—W. & F. HALDANE, W.S.—Agents.

No. 2.

Oct. 16, 1895.
Hood v. Gordon.

JAMES HOOD AND ANOTHER, Petitioners.—*Shaw—Dewar.*
JOHN EDWARD GORDON, Respondent.—*Dickson—John Wilson.*

Election Law—Process—Application for leave to amend petition against the return of member—Inner-House—Election Judges—Remit—Corrupt and Illegal Practices Prevention Act, 1883 (46 *and* 47 *Vict. c.* 51), *sec.* 40, *sub sec.* (2).—*Held* (1) that an application under sec. 40, subsec. (2), of the Corrupt and Illegal Practices Prevention Act, 1883, for leave to amend a petition against the return of a member of Parliament must be presented to one of the Divisions and not to the Election Judges; and (2) that, on the application being granted, it is not necessary for the Division to remit the petition to the Election Judges to enable the latter to exercise the power by statute conferred upon them.

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1st Division.

On 19th August 1895 James Hood and Andrew Gillanders, voters at the election of a member of Parliament for the combined counties of Elgin and Nairn, held on 16th and 23d July 1895, presented a petition against John Edward Gordon, Esq., of 61 Princes Gate, London, who had been returned Member of Parliament for the counties.

The petitioners made general averments that the respondent had by himself and his agents or by other persons, before, during, and after the election, been guilty of bribing and treating, and they prayed the Court "that it may be determined that the said John Edward Gordon was not duly elected or returned, and that his election and return were and are wholly null and void, and that the place of Member of Parliament for the said combined counties of Elgin and Nairn is now vacant; and finally, that the said John Edward Gordon may be found liable in expenses, in terms of the said Parliamentary Elections Act, 1868, and the said Corrupt and Illegal Practices Prevention Act, 1883."

On 6th September the petitioners presented a "supplementary petition," containing a number of statements to the effect generally that the respondent and his agent had contravened various provisions of the Parliamentary Elections Act, 1868, and the Corrupt and Illegal Practices Prevention Act, 1883, with regard to the returns and declarations made by them to the returning officer respecting election expenses. They referred to sec. 40, subsec. (2), of the Corrupt and Illegal Practices Prevention Act, 1883,* and prayed that "they may be permitted to amend" the original petition "by adding thereto the aforesaid statements," and then repeated the prayer of the original petition for the unseating of the respondent.

The case was called in the Single Bills.

Argued for the petitioners;—The application was competently made to the Division. An election petition fell in the first place to be dealt with by one of the Divisions,—that appeared from the *Greenock* case,[1] the first interlocutor in which was an interlocutor of the First Division—and nothing had occurred in the present case to remove the petition from the Division. But apart from that, it was expressly provided by the Corrupt and Illegal Practices Prevention Act, 1883, sec. 40 (2), and sec. 68 (4),* that an application for leave to amend should be made to one of the Divisions of the Inner-House. The application should therefore be granted, and the petition remitted to the Election Judges.

Argued for the respondent;—The application ought to have been

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* The Corrupt and Illegal Practices Prevention Act, 1883 (46 and 47 Vict. c. 51), enacts, sec. 40 (2),—"Any election petition presented within the time limited by the Parliamentary Elections Act, 1868, may for the purpose of questioning the return or the election upon an allegation of an illegal practice be amended with the leave of the High Court within the time within which a petition questioning the return upon the allegation of that illegal practice can under this section be presented."

Sec. 68 (4),—"The jurisdiction of the High Court of Justice under this Act shall, in Scotland, be exercised by one of the Divisions of the Court of Session, or by a Judge of the said Court to whom the same may be remitted by such Division, and subject to an appeal thereto, and the Court of Session shall have power to make Acts of Sederunt for the purposes of this Act."

[1] Petition Sutherland and Others, July 14, 1892, not reported. See Blair's Election Manual, 402.

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made to the Election Judges. The petition was now depending before them, and it was incompetent, or in any view highly inexpedient, for a different tribunal to interfere. The provisions of secs. 5, 10, and 11 of the Parliamentary Elections Act, 1868, as applied to Scotland by section 58 (5), clearly shewed that the Election Judges were the proper tribunal to deal with such a matter as amendment. The expression "High Court" in sec. 40 (2) of the Act of 1883 was to be read as meaning the Court before whom the petition was at the time depending. In any view, assuming that the application was competently before the Division, the application should be remitted to the Election Judges.

The case was advised at a later hour on the same day.

LORD PRESIDENT.—We are asked by the petitioners to grant leave to amend a petition originally presented by them to have the election for Elginshire declared void, and Mr Gordon unseated. Objection has been taken to that upon grounds of technicality and procedure, and this objection raises matters worthy of consideration. But I am bound to say that on this question, which is one of practice and precedent, we have not received such assistance from the bar as it turns out might have been available. We have ourselves examined the law applicable to this matter, and I find that our course is rendered tolerably clear by the Parliamentary Election Petition rules applicable to Scotland, framed by the Judges in Scotland under the Act of 1868, and by two decisions of the other Division of the Court. Shortly stated, it appears to me that the result of these enactments contained in the statute and in the rules, along with the decisions which I have referred to of the Second Division, is this: A petition under the Parliamentary Elections Act is properly presented to either Division of the Court, but what may be done after the petition is presented depends entirely on the nature of the questions which are sought to be raised. In one case, which is not reported, but in which I was counsel, and as to which I have just now verified the facts, viz., the *Wigtown Burghs* case,—the petition never was moved in the Division until the approval of the Auditor's report after the trial had taken place. My recollection of the *Dumbartonshire* case is that the same course was followed, but as to that I am not so accurately informed. But in the two reported cases which have occurred in the Second Division, the question has been carefully considered what motions are proper to the Division and what to the Election Judges, and that is so far determined by the 24th rule of the rules of 1868, which provides—"All interlocutory questions and matters, except as to the sufficiency of the security, shall be made upon application in writing to be lodged at the office of the Principal Clerk, and shall be heard and disposed of by one of the Judges,"—that was of course in the days when one and not two Judges tried these petitions,—"or in their absence by the Lord Ordinary on the Bills." In these cases, *Christie* v. *Grieve* and *Irwin* v. *Mure*,[1] the Second Division had to determine whether the question which was brought under their cognisance was an interlocutory matter. If it was, then the statutory rule made that proper to the decision, not of the Division, but of the Elec-

[1] Christie v. Grieve, Jan. 19, 1869, 7 Macph. 378, 41 Scot. Jur. 205; Irwin v. Mure, March 13, 1874, 1 R. 834.

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tion Judges; and in both these cases the Division held the subject-matter in dispute was not of an interlocutory character, because in both cases the objection taken by the respondent, which formed the subject of debate, went to the root of the petition, and if sustained would have precluded any further procedure. The Court then laid down that questions of that character and quality were proper to the Division, and not to the Election Judges. I have referred to the 24th rule, but that does not exhaust the questions which are expressly appropriated to the decision of the Election Judges as distinguished from the Division, because Election Judges have also to fix, *inter alia*, the time and place of trial. Under section 17 of the rules, it is expressly provided,—"The time and place of the trial of an election petition shall be fixed by the Judges, and notice thereof in writing shall be" given in certain ways. Accordingly, the time and place for trial, interlocutory matters, the trial itself, all are proper, not to the Division, but to the Election Judges. But in the two cases to which I have referred, *Christie* v. *Grieve* and *Irwin* v. *Mure*, the Court held, as I have already mentioned, that questions going to the root of the petition and requiring to be determined before anything else is done are proper to the Division.

Now, we have to consider how stands the present application. It was suggested by Mr Dickson that it was necessary that the petition—when I say the petition I should amplify that by saying all petitions—even under the Act of 1868—must be got out of the First Division by being transferred or remitted to the Election Judges. I take that, upon the statute, the rules, and the two decisions which I have referred to, to be a mistake. I do not think that the Division requires to remit the petition for the disposal of these matters, within the statute and the rules, even to the Election Judges. The thing works automatically. If you have a thing proper to the Division in the sense of the two Second Division cases, come to the Division. If you have a matter proper to the Election Judges under the statute and the rules, go to the Election Judges. Now, how stands the present application? It appears to me to depend not on the discrimination of the duties of the Division and Judges, as those are determined by the Act of 1868, because it is expressly presented under the Act of 1883; it is an application for leave to amend the petition. Now, the Act of 1883 says that leave must be granted, if at all, by the High Court, and the High Court, as interpreted for Scotland, means the Division. Accordingly here I think our course is quite clear. We are asked to administer the Act of 1883 on an application for leave to amend, and it is we alone who can grant such leave. Accordingly, I think we must entertain this application, but entertain it for the purpose of performing the statutory duty under the Act of 1883, of granting or refusing leave to amend.

Now, on the merits of the question, Mr Dickson, whose position I perfectly understand, made no observations; that is to say, he had no opposition to offer on the merits of the question whether the petition shall be amended unless he was right in his original suggestion that that is no business of ours, and is to fall to the Election Judges. Now, I have looked at the proposed amendments. They seem to be legitimate and proper, and I am supported in that view by the absence of observations to the contrary on the part of Mr Dickson. I think we should grant leave

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to amend the petition by inserting in it the allegations contained in the note. By a singular view of what was fitting in such an application the petitioners have gone on in this application for leave to amend the petition to pray over again that Mr Gordon be unseated. I am not disposed to take any notice of that application, because that is not matter for us. I propose to limit our action to what the Act of 1883 gives us power to do,—that is, to give leave to amend. I think we should do so by allowing the petitioners to insert this statement of facts contained in this paper, and leave it so. After that the parties require no remit of ours to go to the Election Judges to get them to exercise the powers conferred on them by the Act of 1868, the rules under that Act, and the Act of 1883.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT granted leave to amend the original petition in terms of the prayer of the supplementary petition.

JAMES FALCONER, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

No. 3.

Oct. 16, 1895. Fife v. Orr.

WILLIAM FIFE (Liquidator of W. Muir & Company, Limited), Pursuer (Respondent).—*Johnston*—*Salvesen*.
ROBERT ORR, Defender (Appellant).—*R. V. Campbell*—*Craigie*.

Reparation—*Wrongous Interdict*.—In an action of damages raised by the liquidator of a bleaching company, the pursuer stated that he had advertised a sale by auction of a large number of articles belonging to the bleachwork; that the defender, who had already bought the machinery of the bleachwork and other articles on the day before the sale, wrongfully obtained interim interdict against the sale proceeding; that of 266 articles included in the inventory prepared for the sale nine only were ultimately ascertained to belong to the defender, and that the interdict was unwarrantable *quoad* the articles belonging to the pursuer.

The defender pleaded that the action was not relevant, in respect that in the circumstances set forth by the pursuer the defender was entitled to stop the sale until his rights should be ascertained. *Held* that the action was relevant.

Observations per Lord M'Laren on the distinction between actions for wrongous interdict and for the wrongous use of diligence.

Process—*Appeal*—*Proof or Jury Trial*—*Judicature Act*, 1825 (6 *Geo. IV. c.* 120), *sec.* 40.—In an appeal for jury trial in an action of damages for wrongous interdict, the action having been held to be relevant, the Court, in respect that neither party asked for jury trial, refused the appeal and *remitted* the case to the Sheriff.

1ST DIVISION. Sheriff of Renfrew and Bute.

THIS was an action raised in the Sheriff Court of Renfrewshire at Paisley by William Fife, liquidator of William Muir & Co., Limited, sometime bleachers at Lintmill, against Robert Orr, thread manufacturer, for damages for the wrongous use of interdict.

The pursuer averred (cond. 2) that on 8th November 1894 the defender, Mr Orr, purchased Lintmill Bleachworks from the trustees of the late Henry Heys, the proprietors of the heritage and from the pursuer, the voluntary liquidator of William Muir & Co., the tenants. The said purchase included, *secundo*, the whole fixed and moveable machinery situated on the several subjects thereby sold, and particularly (but without prejudice to the said generality) the whole machinery and other effects specified in an inventory . . . In terms of the said agreement the defender's date of entry was Martinmas 1894.

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(Cond. 3) "In consequence of the said sale, it became necessary for the pursuer, who was in the tenant's right of said subjects, and owned all the plant therein, to realise the effects belonging to him as liquidator aforesaid. He caused a catalogue to be printed, of which a copy is herewith produced, specifying certain articles, the sale of which was advertised to take place at Lintmill on Wednesday, 21st November 1894. The said catalogue contained 266 lots, consisting of moveable plant, drysalteries, and dye stuffs, spring vans, weighing machines, tools, and other articles." (Cond. 4) "On or about Tuesday, 20th November 1894, the day preceding the proposed sale, the pursuer, and also the said James Laird & Son, auctioneers, were served with interdicts by the Sheriff of Renfrew and Bute, at Paisley, obtained at the instance of the defender, against them. By the terms of the interdict the pursuer and the said auctioneers were interdicted, to the effect therein mentioned, until Tuesday, 27th November, at twelve noon, when a diet for further consideration was appointed." (Cond. 5) "The effect of the said interdict, granted as aforesaid, was to interdict the present pursuer and Messrs Laird & Son from selling, by public roup or otherwise any and all of the articles enumerated in the said catalogue, the sale of which was advertised, as aforesaid, for Wednesday, 21st November." (Cond. 7) That on 23d November the interim interdict was recalled, except in regard to 130 articles. (Cond. 8) That the pursuer having to remove from the premises on 28th November, he was obliged to have a sale on 27th November of the articles as to which interdict had been recalled; that the question as to the other articles fell to be determined by an arbiter, and that the arbiter found that of these nine belonged to the defender. (Cond. 12) "The interdict obtained by the defender, in the circumstances before mentioned, was illegal and unwarrantable, in so far as it related to articles belonging to the pursuer, in which the defender had no right or interest."

He further made specific averments of damage resulting to him from the stoppage of the sale, and pleaded;—The defender having by his illegal and wrongous use of the process of interdict occasioned loss and damage to the pursuer, is liable in reparation therefor.

The defender pleaded;—(1) The defender having acted reasonably and justifiably for the protection of his interests, he is entitled to be assoilzied, with expenses. (2) The interim interdict applied for being the only effective and competent application to make to the Court for the protection of the defender's interests . . . and the defender having acted fairly and reasonably throughout, he is entitled to be assoilzied, with expenses. (4) The remedy of interdict having been held to be competent and proper, the defender is entitled to be assoilzied, with expenses. (6) The action is incompetent and irrelevant.

On 25th June 1895 the Sheriff-substitute allowed a proof. The defender appealed for jury trial.

The defender argued;—The averments of the pursuer were irrelevant. It was not suggested that the defender had acted *in mala fide*. He was entitled to have the *status quo* preserved until the questions at issue were determined, and the only method open to him of securing this was to apply for interim interdict. It was not a universal rule that anyone who applied for interdict was liable in damages if the interdict was afterwards set aside.[1] It was always a question of cir-

[1] Moir v. Hunter, Nov. 16, 1832, 11 S. 32.

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cumstances.[1] The action of the defender here was perfectly fair and reasonable, for some of the articles exposed for sale belonged to him, and it clearly appeared from his statements in the interdict process that he did not wish the interdict to apply to the whole catalogue.

Argued for the pursuer;—The case was ruled by that of *Kennedy* v. *Police Commissioners of Fort-William*.[2] The prayer of the interdict was quite general and could have no other effect than that of stopping the whole sale. It was enough to make the interdict wrongous that many of the articles claimed by the defender turned out not to belong to him at all. In *Moir* v. *Hunter*[3] the person applying for interdict was in possession; here on the other hand the person interdicted was in possession. It was only in cases of wrongous use of diligence that malice and want of probable cause must be averred to found a claim for damages; cases of wrongous interdict were clearly distinguishable.[4] Interdict was always obtained *periculo petentis*.

Lord President.—In my opinion the pursuer's action is relevantly laid. He alleges that a sale of certain articles, which he had exposed for roup, was interdicted at the instance of the defender, and he claims damages because the ground on which the sale was postponed was unfounded in fact, certain articles claimed by the defender as belonging to him having turned out not to belong to him at all, but to belong to the pursuer, who was exposing them to sale. He says also that damage resulted. I think that a case so stated is one to be tried upon the legal footing set out in the issue settled by Lord Rutherfurd Clark in the case which was cited in debate (*Kennedy* v. *Police Commissioners of Fort-William*[2]).

But neither party in the present instance asked for jury trial, although the appeal is taken under the 40th section of the Judicature Act, and I desire to note the absence of any claim for jury trial on either side, because that leaves it to the Court to consider whether any reason has been relevantly stated for bringing this action into the Court of Session, not for trial by jury but for trial by proof. I have not heard anything which marks out this case as one in which there should be any departure from the ordinary routine of an action in the Sheriff Court.

I have not entered with any elaboration into the questions of law which have been argued at the bar. It seems to be perfectly clear that the contention of Mr Campbell that liability for damages is to be determined by the fairness and reasonableness of the person who applies for interdict is not borne out by the authorities. If any person asks interdict on statements of fact made by him to the Judge he does so at his own peril, and the mere circumstance that he may have been misled, or sanguine, will not justify him in a question with the person whom he has injured. The argument, in fact, on the side of Mr Campbell's client, proceeded upon a disregard of the plain distinction drawn between a case of interdict and a case

[1] Glasgow, &c. Railway Co. v. Glasgow Coal Exchange Co., July 14, 1885, 12 R. 1287, Lord Mure, p. 1293.

[2] Dec. 12, 1877, 5 R. 302.

[3] Moir v. Hunter, Nov. 16, 1832, 11 S. 32.

[4] Wolthekker v. Northern Agricultural Co., Dec. 20, 1862, 1 Macph. 211, 35 Scot. Jur. 156; Robinson v. North British Railway Co., March 10, 1864, 2 Macph. 841, 36 Scot. Jur. 420.

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of diligence, and that being a matter settled by decision I think that the case does not present any legal difficulty.

LORD ADAM.—I concur.

LORD M'LAREN.—The ground of action averred by the pursuer is that he has suffered damage by reason of the defender having wrongously obtained interim interdict, with the result of interfering with the sale of his goods.

Prima facie, such an averment constitutes a relevant case for damages. There is a very well-settled distinction between rights of action for wrongous use of interdict and for wrongous use of personal diligence. It is unnecessary to enter into the grounds of this distinction further than to say that interdict is an extraordinary remedy almost always productive of great inconvenience, and therefore our law does not allow a party to get interim interdict as a matter of course, but only on sufficient representations made to the Judge, on which alone in the case of interim interdict the Judge acts. Where interdict is improperly obtained, no distinction can be taken between the cases when it is based on positive false statements, and when it is obtained by the suppression or non-disclosure of facts which are necessary to enable the Judge to determine the question of the expediency of granting interim interdict. Here, according to the averments of the pursuer, the Judge was misled, with the result that he granted interdict against the sale of the aggregate of all the articles constituting the stock of a trader, when, if the facts had been properly set before him, he would have limited the application of the interdict to certain articles which were the complainer's property. It is true that there are expressions in the condescendence annexed to the petition for interdict which indicate that the applicant was not entitled in whole to the remedy he asked, all the goods not being his property, but this was not brought forward by him in such a prominent way as to attract the attention of the Sheriff, and in particular, the complainer did not directly inform the Sheriff that he did not desire interdict to the full extent. According, therefore, to the pursuer's averments the defender obtained an interdict to which in fact, as it now appears, he was not entitled. I agree that these averments constitute a case for damages, such as is proper to be disposed of by the Sheriff.

LORD KINNEAR.—I concur.

THE COURT refused the appeal, and remitted to the Sheriff.

F. J. MARTIN, W.S.—MILLER & MURRAY, S.S.C.—Agents.

No. 4.

Oct. 18, 1895.
Rooney v. Cormack.

MRS MARY RAE OR ROONEY (with consent of her Husband) AND ANOTHER, Pursuers.—*Jameson—Salvesen.*
JOHN FORD CORMACK, Defender.—*W. Campbell.*
JAMES MACKIE'S CURATOR AD LITEM, Defender.—*Hunter.*

Expenses—Separate defences—Liability of defenders inter se—Trust.—A law-agent was appointed sole trustee, and was left a legacy under the will of a client, which the law-agent had himself prepared. An action for the reduction of the will was brought against (first) the law-agent, and (second) the residuary legatee, who was a pupil, and to whom a curator ad litem was appointed, on the ground that the first defender had by fraud or circumven-

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tion impetrated the will from the testator, who was weak and facile. Separate defences were lodged. The jury returned a verdict for both the defenders.

In dealing with expenses the Court found the pursuer liable to the first defender as trustee, and found the latter personally liable to the second defender, the curator ad litem, on the ground that his action in taking benefit under the will which he had himself prepared had so prejudiced the case that, but for the separate defence, the jury might have disregarded the pupil's interest, and returned a verdict for the pursuer.

1st Division.

(Previous report, June 22, 1895, 22 R. p. 761.)

On 17th February 1894, James Rae, Esquire, of Newton and Kirkpatrick, Dumfriesshire, died unmarried, leaving a trust-disposition and settlement dated 27th January 1894. By this deed he, *inter alia*, left an annuity of £200 to his sister and sole next of kin Mrs Mary Rae or Rooney, and £500 to John Ford Cormack, his solicitor and sole trustee who had prepared the deed, and he directed the latter to hold the residue of his estate (which amounted to about £25,000) for behoof of James Mackie, a natural son of the truster, until he attained twenty-five, and then convey it to him.

On 20th February 1895, Mrs Rooney and Janet Rae (the truster's niece and heir-at-law) raised an action of reduction of the settlement against Cormack and James Mackie (to whom a curator ad litem was subsequently appointed).

The defenders lodged separate defences, and were represented by different counsel and agents.

The trial took place on the following issues:—"(1) Whether the pretended trust-disposition and settlement dated 27th January 1894, No. 9 of process, is not the deed of the late James Rae? (2) Whether on or about 27th January 1894 the late James Rae was weak and facile in mind and easily imposed upon; and whether the defender John Ford Cormack, taking advantage of his said weakness and facility, did by fraud or circumvention impetrate from him the said trust-disposition and settlement to his own benefit, and to the lesion of the said James Rae?"

The jury returned a verdict for the defenders.

Thereafter the defenders moved the Court to apply the verdict, and to find the pursuers liable in the expenses of both the defenders, the curator ad litem of the defender Mackie moving the Court alternatively to find the defender Cormack liable in the pupil defender's expenses.

Lord President.—The jury have found for the defenders on both the issues, the first being—in the usual form—whether the deed in question was not the deed of Mr Rae, and the second being whether Mr Rae was weak and facile, and whether the defender Cormack, taking advantage of his weakness and facility, did, by fraud and circumvention, impetrate the deed from him. The pursuers accordingly have been found to be in the wrong, the jury having held that the deed was the will of the testator, and that it was honestly executed. The Court must therefore follow the ordinary rule, and find the pursuers liable in expenses. But I do not think that they ought to be found liable in two sets of expenses, because in ordinary circumstances there would have been only a single defence, the trustee conducting it. But here, in the interests of the boy, it was in every way right that he should be separately represented, because the trustee, by his proceedings in

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connection with this will, had so prejudiced the case that the jury might have been apt, but for the separate representation of the boy, to disregard his interest, and, identifying the will with the trustee, to condemn both. The expense so occasioned was brought about by the action of Mr Cormack, and it appears to me that the proper solution of the question is that the pursuers should be found liable in the expenses of the trustee but not in the expenses of the boy, and that on the motion of the boy's curator ad litem we should find Mr Cormack liable in the expenses of the boy's separate defence.

LORD M'LAREN.—I think that the Court has jurisdiction over the whole subject of expenses in any action before it. It is not necessary to have any conclusion for expenses on the part of a defender as against the pursuer, and I see nothing to prevent our granting an award of expenses to one defender against another where they stand in such a relation as to make it just that such an award should be given.

I agree that the course proposed by your Lordship is reasonable and just.

LORD ADAM and LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"Apply the verdict of the jury, and in respect thereof assoilzie the defenders from the conclusions of the action, and decern: Find the pursuers liable in expenses to the defender John Ford Cormack as trustee, and remit the account thereof to the Auditor to tax and to report; and on the motion of Alexander Wylie, curator ad litem to the residuary legatee, James Mackie, find the said John Ford Cormack liable personally in expenses to the said curator ad litem," &c.

FRASER, STODART, & BALLINGALL, W.S.—J. & J. GALLETLY, S.S.C.—ALEXANDER WYLIE, S.S.C.—Agents.

No. 5.

Oct. 18, 1895. Wilson & Sons v. Mackay's Trustees.

CHARLES WILSON & SONS AND OTHERS, Petitioners (Respondents).—*Shaw—Graham Stewart.*

WILLIAM MACKAY'S TRUSTEES AND ANOTHER, Respondents (Appellants).—*W. Campbell—Gunn.*

Burgh—Dean of Guild—Process—Form of warrant when buildings erected before warrant granted.—Held that a warrant by a Dean of Guild granting leave to erect a building which had in fact been erected before the warrant was applied for, though inaccurate and inappropriate, was not invalid.

Observations per Lord Adam and Lord M'Laren as to the form which a warrant in such circumstances should take.

Burgh—Dean of Guild—Heritable right—Competing titles—Onus.—The owner of premises within a burgh having applied to the Dean of Guild for warrant to erect a flue inside the subjects belonging to him—the title to which he produced—an adjoining proprietor objected that the proposed operation would encroach on his property. The Dean of Guild, considering that the answers raised a question of heritable right which was outwith his jurisdiction, sisted process for twenty-one days to enable the respondent to bring an action for its determination in a competent Court. The respondent not having done so, the Dean of Guild granted the warrant prayed for.

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1st Division. Dean of Guild Court, Edinburgh.

The respondent appealed on the ground that the *onus* should have been laid upon the petitioner of proving his right. *Held* that the petitioner having produced a title to the subjects occupied by him, which was *ex facie* good, the *onus* had been properly laid upon the appellant of disproving it.

Charles Wilson & Sons, butchers, 19 South Castle Street, Edinburgh, erected a flue in the back tenement of the premises occupied by them as tenants under Beattie's trustees, who were the owners of the subjects. The flue was intended to serve a furnace used by them in connection with the sausage making department of their business. They obtained no warrant from the Dean of Guild authorising the construction of the flue, and after intimation had been made to them that they should have, in the first instance, obtained a warrant, they were fined for neglecting to do so. Thereafter Messrs Wilson & Sons, with the consent of the proprietors, presented a petition to the Dean of Guild craving a warrant "to erect a flue entirely inside the property occupied by them at the back of 19 South Castle Street . . . the said flue to be made of brick, all as shewn on two plans herewith produced."

The flue referred to in the prayer of the petition was the one which had already been erected.

Answers were lodged by William Mackay's trustees and Hugh Douglas.

The respondents averred that the works in question were executed on the back wall of certain premises in Rose Street which belonged to them, and which adjoined the back tenement occupied by the petitioners, that the chimneys of the respondents' property were carried up this back wall, and that the petitioners had, in order to form a flue for their furnace, connected the furnace with one of the respondents' chimneys by, *inter alia*, slapping out the wall. They further averred that the use of this chimney for the purposes of a furnace, boiler, and engine flue, was a source of damage and nuisance to the respondents, and was an infringement upon the respondents' rights of property.

The titles produced by the petitioners shewed that the wall in question was either their exclusive property or was at least a mutual gable.

On 28th February 1895 the Dean of Guild found that the averments of the respondents raised questions which were not within the jurisdiction of the Dean of Guild Court, and sisted process for twenty-one days to admit of the respondents, if so advised, raising an action for the determination of these questions in a competent Court.

The respondents did not raise any action.

On 20th June 1895 the Dean of Guild recalled the sist of 28th February 1895, and granted warrant to the petitioners in terms of the prayer of the petition and of the plans therewith produced.

The respondents appealed, and argued;—The course followed by the petitioners in not going to the Dean of Guild until after the flue was erected was prejudicial to the appellants, and it was incompetent for the Dean of Guild to grant a warrant for the performance of an operation which had been already executed. The whole proceedings having been irregular, they should be set aside. In any view the Dean of Guild was wrong in laying the *onus* upon the appellants. The petitioners [were] seeking to invert possession, and the *onus* therefore was upon them.

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Argued for the petitioners;—The warrant was in the form usual in such a case, but even if it were irregular, that was a purely technical objection, and the point had not been insisted in in the inferior Court. It was too late now, and in any view it would serve no purpose to have the warrant rewritten. The petitioners had produced an *ex facie* title to the subjects, and it was for the respondents to shew that they were going beyond their right.

LORD M'LAREN.—This is an appeal from an interlocutor of the Dean of Guild granting warrant to make certain structural alterations in the premises of the present respondents. It would appear from the proceedings that these alterations had in fact been made a considerable time before the warrant of the Dean of Guild was applied for, but that he, in the exercise of a very ancient jurisdiction, and on the application of his fiscal, fined the owners of the premises (the respondents) for not having obtained a warrant before proceeding with their alterations, and interdicted them from going on. To purge themselves of the contempt of which they had been found guilty the respondents presented their application, which, I think, should have craved approval of the operations as executed, but which was put in the form of a petition for the approval of works to be executed. Answers were put in, and the warrant appealed against is in the ordinary form, granting authority to execute the alterations.

Your Lordships will, I think, agree with me that this is not an accurate form of warrant in such circumstances, and that it would have been better if the interlocutor, instead of taking the form of a warrant to erect, had narrated that after examination the Dean of Guild approved of what had been done, using any appropriate language to distinguish between approbation of what had been done and the ordinary case of approval of something proposed to be done. I cannot think, however, that the omission to notice this distinction should invalidate the warrant. At most, the effect of such criticism would be to have the case remitted to the Dean of Guild to pronounce an interlocutor more accurate in point of form. But this would not be desirable, as the case has been defended, and is brought here in order that we may dismiss the application and give effect to the appellant's plea of right. That is a course which I think it is impossible for us to follow in view of the procedure which followed in the Dean of Guild Court. When it was seen there that the defenders' objections involved questions of property, which were not appropriate to the jurisdiction of that Court, the Dean of Guild sisted process in order that an action might be raised by the defenders before a competent Court for the determination of the question. The defenders did not avail themselves of that sist; they took no proceedings, but asked for a judgment on the case as it stood. Accordingly, judgment was given for the petitioners approving of the work as executed. It has been said that the *onus* lay upon the latter to clear their title by instituting an action for that purpose, but no authority for this proposition has been cited, and according to my experience it is contrary to the usual practice. To support an application to the Dean of Guild a petitioner must produce a title to property which is *prima facie* good, but if there is opposition by anyone who says that the subjects are not included in the petitioner's title, or that he has a right of servitude, then, unless the question be one within

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the jurisdiction of the Dean of Guild, it is his duty to sist the case, in order to have the question determined in this Court. In such circumstances it is according to all precedent for the defender to raise the action. Now, the petitioners produced a *prima facie* title, and in the absence of any attempt of the defenders to disprove it by an action, the Dean of Guild had no alternative but to act upon it and grant a warrant.

I think that no sufficient ground has been stated for our displacing this warrant, and accordingly I am for dismissing the appeal.

LORD ADAM.—I agree, and while I think that the form of the warrant is not a happy one, and that it would have been better if it had been expressed as approving of works already executed, instead of sanctioning their erection, it does not appear to me that the appellants have been in any way prejudiced by this incorrectness of form. Had the petition craved approval of works already executed, the appellants' objections to it would have been the same, viz., that the property was theirs, and that a nuisance was caused by the petitioners, and the Dean of Guild would have acted just as he has done,—that is to say, he would have sisted the case, to allow the objectors to make out their case by raising an action. The only difference would have been that in the event of their not doing so he would have pronounced an interlocutor approving of the works executed instead of a warrant to erect, but the appellants would have been in precisely the same position as they are now. Accordingly, their real objection is not to the form of the petition, but to having, as they say, the *onus* of raising an action thrown upon them. I agree that the Dean of Guild was quite right in what he did. There may be cases in which the *onus* should be on the petitioner, as for example, where the subjects are *ex facie* the objector's property, and are not included in the petitioner's titles; but that is not the case here, and nothing has been said to shew that this should have been done.

The result of the action would of course be the same, on whichever party this *onus* lay, so that the question is comparatively unimportant. On the whole matter I agree that the appeal should be dismissed.

The LORD PRESIDENT and LORD KINNEAR concurred.

THE COURT dismissed the appeal.

CURROR, COWPER, & CURROR, W.S.—JOHN MACKAY, S.S.C.—Agents.

No. 6.
Oct. 19, 1895.
Alston v. Alston.

JOHN STIRLING ALSTON AND OTHERS, Petitioners (Respondents).—*Clyde.*

MRS A. A. M. ALSTON, Respondent (Reclaimer).—*Cook.*

Curator Bonis—Insanity—Opposition of alleged incapax—Necessity for inquiry.—A petition was presented, along with two certificates by medical men, for the appointment of a curator bonis to a person, on the ground that he was of unsound mind. The alleged *incapax* lodged answers, in which he denied that he was insane. He further averred that he was a domiciled Englishman, and not subject to the jurisdiction of the Scots Courts. The Lord Ordinary (Low) granted the petition without inquiry. On a reclaiming note, *held* that, having regard to the statements in the answers, the petition should not have been granted without inquiry as to the question of domicile and as to the respondent's insanity.

No. 6.

Oct. 19, 1895.
Alston v. Alston.

Bill-Chamber.
1ST DIVISION.
Lord Low.

ON 4th July 1895 a petition was presented by John Stirling Alston, residing in Ayr, and others, for the appointment of a curator bonis to Harry Ritchie Alston.

The petitioners stated that Mr Alston was an inmate of a private asylum kept by Dr Chambers at the Priory, Roehampton, near London, and that he was "of unsound mind, and incapable of managing his own affairs, or for giving direction for the management thereof," and they produced two medical certificates to that effect. They further stated that Mr Alston was a native of Lanarkshire, and a domiciled Scotsman.

Answers were lodged for Mr Alston and his wife, who stated that Mr Alston had for a short time been, and still was, "resident at the Priory, Roehampton." They averred,—"The respondent, Harry Ritchie Alston, is not a domiciled Scotsman, or subject to the jurisdiction of the Scotch Courts. He is and has for some time been a domiciled Englishman. . . . The said respondent is not of unsound mind, or incapable of managing his affairs, or giving directions for their management."

No medical certificates were produced with the answers.

On 20th July 1895 the Lord Ordinary (Low), "having considered the petition and answers and heard counsel," appointed a curator bonis to Mr Alston.

The respondents reclaimed, but before the hearing Mr Alston died, and parties agreed that the appointment of the curator must be recalled.

On the question of expenses the respondent Mrs Alston argued;—The Lord Ordinary was wrong in appointing a curator bonis without inquiry of some sort into the state of the respondent's mind. His Lordship had acted as he did because the respondents did not support their answers with medical certificates. But in circumstances like the present an inquiry was always ordered.[1] Moreover, the respondents had averred that Mr Alston was a domiciled Englishman. If he was, then the jurisdiction of the Scots Courts was excluded, for it was not averred that there was any moveable estate in Scotland which required protection. The petitioners had recognised this, for they had made a similar application in England. The respondent was entitled therefore to expenses, or at least to the expenses of the reclaiming note.

Argued for the petitioners;—The respondent Mr Alston was admittedly resident in an asylum when the petition was presented, and the petitioners had produced two medical certificates that he was incapable of managing his affairs. In these circumstances, mere statements in denial were not sufficient, and the respondents had not even produced medical certificates. The Lord Ordinary was right therefore.[2]

LORD PRESIDENT.—All parties are agreed that the appointment of curator must be recalled, Mr Alston having died, but the first question is, Can the Lord Ordinary's judgment be maintained? In a word, I think he went too fast, because the answers contain a distinct and articulate denial of the essential allegation of insanity. There is also a question of domicile. Accordingly, the Lord Ordinary was not in a position to disregard the answers as he did. Mr Cook's clients therefore were justified in presenting

[1] A B v. C D, Nov. 8, 1890, 18 R. (H. L.) 90; Yule v. Yule, Nov. 29, 1881, 19 S. L. R. 140; Taylor v. Macfarlane, Nov. 12, 1847, 10 D. 38; 19 Scot. Jur. 105.

[2] A B v. C D, 18 R. (H. L.) 90.

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a reclaiming note, and accordingly Mrs Alston is entitled to expenses from the date of the interlocutor reclaimed against.

Then, as regards the period anterior to that, we have really no means of coming to a conclusion; we have no material for deciding who was right and who was wrong, and the parties do not propose a proof. We shall therefore find no expenses due to or by any of the parties prior to the date of the interlocutor reclaimed against.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT recalled the interlocutor reclaimed against, dismissed the petition, and found the respondent Mrs Alston entitled to expenses since the date of the Lord Ordinary's interlocutor, and *quoad ultra* found no expenses due to or by any of the parties.

WEBSTER, WILL, & RITCHIE, S.S.C.—A. P. PURVES & AITKEN, W.S.—Agents.

No. 7.
Oct. 22, 1895.
John Wilson & Son, Limited, v. Inland Revenue.

JOHN WILSON & SON, LIMITED, Appellants.—*Balfour—Shaw—Cook.*
COMMISSIONERS OF INLAND REVENUE, Respondents.—*Lord-Adv. Sir Charles Pearson—A. J. Young.*

Stamp—Conveyance on sale—Transfer of assets of private partnership to public company—Identity of partners and shareholders—Consideration—Company—Stamp Act, 1891 (54 *and* 55 *Vict. c.* 39), *secs.* 54 *and* 55—*First Schedule.*—Where a private partnership conveyed its whole assets to a joint stock company limited by shares, consisting exclusively of the same partners, in consideration of each partner getting shares in the new company equal in value to his holding in the old partnership, *held* that the conveyance was a conveyance on sale within the meaning of the Stamp Act, 1891, and that the disposition was chargeable with *ad valorem* stamp-duty on the value of the stock transferred.

John Foster & Sons v. *Commissioners of Inland Revenue*, L. R. [1894], 1 Q. B. 516, *approved.*

1ST DIVISION.

THIS was an appeal on a case stated by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 and 55 Vict. c. 39), at the request of John Wilson & Son, Limited, with respect to the stamp-duty chargeable on an instrument executed in connection with the conversion of the private firm of John Wilson & Son into a limited company.

The case set forth the following facts :*—

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* The following clauses, *inter alia*, of the Stamp Act, 1891 (54 and 55 Vict. c. 39), were referred to :—By the first schedule there are charged the following stamp-duties, viz. :—

"Conveyance or transfer on sale of any property (except such stock as aforesaid) where the amount or value of the consideration for the sale does not exceed £5, ... £0 0 6

. . . . . .

"For every £50, and also for any fractional part of £50 of such amount or value, ... 0 5 0

"And see sections 54, 55, 56, 57, 58, 59, 60, and 61.

. . . . . .

"Conveyance or transfer of any kind not hereinbefore described, ... 0 10 0

"And see section 62.

"Deed of any kind whatsoever not described in this schedule, 0 10 0"

Section 54 of the Act is as follows :—"For the purposes of this Act the

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By deed of assumption dated 25th, 26th, and 27th December 1894, which proceeded on the narrative that John Wilson and Matthew G. Wilson, his son, had carried on business in partnership for a number of years as malleable iron tube manufacturers and as brassfounders under the name of John Wilson & Son, and that the whole capital of the firm, amounting to £100,000, belonged to John Wilson, the other members of Mr Wilson's family and two gentlemen in the employment of the firm were assumed as partners—making eight partners in all. To these eight persons Mr Wilson, with consent of himself and his son Matthew, as trustees vested in the whole assets of the firm, donated, assigned, and conveyed the capital of the firm in various amounts.

By a subsequent "minute of agreement among John Wilson & Son and partners thereof," dated 28th, 29th, and 31st December 1894, it was agreed,—First, "That the said whole parties have resolved and now resolve to convert the company into a company limited by shares to be registered under the Companies Acts, 1862 to 1890, the capital of the company after registration being the same as at present, *videlicet*, £100,000 sterling, but divided into shares of £10 sterling each. . . . ."

Second, "That the share and interest which each of the partners has at present in the company shall remain the same after registration, only it shall then be expressed in shares instead of in pounds sterling, and accordingly the company after registration shall forthwith allot its shares as follows: . . . And the said several parties agree and engage to accept of such shares in full satisfaction to them respectively of their present shares and interests in the capital of the company and whole assets thereof."

Third, "That the parties agree and engage that at or prior to the issue of the shares mentioned in the preceding article, the company, as constituted after registration, shall formally assent to this minute of agreement, and procure this minute and such assent filed in the office of the Registrar of Joint Stock Companies in Edinburgh, in terms of section 25 of the Companies Act, 1867. . . ."

This deed was impressed with a stamp-duty of 10s. It was filed in the office of the Registrar of Joint Stock Companies at Edinburgh on 3d January 1895.

Thereafter, John Wilson and Matthew G. Wilson, as trustees for behoof of the company of John Wilson & Son, granted the following

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expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

Section 55, subsection (1), is as follows:—"Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security."

Section 57 is as follows:—"Where any property is conveyed to any person in consideration, wholly or in any part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

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disposition (dated 2d and 5th February 1895):—"Considering that by minute of agreement dated the 28th, 29th, and 31st days of December 1894, . . . the said partners agreed to convert the said company of John Wilson & Son into a company limited by shares, to be incorporated under the Companies Act, 1862 to 1890, upon the terms contained in the said minute, that the company was incorporated upon the said 3d day of January 1895 under the name of John Wilson & Son, Limited, and that after the said incorporation the company, by minute of assent, of date the 30th, formally assented to the foresaid minute of agreement, and procured the said minute of assent to be filed in the office of the foresaid registrar, of date the 31st, both days of January 1895: And further considering that the heritable subjects and others hereinafter described and disponed which form part of the assets of the said company of John Wilson & Son were acquired by the said company of John Wilson & Son, when we, the said John Wilson and Matthew Gemmell Wilson were the only partners therein, the titles being taken in favour of us, the said John Wilson and Matthew Gemmell Wilson, as trustees for behoof of the said company and partners thereof, present and future, according to their respective rights and interests therein, and that we as such trustees still stand heritably vested in said subjects and others: And further considering that in consequence of the said company being now incorporated as aforesaid, and therefore able to hold and be heritably vest in the said subjects and others directly without the intervention of us as trustees, it is right and proper that we should grant the disposition under written in order to divest ourselves of the said subjects and others, and devolve the same and all other assets in favour of the said company: Therefore we, the said John Wilson and Matthew Gemmell Wilson as trustees heritably vest as aforesaid, at the request and with the special advice and consent of the said company of John Wilson & Sons," and individual partners, "and we, the said whole consenters, for our own several and respective rights and interests, and we, the whole parties hereto, of joint consent and assent, do hereby assign and dispone to and in favour of the said John Wilson & Son, Limited, incorporated as aforesaid, and to the assignees of the said John Wilson & Son, Limited, heritably and irredeemably"—In the first, second, third, fourth, and fifth places, certain heritable properties, including the whole business premises of John Wilson & Son, with the buildings and machinery thereon: "And in the sixth place, All and Sundry the whole moveable estate, property, and effects of and relating to the foresaid company of John Wilson & Son, and businesses carried on thereby in Glasgow, including all book debts and goodwill, as also the whole moveable machinery on or connected with the several heritable subjects hereinbefore disponed, dispensing with the generality of this conveyance, and declaring the same to be as good, valid, and effectual as though every particular of the said whole moveable estate, property, and effects, machinery and others had been herein particularly set forth, with entry as at the first date hereof: And we, the said John Wilson and Matthew Gemmell Wilson, as trustees foresaid, with consent foresaid, assign the writs, and have delivered the same so far as in our possession; and we, with consent foresaid, assign to our said disponees all right competent to us as trustees foresaid, or to us the consenters, or any of us, to demand delivery or exhibition of the undelivered writs. . . ."

The Commissioners of Inland Revenue were of opinion that the

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instrument was chargeable with *ad valorem* duty as a conveyance on sale, and that the sum to be deemed the consideration, in respect of which it was so chargeable, was the sum of £100,000, being the cumulo amount or value of the stock or shares of John Wilson & Son agreed to be allotted to the whole partners of John Wilson & Son in terms of the said minute of agreement.

The Commissioners accordingly assessed the *ad valorem* conveyance on sale duty of £500 upon the instrument in respect of this sum of £100,000. John Wilson & Son, Limited, however, declared themselves dissatisfied with the determination of the said Commissioners, on the ground that the acts and procedure of John Wilson & Son, in assuming the new partners into the company of John Wilson & Son, and after the assumption agreeing to convert the company into a company limited by shares, and thereafter carrying the agreement into effect, did not constitute a sale either in substance or form, and that the disposition was not liable to an *ad valorem* duty, but was originally sufficiently stamped with the duty of 10s.

At their request the Commissioners stated the present case, the question for the opinion of the Court being—"Whether the said instrument, in the circumstances above set forth, is liable to be assessed or charged with the said *ad valorem* conveyance on sale duty in respect of the sum of £100,000, or with the duty of 10s. only?"

Argued for the appellants;—It was not enough that stock or shares were given for the conveyance to make it a conveyance on sale under section 55 (1). There must be a sale. Here neither was the form of the deed appropriate to a sale, nor was the transaction in substance a sale. It was a case of divestiture by trustees in order to complete an arrangement already executed by the parties who had the beneficial right to the assets. Had there been no heritable property, then no deed would have been required. Mere delivery would have been sufficient. Sale implied a price. There was none here. It also implied a buyer and a seller. Here the partners of the old firm and the shareholders of the new company were the same. There was complete identity of persons and interests. But the same person could not be both buyer and seller. The case of *Foster*,[1] even if it were identical with the present, was not binding on this Court, and ought not to be followed. But it was different in its circumstances, and was distinguishable. Great weight was attached by the Judges there to the form of the transaction, for the deed by which it was carried through was appropriate only to a sale. The parties truly interested were on the face of the deed divested of their property, and received shares therefor from the company. There was no similarity between such a deed and the conveyance here. In this case the partners had already been vested in the shares of the company.[2] The transaction here was more akin in legal effect to a partition than a sale.[3]

Argued for the respondents;—The present case could not be distinguished from *Foster*.[1] The substance of the transaction in each case was the conversion of a private firm into a public company. There

[1] John Foster & Sons v. Commissioners of Inland Revenue, L. R. [1894], 1 Q. B. 516.

[2] Anderson v. Commissioners of Inland Revenue, Oct. 19, 1878, 6 R. 56.

[3] Macleod v. Commissioners of Inland Revenue, June 3, 1885, 12 R. 1045.

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was here as there a transfer of the partnership assets to the new company, the consideration being shares. It was immaterial that the parties conveying the assets were the trustees of the old firm. That was an accident of title. The true interest in and right to the assets were in the partners, and the trustees were merely their hand. The Scots cases cited by the appellants had no bearing on the present, being entirely different in their circumstances.

At advising,—

LORD PRESIDENT.—I think the determination of the Commissioners is right. It seems to me that the counsel for the parties are right in what they have made common ground, namely, that the earlier and initial transaction which is set out in this case does not materially affect the merits of the legal question which we have to determine. It appears that Mr Wilson was minded to distribute his interest in this business among the several members of his family, and he accordingly, by deed, donated to them certain portions of the partnership assets. But that is rather historically than argumentatively the beginning of this question, because we find that in the very end of 1894 this donation had been carried into effect, and there was constituted a private partnership consisting of Mr Wilson, several members of his family, and two gentlemen who had been connected with him in business; and these were then, by Mr Wilson's gift, beneficially vested in the assets which ultimately are the subject of conveyance. So stood matters for about a month, there existing this private partnership consisting of these eight persons. It is true that the heritable property was not formally vested in the partners, but stood in the names of Mr John Wilson and Mr Matthew Wilson, his son, but this was for a purely technical reason, and not the less were those eight persons beneficially interested in all the property which they proceed to deal with, and the trustees, it is needless to say, had but one duty, and that was to keep the property for them, or to hand it over to their assignees. Now, they determined to constitute a limited liability company, of which they should be, I think it is safe to say, in the meantime, the whole members; and they put this in form by executing the minute of agreement, the substance of which is on pages 8 and 9 of this case. That agreement sets forth that they resolved to constitute a company. The company was constituted, and once that was done the deed in question was executed. Now, the deed in question is in substance a conveyance by the private company to the limited liability company. It is true that, formally, the leading parties to the deed are the trustees who held the property, but then, as I have said, they were absolutely at the call and command of their beneficiaries, and they intervene merely to give effect to the agreement and the resolution of their beneficiaries. Now, the conveyance is a conveyance of property, both heritable and moveable, from the private company to the limited company. It is quite true that this has been represented as being neither more nor less than a conversion of a private company into a limited liability company. That, in a sense, is true; but then the legal effect of what was done was that the private company parted with their rights in the specific articles of property, land, tubes, stock in trade, and the like, handed them over to the limited liability company, and got in exchange merely shares in the limited liability

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company. Now, the question we have to do with is, whether that is a conveyance on sale in the sense of this statute, and we are aided in determining that question by the interpretation clause which has been referred to, section 55, which says that you do not require to have money, but that money's worth, including shares, will do perfectly well as the consideration. Now, first, what do the true disponers—for I take them to be the private company—what do the true disponers have? Certain property, land, and stock in trade. What do they get for that? The answer to that is set out in the deed itself, which is the subject of dispute, and it is to be found in the previous agreement by which the private company and its individual members resolve to part with the specific articles, giving them to the joint stock company and taking in exchange the right to shares. It seems to me that on a fair construction of the statute, the sections invoked by the Crown do apply to that transaction. But further, Mr Balfour has very fairly admitted that, setting aside certain rather superficial distinctions to which he gave a fair although not excessive consideration, this case is not distinguishable from the case of *Foster*[1] which was decided very recently in the Appeal Court of the High Court of Justice in England. I have examined that case, and I think Mr Balfour is perfectly right, that it deals with precisely the case which we have here, taking it as a case of conversion of a private company into a limited liability company; and there the reasoning of the Judges, which in the Court of Appeal was entirely in one direction, leads them to the conclusion that that is a conveyance on sale, the consideration being stock, and there being, not merely in legal language but in substance, a conveyance of property from one party to another. I am greatly influenced by that case, which I think a direct authority, and I concur in the reasoning which prevailed.

LORD ADAM.—I agree that this case cannot be distinguished from the case of *Foster*[1] to which we have been referred; and I have further to say that there has not been raised, to my mind, any such doubt as to the soundness of the decision in the case of *Foster*[1] as to lead me to dissent or differ from the judgment of the Appeal Court in that case.

LORD M'LAREN.—I agree in the judgment proposed. My opinion is that the contract between the private company, consisting of Mr Wilson's family and two gentlemen connected with him in business on the one hand, and the new limited company consisting of the same partners on the other, followed by a conveyance of the stock and assets, included a conveyance on sale in the sense of the Stamp-Duty Act. There is no exhaustive definition of sale in the Stamp-Duties Act; but there is a series of clauses from the 54th to the 62d in which a number of different cases—in fact all the more usual and obvious cases—which look a little different from sale, are considered and are placed under that category. I say this is not an exhaustive category, because the subject is resumed in the 73d section, where the case of exchange of land for land is considered and an equivalent duty is imposed. But I think this much is clear on the series of sections to which I have

[1] John Foster & Sons v. Commissioners of Inland Revenue, L. R. [1894], 1 Q. B. 516.

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referred, and especially on the 55th and 57th sections, that where land or a *universitas* or capital stock being the subject of sale, is given in exchange for securities or shares, the securities or shares are considered to be the equivalent of a price, and the value of the securities or shares is charged with duty as consideration money. Indeed, I think it was hardly disputed that if the circumstances had been varied to this extent, that the new joint stock company was a company consisting of different members from the old, the statute would have applied. Mr Balfour's argument was rested mainly, I think, on this, that he was entitled to take it as a fact that under the transaction in question there was substantial identity in the persons who received benefit as vendors and purchasers. He did not, and could not, controvert the proposition that there is no legal identity, because, when a number of persons are constituted as a company under the Companies Act, the new company is by statute a corporation having an identity distinct from that of its constituent members or those to whom shares may be allotted. Now, after giving the best consideration to that argument, and admitting that this may be considered a hard case for the family, I am unable to adopt the view that a case of substantial identity between sellers and purchasers who are theoretically distinct can be regarded as an exception to the scope of the statute. I think this case must be determined upon the legal fact that there is a sale, or what the statute treats as equivalent to a sale, from a private partnership to a company which for the present consists of shareholders having the same proportionate interests as the old, but which may hereafter be very different in its constitution. If it were possible to distinguish the case as specifically different from the ordinary case of the sale of a business to a joint stock company, I should have been disposed to give effect to Mr Balfour's argument. But it seems to me to be impossible to draw a distinguishing line anywhere between—first, the case of a sale where the vendors and purchasers are entirely distinct; secondly, the case of a sale to a company which consists in substantial proportions of the original sellers and also of new shareholders who come in; thirdly, the case of a sale by private individuals to a company which, except to a very small extent, consists of members of the old undertaking; and lastly the case where the interests are identical. I think the case where the component members of the new firm and the old are the same, and where their shares are the same, is merely a limiting case of a sale with a reserved interest in the vendors, and not a distinct and separable case.

Then I agree with your Lordship in the chair that our opinion on this point is fortified by the decision in the English case of *Foster*,[1] in which all the arguments that have been addressed to us to-day were considered, and were considered so carefully that there resulted a difference of opinion amongst the Judges, the majority being in favour of the view on which we propose to proceed. I should be extremely averse to considering questions of revenue law independently of English precedents, because this Court in revenue cases is just a co-ordinate Court with the English Exchequer jurisdiction. It would be in the highest degree inconvenient that the same revenue

[1] John Foster & Sons v. Commissioners of Inland Revenue, L. R. [1894], 1 Q. B. 516.

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statute should be interpreted differently in different parts of the United Kingdom, with the result that taxation should be levied in the one country while there was exemption in the other. Of course, where the circumstances are different, it may happen that indirectly a conflict of opinion should arise. But I see no distinction of circumstances here, and even if I were less fully persuaded than I am of the soundness of the decision in *Foster's*[1] case, I should be disposed to defer to it as an authoritative exposition of the law. I agree with your Lordships who have spoken, that the determination of the Commissioners is right, and that it is put upon the right ground.

LORD KINNEAR.—I agree. The case of *Foster & Sons* v. *The Commissioners of Inland Revenue*[1] is not distinguishable from the present, and I think that we ought to follow that decision. I agree with your Lordships that the argument which we have heard from Mr Balfour has entirely failed to displace the reasoning upon which that case stood.

THE COURT refused the appeal, and affirmed the determination of the Commissioners.

R. P. STEVENSON, S.S.C.—SOLICITOR OF INLAND REVENUE—Agents.

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WILLIAM HORN HENDERSON, Pursuer (Respondent).—*Comrie Thomson —W. Campbell.*

JAMES RUSSELL, Defender (Exceptor).—*Jameson—Cullen.*

Reparation—Slander—Innuendo—Issue—Counter issue—Veritas—Evidence competent to defender without counter issue.—In an action of damages for slander the pursuer obtained an issue whether the defender falsely and calumniously stated that a clause in an agreement between a client of the pursuer and the Police Commissioners of a burgh had been added by the pursuer to the agreement after its execution by the Commissioners, meaning thereby that the clause had been fraudulently interpolated in the agreement by the pursuer after execution.

The defender admitted that he had made the statement, and stated that it was true, but denied the innuendo.

At the trial the defender proposed to adduce evidence to shew that the clause was added after execution by the Commissioners, but the evidence was disallowed by the presiding Judge, on the ground that it was an attempt to prove *veritas* without a counter issue.

In a bill of exceptions, *held* that the evidence was competent as tendered to prove a fact relevant to the defence.

2D DIVISION.

WILLIAM HORN HENDERSON, solicitor, Linlithgow, raised this action against James Russell, solicitor there, for damages in respect of a slander alleged to have been uttered by the defender on two separate occasions.

The pursuer's averments were to the following effect:—The Police Commissioners of Linlithgow entered into negotiations with Mr Seton of Preston for the lease of water on his property. The pursuer acted as Mr Seton's agent, and in February 1889 he sent to Mr Thom, solicitor, Linlithgow, the clerk of the Police Commissioners, the draft of an agreement for a lease of the water which contained this clause: —" . . . And they shall be bound to relieve the first party and

[1] John Foster & Sons v. Commissioners of Inland Revenue, L. R. [1894], 1 Q. B. 516.

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his foresaids of all expenses which they may incur in connection therewith, and with the preparation of this and the said other minute of agreement, and of the lease to follow thereon, in the same manner as if they had obtained their rights under the provisional order for which they have made application."

The clerk returned the draft with the clause deleted. The pursuer insisted on the clause being retained, and wrote the word "stet" opposite to it. (Cond. 6) "On 5th March 1889 the pursuer sent a clean draft of the agreement to the clerk to the Commissioners. Through the omission of a clerk in the pursuer's employment to notice the word 'stet,' and unknown to the pursuer, the clause for expenses was omitted. The clean draft was returned by the clerk of the Commissioners approved, and the agreement was subsequently engrossed from it, and sent by the pursuer to Mr Seton for his signature." (Cond. 7) "After the agreement had been engrossed, but before it was sent to the clerk to the Commissioners for signature, the omission of the clause regarding expenses was noticed by the pursuer, who instructed his clerk to add the clause to the agreement. As seventeen signatures were required for the deed, and as the clause in question occurred at the end of clause 10, it was engrossed at the end of that clause by writing it in closely instead of making a marginal addition. The agreement with the clause so inserted was sent to the clerk to the Commissioners by the pursuer on 9th May 1889," and the signatures of most of the Commissioners were appended thereto on 17th May 1889.

The pursuer further averred (cond. 10) that the defender, who had been a clerk in the pursuer's office down to April 1890, and who had afterwards commenced business on his own account in Linlithgow, moved by malice, sometime between May and July 1890, stated to John Thom that the clause above quoted had been added after the agreement had been executed by the Commissioners, and that in December 1893 the defender, who was then a Police Commissioner, made a similar statement at a meeting of the Commissioners. That the defender meant by said statements "that the said clause had been fraudulently interpolated in said agreement by the pursuer or by his instructions after the said agreement had been signed by the said Commissioners."

The defender denied that the clause as to expenses after the words "in connection therewith" was in the agreement when signed by the Commissioners. "Denied that he conceived any malice against the pursuer. Admitted that the defender, at the request of the clerk to the Commissioners (who stated to defender that he was taking evidence with the view of the Commissioners reducing said agreement if necessary), gave a statement on precognition to said clerk of what he knew as to said agreement, and then stated to him that the said expenses clause from and after the words 'in connection therewith' had been added or caused to be added by the pursuer to the water agreement after its execution by the Commissioners. . . . Explained that about the time when the said clause was added to the agreement the pursuer informed the defender that it had been included in the agreement with the authority of the clerk to the Commissioners, and the defender believed this to be the case when he made the said statement in precognition to Mr Thom. Further, the statements made in said precognitions are privileged and are true. . . . Explained that the statements made by the defender were not intended to bear, and do not bear, the innuendo here sought to be put upon them by the pursuer."

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The defender denied that his statements were false and calumnious, and averred that they were true.

The defender pleaded;—(3) The statements made by the defender being privileged, and not having been made maliciously or without probable cause, the defender is entitled to be assoilzied. (4) The statements made by the defender being true in point of fact, the defender is entitled to be assoilzied.

The pursuer lodged the following issues:—"1. Whether, on a day between 15th May and 23d July 1890, the defender, in his office in Linlithgow, in the presence and hearing of John Thom, solicitor, Linlithgow, falsely and calumniously stated of and concerning the pursuer that the clause in an agreement between the Police Commissioners of Linlithgow and Mr Seton of Preston, binding the Commissioners to relieve Mr Seton of expenses, had been added to the said agreement after its execution by the said Commissioners, or made a similar false and calumnious statement of and concerning the pursuer, meaning thereby that the clause quoted in the schedule hereto, or a portion thereof, had been fraudulently interpolated in the said agreement by the pursuer, or by his instructions, after its execution by the said Commissioners, to the loss, injury, and damage of the pursuer?" The second issue was applicable to the defender's statement at the meeting of Police Commissioners.

The defender proposed the following counter issue:—"1. Whether the pursuer added or caused to be added to an agreement between the Police Commissioners of Linlithgow and Mr Seton of Preston, relating to the lease of the Hiltly and Preston Water, after the said agreement had been signed by the Commissioners, and between 20th May 1889 and 16th August 1889 the following words, *videlicet*:—'And with the preparation of this and the said other minute of agreement, and of the lease to follow thereon, in the same manner as if they had obtained their rights under the provisional order for which they have made application'?"

This issue was disallowed by the Lord Ordinary (Stormonth-Darling) as it did not meet the innuendo.

At the trial on the 8th and 9th July 1895, the defender proposed to adduce evidence to the effect that in point of fact the clause was not in the agreement when it was signed on 17th May 1889. The pursuer objected on the ground that there was no counter issue of *veritas*, and the presiding Judge (the Lord Justice-Clerk) sustained the objection. The defender excepted to this ruling.

Mr Thom deponed,—"(Q.) Do you remember after Mr Russell had left Mr Henderson's office, but before he was in the Commission, of being in Mr Russell's one day about the month of June and reference being made to the water agreement? (A.) I remember the conversation referred to. . . . I cannot remember what Mr Russell said, or give it in conversational form; but I know what I wanted and what I got, and it was this, that this clause providing for the expenses of the negotiations and agreements had been inserted in the deed after it had been signed by the Commissioners. That is the substance of what Mr Russell said. . . . I was clerk to the Commissioners. I could not venture to ask anyone in the service of Mr Henderson the direct question—was this thing put in after signature? I wanted proof to advise the Commissioners to reduce the deed on the ground of fraudulent vitium. (Q.) Then were you, in short, when you went to Mr Russell, in the position of an agent taking a precognition?

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(A.) Yes. (Q.) And you wished to be able to find out whether the Commissioners had any case or not? (A.) Yes. I informed Mr Russell why I wanted to know it."

The jury found for the pursuer on the first issue, with damages of one farthing, and for the defender on the second issue, on the ground that no malice had been proved.

The case came up on a bill of exceptions for the defender, and on a motion for a new trial.

Argued for the defender;—*I. On the bill.*—The ground for disallowing the evidence in question was that it amounted to evidence of *veritas*, which could not be proved without a counter issue. This was not so, because the essence of the alleged slander lay in the innuendo of fraud, while the defender only proposed to prove that the clause had been *de facto* added to the agreement after execution. The defender did not maintain on record the *veritas* of the statement as innuendoed. On the contrary, he disclaimed the innuendo, and averred that the statement was made by him in another and innocent sense. It was proof of the evidence in question not being evidence of *veritas* that the defender's proposed counter issue had been objected to by the pursuer, and refused on the ground that it did not counter the innuendo. The pursuer was bound to prove his innuendo. The defender was entitled in answer to lead evidence to shew (1) that the meaning of his statement was that averred by him; and (2) that in that sense it was true. The evidence under the latter head was material in judging whether he had uttered the statement in the sense he alleged, and was legitimate matter for the jury as shewing the circumstances in which the statement was made.[1]

II. *On the motion for a new trial on the first issue.*—The statements were privileged. The defender only spoke at the request of the official representative of the Commissioners, who were parties to the agreement, and therefore vitally interested in the matter. An analogous case was that of giving information to a man that he had been the victim of a crime, and privilege existed in such a case as well as where the information was given to the authorities. The existence of a direct interest to receive the communication was enough. On this view it did not matter whether Thom was or was not taking a precognition of the defender in the strict sense, although in point of fact Thom had deponed that he was precognoscing with a view to advising his clients. There was no proof of malice. The jury had so found on the second issue, and the pursuer's evidence on this head applied in the same way to both issues.

Argued for the pursuer;—There was no case of privilege. Although the jury found for the pursuer on the first issue, the damages assessed shewed their estimate of the interview between Mr Thom and the defender. It was plain that they regarded the statements made on this occasion as mere gossip, and that they did not regard Mr Thom as acting in an official capacity. There was no evidence that he was taking a precognition. Even assuming privilege, although the good faith of the defender would be presumed, the *onus* still lay on him to prove that the statement was true. But in order to discharge this he

[1] Torrance v. Weddel, Dec. 12, 1868, 7 Macph. 243, 41 Scot. Jur. 149; Craig v. Jex-Blake, July 7, 1871, 9 Macph. 973, 43 Scot. Jur. 363 and 524; Paul v. Jackson, Jan. 23, 1884, 11 R. 460; Bertram v. Pace, March 7, 1885, 12 R. 798; Shaw v. Morgan, July 11, 1888, 15 R. 865.

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required not only a plea on record but a counter issue of *veritas*.[1] Without this the defender could not lead evidence to shew that his statement was true, and the jury were bound to assume that the statement was false.

LORD YOUNG.—What we have now to consider is the legal character of the action, and the legal questions which are raised by the bill of exceptions. There appears to have been a discussion between Mr Henderson, representing the proprietor of the property from which the town of Linlithgow desired to have a water privilege, and the clerk of the committee representing those charged with the town's interests in the matter. A dispute arose first as to the general terms of the bargain, the amount to be paid to the proprietor by the town for the water privilege, and about the town paying the proprietor's costs of the discussions and arrangements connected with the transaction. Then when the deed which was ultimately arranged came to be adjusted and executed, a controversy arose about a clause regarding these expenses, and I assume, and indeed feel sure, that Mr Henderson was of opinion that the clause which was ultimately introduced into the deed, whether before or after it was subscribed by the Commissioners, had been assented to. The parties are not agreed as to whether it was introduced into the deed before or after execution by the Commissioners. It certainly was introduced after the deed was extended, being crowded into a small space. Mr Henderson says—and I do not doubt his veracity in the sense that he is speaking according to his honest impression and belief—that it was introduced before it was subscribed by the Commissioners. The defender, on the other hand, who was a clerk in his office at the time, says that it was added after. That persuasion and statement of his is accompanied with the belief which he distinctly and frequently enough expressed, that Mr Henderson, the pursuer, from whom he received his information, had the authority of the Commissioners or of their officers to insert it after execution.

I may just remark here in passing that while we must judicially disapprove of any material addition being made to a deed after execution, and rather insist that the only regular course is to have everything filled in—sums of money, names which have been left blank, and so on—before subscription, I am not prepared to say that there is anything more than irregularity, or even that there is always irregularity, in making such additions. If it is discovered at the time of the execution of the deed, or immediately thereafter, that a name which had been left blank has not been filled in—a Christian name or a surname, or both—or a date which was left blank has not been filled in before subscription in whole or in part, I am not at all prepared to say that, if with the assent of parties, and quite regularly and honestly the thing is done after subscription, that will at all affect the deed, or even justify the application of the word "irregular" or "censurable" to the proceeding.

[1] Bertram v. Pace, March 7, 1885, 12 R. 798; Torrance v. Weddel, Dec. 12, 1868, 7 Macph. 243, 41 Scot. Jur. 149; Craig v. Jex-Blake, July 7, 1871, 9 Macph. 973, 43 Scot. Jur. pp. 363 and 524; Paul v. Jackson, Jan. 23, 1884, 11 R. 460, *per* Lord Fraser, 468.

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This action is brought upon a statement on record that the defender here, an old clerk of the pursuer, influenced by some malicious feeling against him, made a statement first to Mr Thom, the clerk to the Police Commissioners, sometime between May and July 1890, that the clause to which I have referred about expenses had been added to the agreement after its execution by the Commissioners, meaning thereby that the clause had been fraudulently interpolated in the agreement by the pursuer, or by his instructions, after its execution. If that statement was made by the defender to Mr Thom, it was certainly *prima facie* a slanderous statement, and so actionable. The action is also founded upon another allegation, that the statement was repeated by the defender in December 1893 at a meeting of the Police Commissioners, that this clause had been added after execution, the defender meaning to represent, and intending that those who heard him should understand, that it had been fraudulently interpolated by the pursuer or by his instructions. That, again, was *prima facie* slanderous and actionable, but I am of opinion upon the case as stated on record that the statement was privileged, for on the first occasion it was made to the clerk to the Commissioners, who were interested in the matter to which it related; and on the second, it was made to the Commissioners themselves,—they being the body representing in that matter the public—who were interested in the statement being true or false in the matter which it brought under their notice. If it is true, then the law does not allow the party who has been guilty of such conduct any damages for a true representation, if made, be it even in gossip and tittle-tattle. He is precluded by the impropriety of his conduct from seeking any reparation. But if a statement *prima facie* slanderous is made to those who are interested in the matter—legitimately interested in the matter—the occasion excludes the presumption of falsehood and malice, and as a condition of the pursuer's success in the action malice must be proved, and the most obvious and legitimate way of proving malice is to prove that the statement was false to the knowledge of the party making it, or that he made it without any legitimate knowledge upon the subject, and that it can only be attributed to some malice on his part against the party whose reputation the statement assailed.

Now, the defender here in this, upon the face of it, privileged case of alleged slander, admits upon record that he made the statement that the clause in question had been introduced into the deed,—added to the deed after execution,—but he altogether denies the imputation that he charged the pursuer with any fraud,—with any interpolation. He says that he was merely stating a fact, and that so far from charging the pursuer with fraud, which "interpolation" as it is used by us always signifies, he was simply stating the fact that the clause was added after subscription as he believed with the authority of the Commissioners. "Interpolate" is always used by us, as "*interpolo*" usually was in Latin, in a bad sense—meaning furbishing a thing up, giving it a false appearance, committing a fraud. It is not the introduction of words which may be introduced legitimately, or at all events excusably, and without any imputation of fraud; it means an imputation of fraud. Now, the defender distinctly denies any imputation of fraud or misconduct on the part of the pursuer. His admission is of a mere statement to the effect that the clause was added to the deed after

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subscription, as he believed, with the authority of the Commissioners, or as he believed Mr Henderson understood, with the authority of the Commissioners and without any reason for fault-finding on their part.

Well, the case went to trial upon the issue which is before us, with this innuendo, without which the statement imputed to the defender would not have been actionable at all. It goes to trial, and the defender's counsel proposes to ask the question of several witnesses,—"Was that added after execution, or was it not?" Now, that question was disallowed, and I am of opinion that it was a legitimate question, and ought to have been allowed. I have perhaps already indicated sufficiently the ground upon which I think so. In the first place, in a case of privilege, I think it is incumbent upon the pursuer to prove that the statement was made maliciously, the first step—the most obvious step—towards which is that it was false in the knowledge of the party making it, that it was untrue in fact; and in the second place, I am of opinion that in the action it was legitimate for the defender to prove that what he did say, not amounting, in my opinion, to slander at all, was true in itself, that the clause really was added after subscription. I think it was legitimate to allow him to prove that, and that therefore the questions which he proposed to put and which were disallowed upon the pursuer's objection, were competent questions, and ought to have been allowed. I do not think it is necessary to go further into the matter than that, for that leads to the exceptions being allowed, and the exceptions being allowed of necessity leads to the case being tried again if—and I hope parties will think of that "if"—the pursuer thinks that it is for his interest, and that it would be a reasonable and proper thing to have another trial in the matter.

There is a motion for a new trial here which we do not need to deal with separately, but I should like to observe that if there had been no exceptions but only this evidence before us, and the motion had been for a new trial upon the ground that there was no evidence reasonably to support the verdict upon the first issue—even to support the verdict of a farthing damages,—in short, that the pursuer had no case at all against the defender,—I should have been prepared to allow a new trial upon that ground. I think the case is one of privilege, and that the evidence laid before the jury here was not such as to entitle him to a verdict or reasonably to support the verdict for a farthing which the jury gave. I am of opinion, however, that we shall dispose of the case sufficiently by allowing the exceptions, and I propose judgment to that effect.

LORD TRAYNER.—I am of the same opinion. In the circumstances of this case the defender could not (having regard to the decision in *Bertram's*[1] case) get a counter issue of *veritas*. He admitted having used the words complained of by the pursuer, but repudiated the meaning which the pursuer put upon them. The ruling of the learned Judge at the trial excluded evidence tendered by the defender on the ground that it was an attempt to prove the *veritas* without a counter issue. But the *veritas* which could only be proved under a counter issue was not at all what the defender proposed by the rejected evidence to prove. He was not trying to prove what

[1] 12 R. 798.

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he had repudiated. He was trying to prove a fact relevant to his defence, but a fact which did and might exist independent and separate altogether from the innuendo in the pursuer's issue. In these circumstances to reject the evidence tendered by the defender was, I think, wrong. I cannot help observing that the present state of our law, as regards what may or may not be proved by a defender without a counter issue, is not satisfactory. A defender should, in my opinion, be allowed to prove anything that is relevant to his defence of which he has given due notice on his record.

I agree, further, in what Lord Young said, that this case, both as regards the first and second issue was a case of privilege, and in that view I think there was no proof to support the verdict which the jury returned upon the first issue.

LORD JUSTICE-CLERK.—At the time of the trial of this case this question came up, and it was certainly one of very great importance. In most cases before juries, objections taken to points of evidence do not, for the most part, really or seriously affect the main question of the case upon record, but this one undoubtedly did. I had an argument before me at the trial which I must say was a very different argument from that which we have had to-day—very meagre compared with what has been put before us to-day—although that does not make any difference in my responsibility in the matter. The cases cited before me seemed to point in the direction of the judgment which I gave, and no case was brought before me pointing in any other direction, although certainly there are some statements in the different cases which are rather confusing and very difficult to expiscate. But had the case of *Shaw* v. *Morgan*,[1] which has been brought up to day, been brought before me, and had I seen that this matter was dealt with by my learned brother Lord Young, with the assent of his brethren in the Division at that time, I do not think I would have given the judgment upon this objection which I did. I am satisfied,—I say it with regret,—that I erred in giving the judgment which I did. It is some satisfaction to know, and it has been said by your Lordships,—and upon that I agree most emphatically,—that whether this case had been rightly decided by me upon this question, or whether your Lordships sustained the bill of exceptions, still this verdict could not have stood, because I am very clearly of opinion with your Lordships that the verdict upon the first issue is not a verdict which is in accordance with the evidence, and on the same grounds which have been stated by your Lordships. The result will be that the bill of exceptions will be sustained and a new trial granted.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Allow the exceptions for the defender: Set aside the verdict and grant a new trial: Find the defender entitled to the expenses of the discussion in the Summar Roll, including the expense of preparing the bill of exceptions, and remit to the Auditor to tax the same and to report: *Quoad ultra* reserve the question of expenses, and decern."

TODS, MURRAY, & JAMIESON, W.S.—DAVID DOUGAL, W.S.—Agents.

[1] 15 R. 865.

THE REV. ROBERT POLLOK WATT AND OTHERS, Petitioners.—*Johnston —C. D. Murray.* No. 9.

Oct. 23, 1895. Watt.

Trust—Charitable trust—Alteration of purposes—Nobile officium—Petition by persons named as trustees before accepting office—Title to sue.—A testator, who died in 1879, directed his trustees on the occurrence of a certain event to pay £3500 to the minister and kirk-session of a church in Edinburgh in trust for maintaining a male and a female missionary in connection with the congregation. In 1895, when the sum became payable, the minister and kirk-session presented a petition to the Court stating that a mission-hall was essential to the successful prosecution of mission work, and that the income of the fund, which would not probably exceed £100, would be insufficient to support two missionaries, and praying the Court to approve a scheme giving authority to the petitioners to spend £1000 in erecting a mission-hall and to employ the income of the remainder in supporting one missionary.

The Court, having regard to the fact that the trustees had not accepted office, and considering that it had not been shewn that the testator's scheme was impracticable, *refused* the petition.

1ST DIVISION.

THIS was a petition at the instance of the Rev. Robert Pollok Watt and others, the minister and kirk-session of the Infirmary Street (Edinburgh) congregation of the United Presbyterian Church, asking the Court to settle a scheme for the administration of a fund bequeathed in trust to the petitioners by Mr William Hunter, merchant, South Bridge, Edinburgh.

Mr Hunter died on 26th July 1879, leaving a trust-disposition dated March 1879 and codicils, by which he conveyed his whole estate to trustees.

Mr Hunter, after providing for certain annuities, left the residue, amounting to £70,000, "to the Edinburgh Chamber of Commerce and Manufacturers, whom failing, to the Lord Provost and Magistrates of Edinburgh, in trust, to found the 'William Hunter's Old Men's Fund,' from which annuities were to be granted as follows:—To ten persons not less than eighty years of age annuities of £30 each, to twenty persons not less than seventy years of age annuities of £20 each, to thirty persons not less than sixty years of age annuities of £15 each, and to persons not less than fifty years of age annuities of £10 each, to such extent as the free produce of the trust fund will safely admit."

By the fourth codicil, which was dated 22d July 1879, Mr Hunter made the following provision:—"If and when my trustees shall consider that before they denude my estate amounts to the value of £73,500 or upwards, of which they shall be the sole judges, then I direct that the sum of £3500 shall be paid over to the minister and kirk-session for the time of the Infirmary Street (Edinburgh) congregation of the United Presbyterian Church, and shall be held by them in all time coming in trust for the purpose of paying and applying the free income and annual proceeds thereof in maintaining a male missionary and a female missionary in connection with the said congregation, and with the beneficiaries of the old men's fund mentioned in my said trust-disposition and settlement, when constituted: And I declare that the male missionary for the time shall not be less than fifty years of age, that the female one shall not be less than forty years of age, and that both shall be God-fearing persons well qualified for the offices, and who will apply their whole time to their duties and have no other employment; and both missionaries shall be elected and appointed annually by the said minister and kirk-session for the time, who shall have

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power in their management of the sum of £3500 from time to time to make such regulations and conditions in regard thereto, and in regard to the duties and conduct of the said missionaries as to the said minister and kirk-session shall seem proper."

The petitioners, who were the legatees in trust mentioned in the codicil, had not accepted the trust. The legacy, which only became available in 1895, after deducting legacy-duty, amounted to £3150.

The petitioners stated,—"During the sixteen years that have elapsed since the death of the truster, great changes in the mission work of the said congregation have taken place, and the conditions attached to the said bequest by the truster are such as to render it impossible to carry out his intentions in strict obedience in detail to his directions. During his life, and while the said William Hunter was connected with the said congregation, the congregation rented mission premises, and regularly employed a missionary; but owing to changes in the district in which their church is situated and other circumstances, the congregation has not for many years been in possession of a mission-hall, and has not employed a missionary. A mission-hall or other premises are essential to the successful prosecution of mission work, and there is no present prospect of such being provided by the congregation. The income derived from the said sum of £3150 will not be sufficient to support two missionaries, as, having regard to the present return for trust moneys, it can hardly exceed £100 a-year. The limit of age and certain other of the conditions imposed by the truster will also make it extremely difficult for the congregation to obtain the services of suitable missionaries. The petitioners have maturely considered the terms of the above bequest, and they have been compelled to come to the conclusion that they could not, in the circumstances above narrated, carry it out according to the letter of the truster's directions."

The petitioners accordingly submitted a draft scheme for the administration of the fund, which modified the terms of the bequest in respect that it, *inter alia*, conferred powers on the trustees (1) to spend £1000 of the capital on the acquisition of a mission-hall, or to accumulate for that purpose the interest of the fund until it amounted to £1000; (2) to employ one male missionary only without restriction as to age; and (3) to regulate the conditions of the tenure of office of the missionaries to be appointed.

On 6th July 1895 the Court remitted to Mr Bremner P. Lee, advocate, to report upon the petition.

Mr Lee having lodged a report, counsel for the petitioners admitted that he could cite no case in which persons named as trustees had before accepting office asked the Court to modify the purposes of a trust, but argued that there was no incompetency in their doing so. The petitioners were anxious to accept and administer the trust in question, but they were unable conscientiously to do so unless the scheme of the truster was modified. Their view, after the most careful consideration, was that if they had accepted office and tried to give literal effect to Mr Hunter's will, the trust would have proved unworkable. If that had been so, the Court would have sanctioned such a scheme as was now asked. It should make no difference that the trust had not in fact been put in operation.[1]

[1] The petitioners referred to Glasgow Infirmary, March 19, 1887, 14 R. 680.

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LORD PRESIDENT.—In anything which I have to say adverse to the position taken up by the petitioners, I do not intend to reflect on the motives which actuated them in presenting this application. One can see, from what has been said by Mr Johnston, that it is really their anxiety and scrupulousness for the success of the mission that have led them to adopt a position which we cannot sustain.

In the first place, I have great doubt as to the competency or appropriateness of an application to settle a scheme for the administration of a trust framed by persons nominated to be trustees but who have not accepted the trust, and who, although nominated to the trust, say that, as at present advised, they are not minded to accept unless the scheme which they propose is sanctioned.

I have not heard any sufficient reason, nor am I aware of any precedent, for such a proceeding, in which the Court would interfere upon the application of persons occupying a perfectly irresponsible and tentative position, and without having before it anyone committed to the execution of the trust. Accordingly we have no guarantee for further procedure at all, but are asked to give effect to the no doubt honest but somewhat speculative criticisms and proposals of outsiders.

But, further, this testator died only in 1879, and all that is said is that external circumstances have so changed as to render his proposals less appropriate to 1895 than to 1879. These changes are mainly the inability of the congregation now to rent a mission-hall as they formerly did, and a fall in the rate of interest, which has rendered the fund less adequate for the purposes intended by the truster. Given due consideration to these circumstances, I am driven back to the question, what right have we to alter Mr Hunter's will made so recently as 1879? Is it because its provisions have become impracticable? Now the present petitioners, viz., the minister and session of this church, are entitled to have their opinions treated with great respect, for in a sense they may be regarded as experts in the mode of conducting mission work. But I am not prepared to accept the statement even from them that with a sum of £3000 they would be unable to get missionaries to carry on the work—at least in a humble way—intended by the testator. It may be that if one had to write the will now, it would be better to provide for only one missionary and supply him with a mission-room or hall for carrying on his work. But that is not our business, nor is it that of the trustees, but of Mr Hunter, who may have had more modest and less ambitious ideas on the subject and thought that if two middle-aged persons were selected to visit from house to house a great deal of unostentatious and homely work might be done with this money.

It seems to me that we are not entitled to sanction a scheme of this kind, the central object of which is the acquisition of a mission-hall which would absorb one-third of the whole fund, and at once cripple the objects which Mr Hunter had in view. I am not prepared to take that step. I do not think we have heard any adequate reasons for interfering with the terms of this bequest, least of all at the instance of persons who stand aloof from its execution. The sequel will depend on the reasonable and well-considered opinion which the trust disponees will now come to form as to their own course of action; for I cannot suppose that, because their views of the ideal

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apparatus of mission work do not coincide with Mr Hunter's directions, they will sacrifice this charity altogether.

LORD ADAM.—I concur.

LORD M'LAREN.—On the first point I conceive that it would be contrary to the usual practice to proceed to adjust a scheme at this stage, and at the instance of persons who refuse to say whether they will accept or decline the office of trustees, and who are consequently not yet charged with the administration of the trust. The Court has always taken a very liberal view in questions of title to sue with reference to the administration of charities, and has sustained all sorts of titles, *e.g.*, that of a corporation, that of a sheriff of a county, and that of persons who represent the class intended to be benefited. But then in all these cases the persons who brought the application had to put themselves into a definite position in relation to the charity from which they had no intention of receding. But when, as here, disponees come forward with a scheme, they must first say whether they propose to accept or not the office imposed upon them, for if they do not accept they have no title to intervene; otherwise it might lead to this result, that when the Court had, after obtaining such information or advice as was available, approved of a scheme, the petitioners might decline to accept office, and then new administrators might be appointed, who might come and tell us that the scheme which we had sanctioned was not the best. The attitude which, no doubt with the best motives, the petitioners here have taken, is one which, in my opinion, disables them from promoting an application of this kind.

I also agree that if we were to consider the merits, there would be the greatest difficulty in sanctioning such a variation from the testator's purposes as would be entailed in the expending one-third of the whole fund in the erection of a mission-hall when nothing was contemplated by the testator but out-door work.

LORD KINNEAR.—I concur.

THE COURT refused the prayer of the petition.

MORTON, SMART, & MACDONALD, W.S., Agents.

No. 10.

Oct. 23, 1895.
Tod v.
Marshall.

JAMES TOD AND ANOTHER, Petitioners.—*John Wilson.*
MRS GRACE MOFFAT MARSHALL, Respondent.—*Chree.*

Trust—Non-gratuitous Trustee—Petition for removal—Inner-House—Nobile officium—Trusts (Scotland) Amendment Act, 1891 (54 *and* 55 *Vict. cap.* 44), *secs.* 2 *and* 8.—Under section 2 of the Trusts (Scotland) Amendment Act, 1891, "'the Court' shall mean any Court of competent jurisdiction in which a question relative to the . . . removal of a trustee comes to be tried," and section 8 directs the removal of incapacitated trustees.

In a petition to the Inner-House for the removal of a trustee on the ground of incapacity, which was presented at common law, and made no reference to the Trusts Act of 1891, *held* that the Court, having jurisdiction to deal with the question of removal, was not entitled to treat the application as an appeal to its discretion for the exercise of its *nobile officium*, but was bound to apply the provisions of section 8 of the Trusts Act, 1891, and to remove the trustee on proof of his incapacity.

No. 10.

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Tod v. Marshall.

1ST DIVISION.

THIS petition was presented at the instance of James Tod and J. B. M'Intosh, the surviving trustees and executors acting under the trust-disposition and settlement of the late John Marshall, S.S.C., praying the Court to authorise the petitioner James Tod to resign the office of trustee and executor, or otherwise to remove him from the office.

The truster died in 1870. The petitioner Mr Tod accepted a legacy bequeathed to him under the trust-disposition and settlement as a trustee and executor. The petitioners stated that Mr Tod was seventy-five years of age, and that owing to age and debility he was wholly incapacitated from attending to the affairs of the trust. They produced a medical certificate of his incapacity. They also explained subsequently that even if he were authorised by the Court to resign Mr Tod would not be able to do so, as he was precluded by his health from executing any deed whatever. The petitioners did not found upon or refer to the Trusts Acts.

Answers were lodged for Mrs Grace Moffat Marshall, the liferentrix of the trust-estate, who, *inter alia*, objected to the petition being granted until arrangements had been made for the appointment of suitable persons as new trustees.

Argued for the petitioners;—While the petition was formally an appeal to the *nobile officium* of the Court, and as such well presented to the Inner-House, that Court was a Court of competent jurisdiction in the sense of section 2 of the Trusts Act, 1891,* and was therefore bound to give effect to the provisions of that Act. Under section 8 a trustee incapacitated like Mr Tod fell to be removed.

Argued for the respondent;—The petition was an application at common law, and it was incompetent therefore for the Court to give effect to the provisions of the Act of 1891. That Act was nowhere referred to or founded upon in the petition. If it had been intended to take advantage of the Act the petition should have been presented to a Lord Ordinary. That was so enacted by section 16 of the 1867 Act (30 and 31 Vict. cap. 97), and that section was, by force of section 1 of the 1891 Act, which declared that the Trusts Acts "should be read and construed together," made applicable to petitions under the latter Act. It was not expedient in the circumstances for the Court, in the exercise of its *nobile officium*, to remove Mr Tod.

LORD PRESIDENT.—The Trusts Act of 1891 gives certain powers to, and imposes certain duties upon the Court, and then it says in section 2 that "the expression 'the Court' shall mean any Court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried." Now, we have here an application which *prima facie* looks to be founded on common law, for it appeals to the *nobile officium* of the Court, upon grounds which preclude all idea of the application being disregarded as foreign to that jurisdiction. Accordingly this

* The Trusts (Scotland) Amendment Act, 1891 (54 and 55 Vict. c. 44), enacts, section 2,—"For the purposes of this Act . . . the expression 'the Court' shall mean any Court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried."

Section 8.—"In the event of any trustee being or becoming . . . . incapable of acting by reason of physical or mental disability . . . such trustee . . . shall . . . be removed from office upon such evidence as shall satisfy the Court of the . . . incapacity . . . of such trustee."

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Court is competent to deal with, and is vested in, that application. That being so, it seems to me that this Court is affected by the alteration of law set out in the Act of 1891 in this regard, and that it is impossible for us to ignore the prescribed duty which is imposed on the Court by that Act—the duty which is imposed upon any competent Court dealing with the question of the removal of a trustee. The Legislature has really relieved the Court of the duty of exercising any discretion in the matter, and has bidden the Court remove the incapacitated trustee. I am therefore prepared to grant the prayer of the petition.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Grant the prayer of the petition: Remove the petitioner James Tod from his office of trustee and executor under the trust-disposition and settlement of the late John Marshall . . . . Find the petitioners entitled to the expenses of this application and the procedure out of the trust-estate under their charge: *Quoad ultra* find no expenses due, and decern."

MYLNE & CAMPBELL, W.S.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

No. 11.
Oct. 23, 1895.
Paton v. Clydesdale Bank, Limited.

JOHN PATON AND GEORGE PATON, Pursuers (Respondents).—*Dickson—Salvesen.*

THE CLYDESDALE BANK, LIMITED, Defenders (Reclaimers).

ALEXANDER SCOTT, Defender (Reclaimer).—*Sol.-Gen. Murray—King.*

Fraud — Cautioner — Fraudulent misrepresentation — Mercantile Law (Scotland) Amendment Act, 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 6—*Principal and Agent—Bank and Bank-agent.*—In an action of damages against a bank and against S., the agent at one of its branches, the pursuer averred that S., knowing that D. R. & Company, customers of the bank, were largely indebted to the bank, and were insolvent, or at least were in great financial difficulties, conceived, along with a partner of D. R. & Company, a fraudulent design of obtaining the pursuer's acceptances in favour of D. R. & Company in order to apply them *pro tanto* in reducing D. R. & Company's debt to the bank. That in pursuance of this scheme D. R. & Company applied to the pursuer for accommodation and referred him to S., who falsely assured him (1) that D. R. & Company were in a thoroughly sound condition financially, and only required temporary accommodation; (2) that the sum due to the bank was very trifling; (3) that D. R. & Company had made up certain losses which it was known they had incurred; and (4) that no portion of the proceeds of any acceptances by the pursuer would be applied in extinction of the bank's debt, or of any obligation to the bank. That in reliance on these assurances the pursuer granted acceptances to D. R. & Company, which were all placed to the credit of D. R. & Company's bank account. That D. R. & Company were sequestrated, and the pursuers, as the bills fell due, paid them under protest.

The defenders pleaded, *inter alia*, that as the alleged representations and assurances were not in writing and subscribed by S., they were of no effect under section 6 of the Mercantile Law Amendment Act, 1856.*

* The Mercantile Law (Scotland) Amendment Act, 1856 (19 and 20 Vict. cap. 60), section 6, enacts,—"From and after the passing of this Act all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain

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Held (1) that section 6 of the Act did not apply to the case, so as to exclude proof of the representations and assurances alleged to have been falsely made by S. as part of a fraudulent scheme; and (2) that the alleged fraudulent representations of S. were made in the course of his service, and so within the scope of his authority, and that the bank would be liable therefor.

2D DIVISION. Lord Low.

THIS action was raised by Messrs John and George Paton, merchants, Dundee, against the Clydesdale Bank, Limited, and Alexander Scott, formerly agent for the bank at their branch office in Dundee, for the recovery of £4000, 8s. 5d., alleged to be the value of certain acceptances granted by the pursuers to Douglas, Reid, & Company, merchants, Dundee, who were customers of the Clydesdale Bank.

The pursuers averred;—In March 1893 Douglas, Reid, & Company were indebted to the Dundee branch of the bank to the extent of £20,000. Shortly before that date they had sustained very serious losses in business, and in March 1893 they were insolvent, and remained so down to the date of their sequestration in August 1894. Alexander Scott, in March 1893, was aware of the firm's losses, and that they were insolvent, or at least were in great financial difficulties, and he became apprehensive of the safety of the bank's claim against them, and of the effect on his own position of requiring to report the real state of matters to the head-office of the bank. (Cond. 4) "In the circumstances above condescended on the said Alexander Scott, or otherwise in conjunction with Charles Reid, one of the partners of the said firm of Douglas, Reid, & Company, conceived the fraudulent design of getting the said Douglas, Reid, & Company to procure acceptances from the pursuers and other merchants in Dundee with the view of applying the proceeds of these acceptances in extinction *pro tanto* of the debt due to the Clydesdale Bank. It was a part of this scheme that the pursuers and the other mercantile friends to whom Douglas, Reid, & Company applied for acceptances should see the said Alexander Scott and get from him satisfactory assurances (first) as to the solvency of Douglas, Reid, & Company, and (second) that none of the money payable under the acceptances should be applied in extinction of any prior claim or debt of the bank or other creditor of Douglas, Reid, & Company." (Cond. 5) "In pursuance of this fraudulent scheme the said Charles Reid, in or about the month of March 1893, represented to Mr John Paton, the senior partner of the pursuer's firm, that his firm of Douglas, Reid, & Company required temporary accommodation, and suggested that Mr Paton should see the said Alexander Scott on the subject. Mr Paton accordingly saw Mr Scott, who assured him (first) that Douglas, Reid, & Company were in a thoroughly sound condition financially, and only required temporary accommodation; (second) that the sum due to the bank was very trifling; (third) that Douglas, Reid, & Company had made up the losses which they sustained through Lipman & Company's failure, by fortunate speculations in jute; and (fourth) that no portion of the proceeds of any acceptance by the pursuers would be applied in extinction of the bank's debt or of any obligation to the bank. The said Alexander Scott further assured Mr Paton that he held Mr Reid

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credit, money, goods, &c., postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect."

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in high esteem, and that the bank was also prepared to assist the said Douglas, Reid, & Company, and see them through their difficulties. . . . The statements thus made by the said Alexander Scott were in all essential respects repeated, or at all events confirmed by him to Mr Paton on the occasion of the pursuers' granting each of the acceptances after mentioned. The said statements and assurances by the said Alexander Scott were false, and were made by him in pursuance of the fraudulent design above condescended on." That in reliance on these statements and assurances, the pursuers in March 1893, and subsequently, accepted bills drawn upon them by Douglas, Reid, & Company. That the bills sued for were granted in January and April 1894. (Cond. 11) "Notwithstanding the foresaid statements and assurances of the said Alexander Scott, the pursuers have now ascertained, and the fact is, that their said acceptances were all placed to the credit of the said Douglas, Reid, & Company's overdrawn account-current with the Clydesdale Bank at the several dates when the pursuers' said acceptances respectively were obtained as aforesaid. The defenders, the Clydesdale Bank, were thus *lucrati* to the extent of the proceeds of said acceptances." (Cond. 12) "In consequence of the said false and fraudulent representations, statements, and assurances, or one or more of them, and of the foresaid actings of the defenders, or one or other of them, the pursuers lost and the defenders gained the sum of £4000."

The defenders denied these averments, in so far as material.

The pursuers pleaded;—(1) The pursuers having sustained loss and damage to the amount concluded for in consequence of the false and fraudulent representations, statements, and assurances of the defender Alexander Scott, are entitled to decree as concluded for against both defenders, or at least against the said Alexander Scott. (2) The pursuers having been induced to grant their said acceptances by the said false and fraudulent representations, statements, and assurances, or one or more of them, and the defenders being *lucrati* to the extent of said acceptances and interest thereon, decree should be pronounced as concluded for. (3) The defenders the Clydesdale Bank are liable for the fraud of the defender Scott, in respect that he was acting in said transactions within the scope of his duties as agent for the bank and for their benefit.

The following plea was added in the Inner-House:—"The pursuers having been induced to sign the said bills by the fraud of the said Alexander Scott, and the bank having received the proceeds thereof and being *lucrati* by said proceeds and the interest thereon, the pursuers are entitled to decree as concluded for."

The defenders pleaded;—(1) The action is incompetent. (2) The averments of the pursuers are not relevant or sufficient in law to support the conclusions of the action, *et separatim* are not sufficiently specific to be admitted to probation. (6) In any event, these defenders are not liable in damages, in respect that the alleged false representations were unauthorised and outwith the terms and scope of the said Alexander Scott's employment. (7) The alleged representations and assurances not having been in writing and subscribed by the person making the same, are by section 6 of the Act 19 and 20 Vict. cap. 60, of no effect.

The Lord Ordinary (Low), on 29th August 1895, allowed a proof.*

* "OPINION.—The pursuers' motion for a proof in this case was resisted

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The defenders reclaimed, and argued;—The fraudulent representations of Scott formed the ground upon which the bank were sued. On the averments of the pursuers it was plain that these were representations and assurances as to the character, credit, and ability of Reid, and were made to the effect or for the purpose of enabling Reid to obtain credit from Paton. Accordingly, they fell within the Mercantile Law Amendment Act, 1856, sec. 6, which introduced into Scots law the provisions of section 4 of the Statute of Frauds combined with section 6 of Lord Tenterden's Act, 9 Geo. IV. c. 14.[1] Lord Tenterden's view was ascertainable from remarks of Baron Pollock in *Tatton* v. *Wade*.[2] In *Lyde* v. *Barnard*,[3] it was clearly explained that the purpose of the Act was to meet cases like *Pasley* v. *Freeman*.[4] Misrepresentations, however gross, fell within the statute.[5] It did not matter that the object and result of the misrepresentations was that the bank should profit. The operation of the statute was not excluded because the representer was himself benefited.[6]

2. If Scott made the statements he was outside the scope of his employment, but even if within his employment, the undertaking that the bills should not be credited to the bank was an extraordinary undertaking, and could only be constituted by writ.[7]

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upon the ground that the representations and assurances of Scott, upon the faith of which the pursuers alleged that they accepted bills for the accommodation of Douglas, Reid, & Company, not being in writing and subscribed by him, were of no effect under the 6th section of the Mercantile Law Amendment Act. It is true that the greater part of the alleged representations and assurances, said to have been given by Scott to the pursuers, might be brought within the scope of the very wide phraseology of the Act, namely, 'All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person.' But then in order to bring the case within the Act the representations and assurances must be given 'for the purpose of enabling such person to obtain credit, money, goods, or postponement or payment of debt, or of any other obligation demandable of him.' Now, no doubt, the purpose for which the representations and assurances are said to have been made, was to be accomplished by enabling Douglas, Reid, & Company to obtain credit from the pursuers, but the purpose itself was to enable the bank to obtain payment of the debt of Douglas, Reid, & Company. That, in my opinion, is sufficient to take the case out of the provisions of the statute.

"The defenders further argued that the averments of the pursuers were not relevant, in respect that the bills granted by them to Douglas, Reid, & Company, upon the faith of the alleged representations and assurances, were met by the latter at maturity, and that it was bills subsequently granted which they failed to meet. It is averred, however, that when the later bills were granted, the original representations and assurances were referred to, and in substance repeated by Scott, and that the pursuers were thereby induced to grant the bills. I am therefore unable to say that the pursuers have not stated a relevant case, and I shall allow them a proof before answer."

[1] Bell's Commentaries (7th edition), 402, note 8; Martin's Treatise on Lord Tenterden's Act, ch. 3.

[2] Tatton v. Wade, 1856, 18 Scott's Rep. C. B. p. 381.

[3] Lyde v. Barnard, 1836, 1 M. and W. 101, *per* Abinger, C. B., p. 119.

[4] Pasley v. Freeman, 1789, 3 T. R. 51.

[5] Swann v. Phillips, 1838, 8 Ad. and El. 457.

[6] Devaux v. Steinkeller, 1839, 8 Scott's Rep., C. P., 202.

[7] Reid v. Reid Brothers, June 8, 1887, 14 R. 789; Garden v. Earl of Aberdeen, June 24, 1893, 20 R. 896; Stewart & Craig v. Phillips, Feb. 2, 1882, 9 R. 501; Forbes v. Caird, July 20, 1877, 4 R. 1141.

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3. Assuming all the pursuers' statements to be true, Scott's representations were without the scope of his employment. Assurances regarding the ability of bank customers were beyond the limits of a bank manager's duty.[1] It was true that no employer could keep a benefit obtained by the fraud of his representative,[2] but the act must be within the scope of his employment and the principal must be benefited. The position which the defenders claimed was saved by Sir Montague Smith in *Mackay*.

Argued for the pursuers;—The action was founded upon the fraud of an agent by which the bank had been benefited. The scheme alleged was for the benefit of the bank. This was a good ground of action at common law. But the alleged representations did not fall within the Act, for they were made not for the purpose of obtaining money for Reid, but to induce Paton to grant acceptances, and that in order to obtain money for the bank. Formerly an averment of no value for a bill must be proved by writ, although the rule was elided by averment of fraud.[3] But now any relevant matter was provable by parole.[4] That was enough for the present case, unless it was inconsistent with the Mercantile Law Amendment Act, but that did not apply. The Scots Act was wider in phrase than the English Act, and included all representations leading a person to become creditor of another or to postpone asserting his right as a creditor, but such representations must be for some other person than the representer.[5] No case was cited where proof of representations was disallowed, when the party benefited was the representer himself. But the present was a case of the latter kind. The representations were made not for the benefit of Reid, but to enable the bank to operate payment of their account.

2. Scott's conduct was represented as an innominate contract. There was no contract between Scott and the pursuers, and the action was not founded on contract but upon a fraud inducing damage to the pursuers and advantage to the defenders. The bank could not retain the advantage and deny liability.[6]

At advising,—

Lord Justice-Clerk.—The first question here is, whether this case falls within the clause of the Mercantile Law Amendment Act to the effect of precluding the pursuer from succeeding in his case unless he can prove by writ that certain representations were made. I do not think that this case falls under the statute. The pursuer alleges a fraudulent scheme by means of which these three bills were obtained on representations of the agent for the purposes of the bank. These representations by the agent were made by him within the scope of his employment, and therefore in my opinion this is a proper case for inquiry and proof.

Lord Young.—I agree, and I think that as the case is to be tried either

[1] Swift v. Dewsbury, Feb. 2, 1874, L. R. 9 Q. B. 301.

[2] Barwick v. English Joint Stock Bank, May 18, 1867, L. R. 2 Ex. 259; Mackay v. Commercial Bank of New Brunswick, Feb. 1874, L. R. 5 P. C. Ap. 394, *per* Sir Montague Smith, p. 416.

[3] Little v. Smith, Dec. 9, 1845, 8 D. 265, 18 Scot. Jur. 123.

[4] Bills of Exchange Act, 1882, 45 and 46 Vict. ch. 61, sec. 100.

[5] Haslock v. Ferguson, May 30, 1837, 7 Ad. and El. 86.

[6] Barwick, *supra*; Swift, *supra*; Houldsworth v. City of Glasgow Bank, March 12, 1880, L. R. 5 Ap. Cases.

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by proof or before a jury, perhaps the less that is said at this advising the better. However we must decide, and assign our reasons for deciding, upon the application of the statute in question—the application of the Mercantile Law Amendment Act, section 6, on which the Lord Ordinary's judgment proceeds. I am, with your Lordship, of opinion that that clause of the Act does not apply to this case, as stated on record, or at all events, to such a case as may under the record be proved by the pursuers. If the pursuers had given credit to Douglas, Reid, & Company, and were suing the bank as having guaranteed the payment of Douglas, Reid, & Company's debt to them, inasmuch as the bank or their agent had represented that Douglas, Reid, & Company were in good circumstances, I think that would have been a case for the application of the Act. The case is not of that kind. Indeed, Douglas, Reid, & Company are not here, and on the face of any documents we have before us, Douglas, Reid, & Company never received any credit from the pursuers. We can decide nothing upon the face of the documents before us except that the pursuers accepted certain bills drawn upon them by Douglas, Reid, & Company. On the face of the bills they are debtors to Douglas, Reid, & Company, and to the holders of the bills, and they were dealt with by the holders of the bills, viz., the Clydesdale Bank, as debtors on these bills, Douglas, Reid, & Company having transferred them to the bank. Well, as such debtors on the bills to Douglas, Reid, & Company, or Douglas, Reid, & Company's indorsees, viz., the bank, they paid under protest, the ground of their protest being that the bills had been obtained from them by fraud, and that by the bank, of course not by the body of shareholders at a meeting, or even by the body of directors, but by a man acting as agent for the bank in the transaction of their business and in the particular business of procuring these bills. The fraudulent representation alleged amounts in substance to this—that the bank, through their agent, having Douglas, Reid, & Company as their debtors, upon an account for, say £10,000, wished to get that reduced, and accordingly set about getting acceptances of bills drawn by their debtors, to be applied in reducing the debt, on the false and fraudulent representation that these bills were not to be so applied, but that the proceeds were to be given to Douglas, Reid, & Company to enable them to carry on business, and that they induced the pursuers to accept the bills in question. If these statements are true, it was a knavish piece of work on the part of Scott. And for whose benefit was it? According to the statements of the pursuers, it was for the benefit of the bank. It was to get the pursuers' documents of debt, their money obligation in the shape of bills for £4000, on which the bank could sue and recover the money. That was the end and object for which the fraud was perpetrated. I do not say it was,—far from it,—but that is what is alleged. I am of opinion that the Mercantile Law Amendment Act is not applicable to prevent the case going to trial on the averments of fraud, and that the case must go to trial, and I rather incline to think—but I leave it to the parties themselves to arrange it—that it would be more fitting to bring this question of fraudulent representation—because that is the character of it—before a jury for their judgment.

LORD TRAYNER.—I concur. I agree with Lord Young that as there is to

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be some investigation into the facts of this case, it is desirable we should not pronounce any judgment upon any point which it is not necessary to decide before the investigation. One point, however, I think must be now decided, namely, whether this case falls within the provisions of the Mercantile Law Amendment Act, for, if it does, then the pursuer's action is altogether excluded, it being certain that the representations founded on are not in writing. On that matter I agree with your Lordships in thinking that this case does not fall within the provisions of the Mercantile Law Amendment Act. The case averred (which at present must be taken to be true) is this, not that Scott made representations as to Reid to Paton, in order that Paton might give Reid credit or money, but that Scott made statements—false and fraudulent statements—to Paton in order that the bank might get from Paton payment of part of the debt which Reid owed to the bank. I entertain no doubt that what Scott is said to have done was done by him in the course of his service, and in that sense within the scope of his authority, and for which, consequently, the bank is answerable. It is not to be lost sight of in connection with this point that the bank are retaining the benefit which (according to averment) they obtained through their agent's fraud.

LORD RUTHERFURD CLARK was absent.

THE COURT recalled the interlocutor reclaimed against, and appointed the pursuers to lodge issues.

J. SMITH CLARK, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 12.

Oct. 29, 1895. Magistrates of Edinburgh v. Beatson.

THE LORD PROVOST AND MAGISTRATES OF EDINBURGH, Petitioners (Appellants).—*Comrie Thomson—Boyd.*
WILLIAM BEATSON AND ANOTHER, Respondents.

Burgh—Administration of justice—Dean of Guild—Right to refuse petition ex proprio motu—Ultra vires.—The Corporation of Edinburgh presented a petition to the Dean of Guild Court of Leith for warrant to erect a hospital within the burgh of Leith. The petition was served upon the Leith Local Authority, who entered appearance, but stated no objections. The Dean of Guild refused the petition *in hoc statu* on the ground that the petitioners had no right to erect a hospital within the burgh of Leith without the consent of the Local Authority.

In an appeal *held* that the Dean of Guild was not entitled to give effect to the objection *ex proprio motu.*

1st DIVISION. Dean of Guild Court, Leith.

THE LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF EDINBURGH having resolved to erect hospital buildings on the lands of Quarryholes, within the burgh of Leith, which they alleged belonged to them, presented an application for a warrant to the Leith Dean of Guild Court.

The petition was served upon William Beatson, burgh surveyor, Leith, for the public interest. Mr Beatson accepted service, and lodged a report with the Dean of Guild Court in which he made observations on the plans which had been lodged with the petition, and with regard to the treatment of the hospital sewage, but stated no objection to the warrant being granted.

At the calling of the case on 19th August 1895, no appearance being made for the respondent, the Provost of the burgh of Leith,

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who sat as preses of the Dean of Guild Court, stated that the consent of the Magistrates and Town-Council of Leith, who were the Local Authority of the burgh, had not been obtained. The Court thereupon refused the petition *in hoc statu.**

The petitioners appealed. No appearance was made for the burgh of Leith.

Argued for the appellants;—The interlocutor was incompetent. It had been pronounced on a ground which was never discussed, and in favour of a local authority who were not parties to the case. This question was raised by the Provost *ex proprio motu.* Leith was foreclosed on the point, because the Local Authority had failed to lodge answers on the service of the petition. If not, then there was a question for discussion between the two corporations before the Dean of Guild Court, and at least an opportunity should have been given for arguing it.

LORD PRESIDENT.—It is quite clear, in my opinion, that this interlocutor cannot stand. It is a purely Dean of Guild application presented to the Dean of Guild Court, and what the Court have done is to conjure up objections which were not before them. The Dean of Guild Court have imagined that the Local Authority of Leith were having their rights invaded, although that Local Authority had not come forward to state any such objection. Accordingly, it seems to me that whatever may be the rights of the Local Authority of Leith, this interlocutor is unsupported by anything before the Court, and must be put out of the way.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT recalled the interlocutor, and remitted the case to the Dean of Guild Court to proceed.

WILLIAM ASHER, S.S.C., Agent.

No. 13.

Oct. 29, 1895.
Davidson's Trustees v. Caledonian Railway Co.

WILLIAM JAMES DAVIDSON AND OTHERS (James Davidson's Trustees), Pursuers (Respondents).—*Shaw—Dickson—Burnet.*
THE CALEDONIAN RAILWAY COMPANY, Defenders (Reclaimers).—*Balfour—D. Dundas.*

Railway—Compulsory powers—Mines and Minerals—Misappropriation of freestone—Reparation—Measure of damages.—A railway company having wrongously excavated certain freestone reserved to their superiors, *held* that the superiors were entitled to recover from the company the market value of the freestone used or removed by them, less the cost of working, although it appeared that the superiors could not themselves have worked or let the freestone to a profit.

* "NOTE.—With the time which has been allowed the Court of examining the relative statutes since the petition came before them for the first time last Court day (5th August current), the Court have become satisfied that, under the Public Health (Scotland) Act, especially section 39 of the Act of 1867, and section 1 of the Amending Act of 1890, the petitioners have no right to erect and administer an hospital of this kind within the bounds of the burgh of Leith—at all events without the approval or consent of the Town-Council of Leith, who are the Local Authority for the burgh of Leith, and of the Local Government Board, which have not been obtained.

"Therefore, to obviate procedure by parties, which might all be rendered abortive by the above considerations, the Court have thought it better to refuse the prayer of the petition *in hoc statu.*"

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Livingstone v. *Rawyards Coal Co.*, Feb. 13, 1880, 7 R. (H. L.) 1, *distinguished.*

Superior and Vassal—Feuar's right to freestone for building on feu—Whether railway bridges and other works within right.—A feu-charter, which reserved the freestone to the superior, gave power to the feuar, notwithstanding the reservation, to dig or work the freestone for erecting "houses and offices, or walls or other buildings" upon the feu, or for making or repairing the roads thereon. A railway company having taken over the feu by compulsory purchase, *held* that it was within the powers of the feuar to dig freestone for the construction of bridges and other railway works on the feu.

2D DIVISION. Ld Stormonth-Darling.

(SEQUEL of case reported 21 R. 1060.)

The Lord Ordinary (Stormonth-Darling) having proceeded in terms of the interlocutor of the Second Division of 19th July 1894, it appeared from a proof that a large quantity of freestone below the authorised formation level of the railway had been taken by the defenders from the ground of which the pursuers were superiors, with a reserved right in the minerals, including freestone. It appeared further that the defenders had used a portion of the freestone so taken for building bridges and other railway works on the feu and on other portions of their line, while a portion had been sold. The proof shewed that it was very unlikely that the freestone could ever have been worked to advantage by the pursuers. Questions arose as to the principle of valuation to be adopted in fixing the amount due to the pursuers for the freestone taken, and as to whether the freestone used for railway purposes fell within the right of the defenders as derived from the feu-charter.*

The Lord Ordinary, on 3d July 1895, pronounced this interlocutor:—"Finds that the defenders have excavated and removed freestone belonging to the pursuers below the authorised formation level of the railway to the value of £4657, 7s., for which sum decerns against the defenders in full of the petitory conclusions of the summons signeted 7th July 1893: Finds the pursuers entitled to expenses," &c.†

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* The feu-charter gave the vassal power, notwithstanding the reservation of minerals, to dig or work freestone "for erecting houses or offices or walls, or other buildings upon the said piece of ground, or for making or repairing the roads thereon; but he and they are hereby expressly restricted from selling any part of the said freestone, or disposing of the same to any other purpose or use whatsoever." The charter further took the feuar bound, so far as not already done, to erect a villa or lodging on the feu yielding a yearly rent at least equal to the feu-duty, and to uphold the same in good condition in all time thereafter.

† "OPINION.—What I have to do under the judgment of the Second Division is to ascertain a sum of money which will indemnify the pursuers for the wrongful act of the defenders in appropriating the pursuers' freestone, so far as lying below the authorised formation level of the railway, in a small plot of ground at Maryhill. Of the freestone in that situation, the defenders have taken a portion, and left a portion. With the portion which they have left, I am not concerned. It remains the property of the pursuers, and, although in all probability they will never be able to work it to profit, they have not succeeded in shewing that this result is due to the act of the defenders in removing the remainder. The truth I rather take to be, that, before the defenders acquired the ground, they would have found it exceedingly difficult to work any of the stone. (His Lordship then considered the evidence, coming to the conclusion that the market

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The defenders reclaimed, and argued;—The true standard of value for the stone taken was its value to the respondents. The reclaimers were not in the position of buyers, but must indemnify the respondents for the legal wrong committed; but here they had suffered no loss, and would gain nothing by restitution, as they could never work the freestone to profit. In any event the reclaimers should not pay more than a royalty or lordship on the freestone taken,[1] or a fair price in view of the circumstances should be fixed by arbitration. All stone used for building purposes in connection with the railway, or at all events that used on the feu, was within the reclaimers' right under the charter.

Argued for the respondents;—The true standard was the value to the user,—that was the market value. *Livingstone* v. *Rawyards Coal Company*[1] did not apply, because here the appropriation was wilful and in knowledge of the reserved right; in these circumstances the reclaimers could claim no equitable right to a deduction from the market value. The feuar's power to use freestone for building obviously referred to buildings for the purposes of a feuing subject, and no deduction should be made for what had been used for railway works.

At advising,—

LORD TRAYNER.—This case comes before us now upon a proof which was taken by the Lord Ordinary under a remit by us when the case was pre-

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value of the freestone taken was £6881, 15s., and that the cost of working was £2224, 8s., and continued):—"Now, is this sum [the cost of working] to be deducted or not? The pursuers found on some English cases relating to the unauthorised working of coal, which seem to turn on certain technical rules of the English common law, and to result in rather arbitrary distinctions between the cost of getting the coal and the cost of bringing it to bank. I gather from the opinion of Lord Macnaghten, in the case of *The Peruvian Guano Company*, L. R., 1892, App. Cases (pp. 173-177), that these rules might not now be applied in an English Court administering equity as well as law. But, in any case, a Scottish Court is not bound by them. I am free to consider in this particular case whether it would be equitable to deny to the defenders the expense which they have incurred in working this stone, and I am very clearly of opinion that it would not be. The defenders, no doubt, acted in rather a high-handed way, and under a mistaken view of their rights. They were trespassers, but it would be absurd to call them thieves; and it was a fortunate circumstance for the pursuers that they came to the ground, for I do not think that otherwise the pursuers would have found it easy to make any use of their stone at all. The proper result, therefore, in my opinion, is to allow the defenders no profit on the stone which they removed, but to charge them with the full value of it, less the expense of converting it to marketable use. I accordingly deduct the sum of £2224, 8s. from the sum of £6881, 15s., leaving the sum of £4657, 7s., for which I shall give decree.

"I would only add that the defenders' argument on the declaration in Allan's feu-contract seems to me quite untenable. The power thereby conferred on the feuar was to dig or work freestone 'for erecting houses, or offices, or walls, or other buildings upon the said piece of ground, or for making or repairing the roads therein.' That plainly contemplated the use of the ground as a residential subject, and could not possibly justify the use of the stone for building bridges and other railway works even on the ground itself, and much less in other places."

[1] Livingstone v. Rawyards Coal Co., Feb. 13, 1880, 7 R. (H. L.) 1.

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viously before us; and it does not appear to me that there are many points raised on the interlocutor at present under review which require serious consideration.

The Caledonian Railway Company, who are now reclaiming, are proprietors by purchase of the piece of ground originally disponed or feued out by the superior to Mr Allan, and have, in the exercise of their undoubted rights, used the ground for erecting a railway station upon it, and putting down sidings and other accommodation works which as a railway company they require. But in laying down their rails, and in erecting their offices and other accommodation works, they have excavated the freestone which lay below the surface. It appears to me to be not open to question that the stone which they have so excavated was the property of the superiors, because when the superiors feued off this ground to Mr Allan they distinctly reserved to themselves the whole freestone and other minerals within the ground so feued. Accordingly, the right of property in the minerals never passed out of the superiors. But they did give Mr Allan their vassal a certain limited right in the minerals which was expressed in this way:—"Declaring that notwithstanding of the above reservation,"—that is, the reservation of the freestone and minerals to the superiors themselves,—"it shall be lawful to and in the power of the said Thomas Allan and his foresaids to dig or work the freestone in the said piece of ground hereby disponed for erecting houses and offices or walls or other buildings upon the said piece of ground, or for making or repairing the roads thereon, but he and they are hereby expressly restricted from selling any part of the said freestone."

Now, the state of the title being as I have put it, and the railway company having excavated a great part of the mineral below this feu, the question arises, what is the railway company bound to pay for the mineral so excavated, if anything.

The railway company maintain, first, that they are not bound to pay anything for the freestone excavated, because it was of no value to the owners. That is an argument that I am afraid I could not listen to with very much patience. It may have been a subject of very little value at one time to the superiors. It may have been so situated and the working of it so difficult that it would be almost impossible to get a customer for it, and it might not be worth the while of the superiors to work it for themselves. But all that was changed when the railway company came there, because the railway company came not only as a customer who might buy the freestone, but who, as one sees from the proof, was glad to get it so conveniently. The company needed just this stone for their erections; they got it on the ground, where it was to be put into use in the shape of houses, and were saved the trouble and expense of bringing it from a more distant point. Therefore it is vain for the railway company to say it was of no value to the superiors. They got a customer when the railway company came there, who must pay to the superiors the market value of the subject. The market value of that subject has been ascertained on evidence there seems no reason for doubting, and the Lord Ordinary has estimated the value of the subject at the price which the proof warrants.

The second view which was presented to us by the railway company was,

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that if we were of opinion that the railway company were bound to pay for this stone they should at least not be called upon to pay the market value, but should only be called upon to pay what the superior might reasonably have expected to get by way of royalty or lordship if he had let the ground as some adjoining ground had been let to a quarrier to work, and in support of this view the case of *Livingstone* v. *Rawyards Coal Company*[1] was cited to us. I think that case is different from this. That is a case—into the details of which I need not go, because your Lordships are familiar with them—which is distinguished from the present in this important particular, that there the pursuer of the action might have known from his own titles that the defenders were trespassing upon his property, while the defenders by their title could not have ascertained that for themselves; they worked the coals in the belief that they had been leased to them by the person who had right to the minerals, and were held in that case only liable to Mr Livingstone in such a sum as he would have got had he leased the coal on the same terms as the surrounding mineral field was leased to the Rawyards Company. Here the case is different. The title which the railway company took informed them in express terms that the minerals were reserved by the superior. Notwithstanding this we have it in evidence that the railway company, not only worked out the minerals so reserved, but in violation of the express terms of their title sold part thereof, and also used other parts for their works outwith the feu in question. They were distinctly warned that this was not their property, and that they were not to use it without keeping a distinct note of that which they were taking, and what they were doing with it, because the pursuers intended to raise the question of their liability therefor. In these circumstances I think the case of *Rawyards*[1] is distinguishable from this, and affords no standard by which the defenders' liability ought to be ascertained.

These two points being taken out of the way, the only thing we require to consider is the effect of the deduction which the defenders claim in respect of the minerals and freestone used upon the ground of the feu as being within the authority conferred upon Allan, and therefore upon them, to use the freestone for erections and buildings upon the feu itself. Upon that matter the reclaimers have not given us the information necessary to enable us to fix the exact amount of the deduction to which they are entitled, because, I think, differing from the Lord Ordinary, that they are entitled to a deduction from the pursuer's claim of the market value of the minerals which they used for making roads and erecting walls or buildings of any kind upon the ground in question. The Lord Ordinary in the end of his note says,—"The defenders' argument on the declaration in Allan's feu-contract seems to me quite untenable." I think, with great deference to the Lord Ordinary, that that is not a sound view, and in so far as that view has influenced the interlocutor of the Lord Ordinary under review, and in so far as he has refused in that interlocutor effect to the defenders' contention, I think he is wrong. If the parties can ascertain or agree upon the amount of the deduction to be made in respect of the freestone used upon the feu itself, we may dispose of the case now. If they cannot agree,

[1] 7 R. (H. L.) 1.

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we must then consider the case further as to whether the proof before us will enable us to fix a sum, or whether the railway company should be authorised to supplement their proof to the effect of shewing what is the exact amount of deduction to which they are entitled.

LORD YOUNG.—I am of the same opinion, and I do not think I have anything material to add. I indicated, indeed, my view upon the leading points in the case in the course of the discussion. It seems to me to be clear, and indeed ultimately it was not disputed, that the freestone which the railway company took out of the pursuers' ground and used for their own purposes was the property of the pursuers, and the contention that they are entitled to take the property of the pursuers and use it for their own purposes without paying for it is not far from the extravagant. What they are to pay for it is of course a question depending chiefly upon what was the worth of the article—the property of another—which they took and used for their own purposes. That should not be difficult of ascertainment, and the Lord Ordinary has ascertained it to his own satisfaction. They could only lawfully and regularly get it by a contract with the pursuers whose property it was. They took it and used it without such contract, and I should think it clear enough that the test of its value is just its worth in the market. What was that property of the pursuers—brought out of the estate, and laid on the surface ready for use by the railway company, who wished to use it—worth in the market? Now, that has been ascertained, and that is what the party who took it and used it must pay. They got it, and taking into consideration, of course, the fact that they were at the expense of working it and bringing it to the surface, and making it ready for use by them in their work, what they have got to pay to the owner, without whose consent upon a legitimate bargain they were not entitled to take it or use it, is simply its market value. I agree with what has been stated by Lord Trayner, and I cannot state it more clearly, that the railway company, as the successors of Mr Allan in this feu, have all the rights which he had. They are at liberty to take and use any freestone upon the ground which they feued necessary for buildings upon the ground. Now, Mr Allan himself might not find it necessary to use any or much freestone upon the ground. I suppose he would find it necessary to use as much as he needed to erect the buildings which he undertook to build. But his successor might have no use, or a large use, for freestone, just as it happened. His successor was the Caledonian Railway Company. The Caledonian Railway Company required stone to make buildings upon the ground, and they were not restrained in the kind of buildings for which they might use the freestone on the ground. I assume therefore that the buildings which they did erect with this freestone were erected in the legitimate exercise of their right on the ground,—indeed that was not disputed. Then they are entitled to freestone to that extent free of charge. That disposes of the whole case, subject only to the parties ascertaining for themselves, which I hope they will be able to do without any further litigation, what is the worth of the freestone which was used upon the ground.

LORD JUSTICE-CLERK.—I entirely agree in the opinions which have been expressed.

LORD RUTHERFURD CLARK was absent.

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PARTIES having agreed that the amount of the deduction to be made in respect of the freestone used upon the feu should be £400, the Court pronounced the following interlocutor:—"Recall the said interlocutor: Find that the defenders have excavated and removed freestone belonging to the pursuers below the authorised formation level of the railway to the value of £4257, 7s. sterling, for which decern against the defenders for payment to the pursuers: Find the pursuers entitled to expenses from 19th July 1894 to the date of said reclaiming note, and to one-half of their expenses since that date."

CAMPBELL & SMITH, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

No. 14.

Oct. 30, 1895. Linton v. City of Glasgow Friendly Society.

MRS JANET LINTON AND OTHERS, Pursuers (Respondents).—*Hunter.*
THE CITY OF GLASGOW FRIENDLY SOCIETY, Defenders (Appellants).—*W. Campbell.*

Process — Appeal — Competency — Friendly Society — Dispute between member and society—Small-Debt Court—Friendly Societies Act, 1875 (38 and 39 *Vict. c.* 60), *sec.* 22 (*d*) (*e*).—*Held* that in a small-debt action relative to a dispute between a friendly society and one of its members, an appeal, on a case stated under the Friendly Societies Act, 1875, was competent, although the summons did not refer to the Act.

1ST DIVISION. Sheriff of Renfrew and Bute.

AN action was raised in the Small-Debt Court at Paisley by Mrs Janet Linton and others against the City of Glasgow Friendly Society, claiming the sum of £6, 18s., in respect of the death of Margaret Linton (a daughter of Mrs Janet Linton), whose life was insured with the defenders, and who had died in August 1895. The defenders denied liability. The Sheriff-substitute (Cowan) decerned against the defenders, and at their request stated a case under the Friendly Societies Act, 1875.*

On the case being called in the Single Bills the pursuers objected to the competency of the appeal, and argued;—Small-debt decrees could only be reviewed in the manner prescribed by section 31 of the Small-Debt Act of 1837. Being a small-debt decree, it did not matter that it was connected with a friendly society dispute. Section 31 of the Small-Debt Act was not affected by the provisions of the Friendly Societies Act. Besides, the action was in the form of an ordinary

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* The Friendly Societies Act, 1875 (38 and 39 Vict. c. 60), enacts, sec. 22,—"Every dispute between a member or person claiming through a member . . . of a registered society, and the society or an official thereof shall be decided in manner directed by the rules of the society . . . Provided as follows:—

"(*a*) The parties to a dispute in a society may by consent (unless the rules of the society expressly forbid it), refer such dispute to the chief registrar. . . .

. . . . . .

"(*d*) Where the rules contain no directions as to disputes . . . the member or party aggrieved may apply to the County Court or to a Court of summary jurisdiction, which may hear and determine the matter in dispute.

"(*e*) The Court . . . may at the request of either party state a case for the opinion . . . in Scotland of either Division of the Inner-House of the Court of Session. . . ."

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action in the Small-Debt Court, and made no reference at all to the Friendly Societies Act, so that it could not be founded on.

LORD PRESIDENT.—I think this appeal is competent. As I read the section of the Friendly Societies Act, if the parties agree to do so, and unless the rules of the society forbid it, they may refer their dispute to the chief registrar, and failing such agreement they may bring their action in any Court of summary jurisdiction. It appears to me that the emphasis in subsection (*d*) is to be laid upon the word "summary." Accordingly, I think that the action was brought in the Small-Debt Court in conformity with the regulations of the Friendly Societies Act, and an appeal from it may be taken on a case stated in the manner provided by that Act.

LORD ADAM.—I concur. A special procedure has been provided in the Friendly Societies Act to regulate appeals. If the sum in question is above £25 there is no question that the parties can come here on a case stated, and I cannot see that the procedure provided by the Act is limited to cases where the sum is above that amount. There is nothing to that effect contained in the Act.

LORD KINNEAR.—I am of the same opinion.

A special procedure is provided by the Friendly Societies Act to regulate appeals. It is no answer to the appellants' claim to have the benefit of such procedure to say that under the Small-Debt Act he would have had a different right of appeal, and not that which he claims under the Friendly Societies Act. There is nothing to take this case out of the jurisdiction of the Court to which such cases have by the Act been specially assigned. The only point raised against the competency of the case stated is, that the action in the Sheriff Court was not founded upon the terms of the Friendly Societies Act, and did not set forth that it was brought in accordance with the procedure prescribed therein. But the claim, as set forth in the case, makes it clear that the question brought before the Court is a dispute between a friendly society and one of its members, for the determination of which the Act has provided a special procedure, with a limited right of appeal.

LORD M'LAREN was absent.

THE COURT repelled the objection, sustained the competency of the case, and appointed the case to be put to the Summar Roll.

JOHN BAIRD, Solicitor—SIMPSON & MARWICK, W.S.—Agents.

No. 15.
Nov. 1, 1895.
Scott's Trustees v. Scott.

JOHN CORSE SCOTT AND OTHERS (Scott's Trustees), First Parties.—*Maconochie.*

JOHN CORSE SCOTT AND ANOTHER, Second Parties.—*Rankine—Graham Stewart.*

ALEXANDER CORSE SCOTT AND OTHERS, Third Parties.—*D. Dundas—Clyde.*

JOHN CORSE SCOTT AND OTHERS, Fourth Parties.—*Ure—Chree.*

Trust—Testamentary provisions—Severing of interests of beneficiaries—Appropriation of investments to particular legacies—Incidence of loss on such investments.—A testator directed his trustees "to retain and invest in

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their own names £5000 in trust" for the liferent use allenarly of A B, and for the lawful issue of C D in fee. Then followed similar directions as to other sums. "Lastly, in regard to the residue" "remaining after payment of my debts," "and the legacies, provisions, and others foresaid, I direct and appoint my trustees to divide the same into sixty-two equal parts or shares, and to hold, pay, and apply, and convey and make over the same in the manner after specified, viz., to retain and invest in their own names eight parts or shares thereof for the children of C D, and to apply the income thereof for their behoof, and to pay the capital to them on attaining majority." Then followed similar directions to retain and invest, and in other cases to pay certain shares to legatees. The deed contained a declaration that the annual income of all capital sums and shares of residue directed to be retained and invested by the trustees in their own names "for the liferent use of any party shall be payable to the parties entitled to the liferent thereof half-yearly," "beginning the first term's payment thereof at the first term of Whitsunday or Martinmas occurring six months after the date of investment." The trustees were authorised to retain the testator's investments.

The trustees, with consent of A B and C D, two of the beneficiaries, executed a deed, whereby on the narrative that the capital sums to be retained and invested amounted to £31,000, and that the trustees had resolved that instead of realising the whole trust-estate and re-investing the £31,000, they should retain and set apart deposit-receipts held by the testator, they proceeded to appropriate certain deposit-receipts in this way be held by them in trust for each set of beneficiaries.

Among the deposit-receipts appropriated in this way were three deposit-receipts of a foreign bank which suspended payment, and upon which a loss accrued.

In a special case presented by the trustees and the residuary and other legatees, *held* that the appropriation of the deposits by the trustees to particular legacies was *ultra vires*, and that the loss fell upon residue.

Robinson v. *Fraser's Trustee*, August 3, 1881, 8 R. (H. L.) 127, *distinguished*.

Trust—Liability of trustees—Power to retain securities on which funds invested at truster's death—Deposit-receipt—Term of payment—Guarantee of indemnity.—A testator empowered his trustees to retain securities upon which his estate might be invested at his death. The trustees accordingly retained certain deposit-receipts with a foreign bank which were not yet payable, under a guarantee from two of their number to indemnify them from all loss which they or the trust-estate might incur by continuing to hold the said deposit-receipts. Before the deposit-receipts matured the bank suspended payment.

Held that neither the trustees nor the guarantors were liable to make good the loss sustained by the bank suspending payment, as it did not appear that the deposit-receipts could have been realised before they matured.

2D DIVISION.

BY trust-disposition and settlement, the late Major-General James Corse Scott, Edinburgh, who died on 6th March 1890, conveyed to John Corse Scott, Esq., of Sinton, his nephew; Captain Alexander James Corse Scott, also his nephew; and certain other persons, as trustees and executors, his whole estate, heritable and moveable, for certain purposes.

In the fourth purpose the truster directed his trustees to "retain and invest in their own names the sum of £5000 sterling in trust, for the liferent use allenarly of the said Captain Alexander James Corse Scott, and for the lawful issue of the body of my nephew John Scott of Sinton, in fee, equally, share and share alike." [Here followed similar directions as to other sums to be held for behoof of other

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persons in liferent and children in fee.] "(Lastly), In regard to the residue" . . . "remaining after payment of my debts, deathbed and funeral expenses, and the legacies, provisions, and others foresaid, I direct and appoint my trustees to divide the same into sixty-two equal parts or shares, and to hold, pay, and apply, and convey and make over the same in the manner after specified, viz., to retain and invest in their own names eight parts or shares thereof for the children of . . . and apply the income thereof for their behoof and maintenance in manner after mentioned, and to pay, convey, and make over the capital of said eight parts or shares to the children of said marriage, equally at majority." [Here followed directions as to the disposal of the other shares of residue,—in some cases to retain and invest in their own names for behoof of liferenters and fiars, and in other cases to pay the share to the legatee.]

It was provided that the fee of none of "the capital sums or shares of residue" should vest in any of the beneficiaries until they attained, if males, twenty-one years of age, and if females, twenty-one years or were married, but that the trustees should have power to pay any part or the whole of the annual income accruing upon the presumptive share or shares of any such capital sums or shares of residue, or one-third of the capital sums or shares of residue.

The truster authorised the trustees "to retain the securities in and upon which the funds forming the said trust-estate are and shall be invested at the time of my decease, and to lend out and invest all or any part of my said estate in" certain securities.

The estate consisted, *inter alia*, of securities to the value of about £100,000, including about £33,000 of deposits for fixed periods in various colonial and foreign banks, whereof a sum of £9000 was deposited in three deposit-receipts for £4000, £3000, and £2000, with the English Bank of the River Plate, Limited, maturing, the first on 15th February 1893, and the last two on 11th June 1893.

In February 1891 the trustees, with consent of John Scott, now John Corse Scott, for himself and his children, and Captain Alexander James Corse Scott, for himself and his brother Edward, executed a deed whereby on the narrative that the capital sums directed to be retained and invested amounted to £31,000, and that the trustees had resolved on 24th June 1890 that instead of realising the whole trust-estate and re-investing the £31,000, they should retain and set apart deposit-receipts held by the testator, they accordingly proceeded to appropriate, as at 24th June 1890, certain deposits in this way to be held by them in trust for each set of beneficiaries.

The deed contained the following clause of indemnity:—"And I, the said John Scott, now John Corse Scott, as an individual, do hereby bind and oblige myself . . . to warrant, free, and relieve, and harmless and skaithless keep, the trustees and executors of the said Major-General James Corse Scott . . . from all loss, skaith, interest, damages, and expenses that they, or any of them, or the trust-estate of the said Major-General James Corse Scott may sustain, or incur, or be put to in any manner of way, by continuing to hold and retain the foresaid deposit-receipts, in terms of this present declaration of trust and deed of apportionment, or of having set apart and apportioned the same for the purpose of meeting the provisions and other legacies above particularly set forth and referred to." A similar guarantee was granted by Captain Alexander James Corse Scott.

At the date of the said meeting of trustees on 24th June 1890

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and of the said declaration of trust, the English Bank of the River Plate was in good repute.

In the month of July 1891, the English Bank of the River Plate, Limited, suspended payment, and a winding-up order was pronounced on 1st August 1891. None of the deposits made by the truster in said bank had matured when it suspended payment. It was estimated that the loss on the deposits held by the trustees in the said bank would amount to about 25 per cent on the amount of the deposits,—that is, to about £2000.

In these circumstances a special case was presented to the Court by (1) General Scott's trustees; (2) Mr John Corse Scott of Sinton and Captain Scott, as individuals; (3) Captain Scott and the children of Mr John Corse Scott; and (4) the residuary legatees.

The trustees, first parties, contended that they were entitled to retain the deposits in question until maturity; that they were entitled to set apart the deposits in order to meet particular legacies; and that that having been done the legacies became liable to the *commoda* and *incommoda* of their respective trusts. Further, they contended that, assuming the arrangement embodied in the declaration of trust to be *ultra vires* of the trustees, they were entitled to meet out of residue any deficiency arising in the deposit-receipts; and lastly, that in any event, Mr Scott of Sinton and Captain Scott, as individuals, were liable to relieve the trustees, under the indemnity clauses above set forth, of any loss that they or the trust-estate might sustain owing to the retention of the deposits.

The second parties maintained the same contentions as the trustees, except that, in lieu of the last, they maintained that they were only liable under the indemnity clauses in the event of the retention of the deposit-receipts being *ultra vires* of the trustees, and the trustees being personally liable therefor.

The third parties contended that the trustees were not entitled under the settlement to retain the deposits longer than was necessary for realisation, and that they were consequently personally liable for the loss; that at all events they had no power to appropriate them in satisfaction of particular legacies, but should have held them as part of the general estate, and that the third parties were therefore entitled to have the depreciation made good out of residue; and lastly, that, even if the trustees had not acted *ultra vires*, the third parties were entitled to relief from Mr Scott of Sinton and Captain Scott under the clauses of indemnity.

The fourth parties contended that the trustees were entitled to appropriate particular investments to particular legacies, and that therefore the appropriation having been effectually made the particular legatees must bear the loss. Alternatively, they contended that, if the trustees had acted *ultra vires*, they or the second parties were bound to make good to the fourth parties any loss sustained by them owing to the retention of the deposit-receipts.

The legal questions submitted for the opinion and judgment of the Court were as follows:—"(1) Are the beneficiaries interested as life-renters or as fiars respectively in the provisions and legacies specified in the declaration of trust and affected by the loss on the said deposits in the said English Bank of the River Plate, or either and which of them, entitled to relief from such loss against (*a*) the residue of the trust-estate; (*b*) the trustees of Major-General James Corse Scott, as individuals; (*c*) Mr John Corse Scott of Sinton and Captain A. J.

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Corse Scott, or either of them, under the clauses of indemnity in the declaration of trust, to the extent undertaken by these parties respectively? (2) In the event of head (*a*) of question 1 being answered in the affirmative, are the trustees bound to relieve the fourth parties of the loss thus occasioned them, or are the trustees or the fourth parties entitled to recover from Mr John Corse Scott and Captain Scott, under the clauses of indemnity in the declaration of trust, and to the extent undertaken by these parties respectively, the amount by which the residue is diminished by the payment of such claims? (3) In the event of head (*b*) of question 1 or of the first alternative of question 2 being answered in the affirmative, are the trustees entitled, under the said clauses of indemnity, to be relieved from such claim by Mr John Corse Scott and Captain Scott, to the extent undertaken by these parties respectively?"

Argued for the first parties;—The trustees were not liable for the loss to the trust-estate. They were expressly authorised to retain investments existing at the time of the testator's death, and the deposit-receipts had not matured, and the money could not have been uplifted before the failure of the bank.[1] It was true that they had no express power to set apart and appropriate any portion of the funds to particular legacies, but that power would be held to be implied when, as here, it was the natural and proper method of administering the trust.[2] In any event, if the trustees were liable, they were entitled to relief under the clauses of indemnity.

The second parties adopted the main argument of the first parties, and further argued;—The guarantors were not liable to make good the loss sustained by the trust-estate, for the guarantee only applied if the trustees suffered loss, and they could only suffer loss if they were personally liable. But they were only personally liable if they had acted *ultra vires*, which they had not done if their argument was sound.

Argued for the third parties;—(1) The trustees were no doubt entitled to retain the deposit-receipts, but only subject to the condition that they used their discretion from time to time as to the expediency of retaining them.[3] By the declaration of trust the trustees put it out of their own power to do this, for they had put the deposit-receipts under a trust to retain them. (2) The trustees had no power to apportion the deposit-receipts to special legacies. The trust-disposition said "retain and invest"; the declaration of trust said "set apart and apportion." In both these respects therefore the trustees had acted *ultra vires*, and were personally liable to make good the loss to the estate. (3) Alternatively, on the assumption that the trustees had acted within their powers, the loss must be made good out of residue.[4]

Argued for the fourth parties;—The case was ruled by *Robinson's*.[2] Specific appropriation was here clearly to be implied, because the trust-deed provided that the annual income of shares of residue directed to be retained and invested by the trustees for the

[1] Ritchie v. Ritchie's Trustees, July 20, 1888, 15 R. 1086 (*per* Lord M'Laren, Ordinary, at pp. 1089, 1090); Thomson's Trustees v. Henderson, Oct. 25, 1890, 18 R. 24.

[2] Robinson v. Fraser's Trustees, Aug. 3, 1881, 8 R. (H. L.) 127 (*per* Lord Chancellor, p. 129, *per* Lord Watson, p. 138).

[3] Thomson's Trustees v. Henderson, *ut supra*.

[4] Gray v. Gray, June 4, 1835, 13 S. 866.

liferent use of any party should only commence to run from and after the date of such investment. Without payment or specific appropriation of investments to meet legacies, it was impossible to ascertain the amount of residue, or to invest shares of it. If, therefore, the trustees could not appropriate investments towards such legacies the provision as to payment of interest to persons liferenting shares of residue could not be carried out. Certain of the shares of residue fell to be paid at once, but this could not be done without specific appropriation. The House of Lords gave great weight to the direction to pay residue in *Robinson's* case. Assuming, then, that the securities had been properly appropriated to certain legacies, the parties on whose behalf the securities were held must bear the risk of these securities fluctuating, on the principle "*cujus est commodum ejus quoque debet esse incommodum.*"[1] Alternatively, either the trustees or the guarantors were liable.

At advising,—

LORD TRAYNER.—The questions put to us for determination in this case arise out of the administration of the trust-estate of the late General Scott, and have reference more particularly to a loss which the trust-estate has sustained in the course of administration. What we are asked to determine is, by whom that loss is to be borne.

It is unnecessary to go into any detail of the circumstances under which that question has arisen, as these are fully given in the cases before us. It is sufficient for the purposes of my opinion to recall one or two points which have to be kept in view. (First) General Scott died in March 1890. Part of his estate, amounting to £9000, had been deposited by him with the English Bank of the River Plate, on deposit-receipts for fixed periods. These receipts did not mature until February and June 1893. (Second) In June 1890, the trustees resolved to realise the trust-estate so far as was required to meet the legacies bequeathed by General Scott, and which fell to be immediately paid, and to set apart and appropriate certain of the fixed deposits to meet legacies not immediately payable, but which the trustees were, by General Scott's settlement, directed in the meantime to hold. Under this resolution, the deposit-receipts I have already mentioned for £9000 were, *inter alia*, "set apart and apportioned in implement" of certain legacies of the second class, that is, of legacies which the trustees were in the meantime to hold. (Third) Two of the trustees—both being beneficiaries under the settlement—guaranteed the trustees and the trust-estate against all loss arising from the retention and appropriation of those deposit-receipts in the manner just described. It does not appear that any other of the beneficiaries was either consulted as to such appropriation, or agreed thereto. (Fourth) In July 1891 the English Bank of the River Plate suspended payment, and went into liquidation. Out of this failure the loss in question arose.

It appears to me that the first matter to be considered is, whether the trustees were entitled to set apart and appropriate the deposit-receipts in question as they did. In my opinion they were not. In the first place, such an act was not directed or authorised by the settlement of General Scott, and it was an act the performance of which no beneficiary had a

[1] Teacher's Trustees v. Teachers, Jan. 10, 1890, 17 R. 303 (*per* Lord Shand at pp. 313, 314).

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right to claim. The direction of the truster was that the trustees should hold the estate, so far as not immediately payable, as a whole, out of which they were to pay certain benefits to certain parties. They were nowhere authorised or directed to set apart or appropriate any part of the estate for the benefit of any beneficiary. And so long as the beneficiaries received respectively the payments directed to be made to them out of the trust funds they could claim nothing more. I do not mean to indicate by what I have said any opinion to the effect that trustees may not, in many cases, in the fair administration of trust affairs set apart a particular security or fund to meet some particular or special claim by a beneficiary, without express directions to that effect in the trust-deed under which they act. The case of *Robinson*[1] cited in the debate is an instance to the contrary. In that case appropriation of special funds to meet certain legacies was sustained, although such appropriation had not been directed to be made by the trust-deed. That such a course was intended by the truster in that case might very reasonably be inferred, because such appropriation was necessary to enable the residue to be divided without undue delay, which was the truster's object and, indeed, direction. Except as regards the two special legacies provided for by appropriation there was no need for continuing the trust. Here, however, having regard both to the manner in which the fee of the special legacies (in reference to which the appropriation of the deposit-receipts was made) was destined, and also the necessarily remote period at which the residue could be divided, there was no ground for inferring that the truster ever contemplated such an appropriation of trust securities as here took place. There being nothing, therefore, in the trust-deed authorising the appropriation, and nothing from which such authority could be inferred, and there being nothing to warrant a claim by any beneficiary to have such an appropriation made, I come to the opinion that what the trustees did in that matter was *ultra vires*. In the second place, although the trustees made the appropriation at the request of two of their number (being also beneficiaries), a request which in some circumstances they might lawfully have complied with, yet here they were not entitled to do so, because such compliance did or might result in unduly favouring (as the Lord Chancellor observed in *Robinson's*[1] case) one "set of legatees at the expense of the other." This is plain enough. Take the case of the fourth provision of the trust-deed by way of illustration. All that the beneficiaries were entitled to under that provision was a liferent and fee respectively of £5000. Now, the securities here set apart could not increase in value, while their value might diminish. But securities might have been set apart to meet these claims which might become of greater value than £5000, in which case if the appropriation were sustained, these beneficiaries would get more than the truster bequeathed to them, and the residuary legatees would get just so much less than was intended for and bequeathed to them. In like manner, if the securities set apart and appropriated diminished in value, the special beneficiaries would get less than the truster bequeathed to them, and the residuary legatees would get what otherwise would have been taken from the residue to make up the amount of the special legacy—that

[1] 8 R. (H. L.) 127.

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is, would get more than was intended for them. Accordingly I am of opinion that the appropriation of the deposit-receipts in question was *ultra vires* of the trustees, and that the remaining questions in the case must be considered and determined on that footing.

Are the trustees personally responsible for the loss in question, is the next matter for consideration. This question I also answer in the negative. By the terms of the truster's settlement the trustees were authorised "to retain the securities in and upon which the funds forming the said trust-estate are and shall be invested at the time of" the truster's decease. Such an authority would perhaps not absolve the trustees from the duty (as was said in the case of *Thomson's Trustees*[1]) "to look closely after these investments, and to make sure for themselves that they are reasonably safe." In the case of stocks in railways, shares in public companies, and the like, the trustees may be expected to retain such securities only so long as they, in the interest of the trust-estate, reasonably may. Such stocks and shares are saleable, and may be sold on the market at any time when the trustees think it right to do so. But the securities in question were deposit-receipts for money deposited for fixed periods, and I do not know that such securities can be realised in the market like stocks and shares. It is not said in the case before us that they could, and I never heard of such a thing being done—I assume, in the absence of any statement to the contrary, that the deposit-receipts in question were not realisable until they matured, and as this did not happen till some considerable time after the bank granting the deposit-receipts had suspended payment, it follows that the trustees could adopt no other course than retain the receipts, and that such retention was in no sense culpable. If they were not to blame in retaining the receipts, they cannot be held liable for the loss which was sustained, a loss which, in the view I have expressed, they could not have avoided by any diligence on their part.

I come now to consider whether, as the trustees are not personally liable for the loss sustained, the two trustees at whose request the appropriation of the special securities was made are liable for it. This depends to a large extent on the terms of the guarantee which they gave. Their obligation is thus expressed:—They undertake "to warrant, free, and relieve, and harmless and skaithless keep," the trustees and their successors, "of and from all loss, skaith, interest, damages, and expenses that they or any of them or the trust-estate . . . may sustain, or incur or be put to in any manner of way by continuing to hold and retain the foresaid deposit-receipts . . . or of having set apart and apportioned the same for the purpose of meeting the provisions and other legacies above particularly set forth and referred to." It was argued for the second parties to this case—the guarantors—that this obligation only covered loss for which the trustees might be held personally responsible, and something no doubt may be said in support of that view. I, however, incline to the opinion that the obligation or guarantee was not of that limited character, and assume now that it covered any loss sustained by the trust-estate, although not such as the trustees would be bound personally to make good—which arose from the appropria-

[1] 18 R. 24.

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tion or retention of the deposit-receipts. Even in that view of the guarantee, I am of opinion that the second parties are not liable to make good or relieve the trust-estate of the loss in question, and that for the reason that the loss has not been occasioned by either of the causes, the consequences of which the trustees were guaranteed against. The guarantee was directed against loss sustained or incurred either through the appropriation of the receipts or their retention. Now, it is obvious that no loss has been sustained or incurred through the mere appropriation of the deposit-receipts. They are still in the hands of the trustees, who never transferred them in any way, and their appropriation may be in future disregarded by them. The loss, on the other hand, cannot have arisen from the retention of the deposit-receipts, because, as I have pointed out, the trustees could do nothing but retain them until they matured. Before they matured, however, the bank granting the deposit-receipts failed, and the loss was thus incurred. The appropriation and retention of the receipts in no way occasioned or contributed to the loss.

I am of opinion, therefore, that the loss must fall on and be borne by the residue of the estate, and would propose to answer the questions put to us accordingly.

LORD JUSTICE-CLERK.—That is the opinion of the Court.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Find and declare, in answer to the first question, that the beneficiaries interested as liferenters and fiars respectively in the provisions and legacies there referred to, and affected by the loss on the deposits in the English Bank of the River Plate, are entitled to relief from such loss against the residue of the trust-estate; and in answer to the second question therein stated, that neither the trustees nor the parties of the second part are bound to relieve the fourth parties of the said loss."

M'NEILL & SYME, W.S.—R. C. BELL & J. SCOTT, W.S.—J. A. PATULLO, S.S.C.—Agents.

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MRS CHRISTINA SMITH, Pursuer (Respondent).—*Shaw—W. Campbell.*

LOUIS SOEDER, Defender (Reclaimer).—*Lees—A. S. D. Thomson.*

Sale of heritage—Urban tenement—Objection to title—Restrictions—Failure of seller to disclose restrictions.—A seller, who acted through an agent, exchanged missives of sale of an urban property with a purchaser who had not the advice of an agent. After the completion of the sale the purchaser sent the titles to his agent, who informed him that the property was subject to restrictions whereby dwelling-houses only could be built on the site, windows in the back wall of the upper storey were forbidden, and a passage must be left for access to premises at the back. The purchaser then intimated to the seller that he renounced the sale. *Held* (*rev.* judgment of Lord Moncreiff) that as the restrictions were not disclosed to the purchaser at the time of the sale, he was entitled, when they came to his knowledge, to renounce.

Sale—Sale by owner of burdened house—Right of bondholder to enforce sale.—Opinion (*per* Lord Young) that a bondholder cannot enforce implement of a sale made by the owner of the burdened subjects.

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2D DIVISION.
Ld. Moncreiff.

THIS action for implement of a contract of sale of a house was raised in the following circumstances:—

Mrs Christina Smith was owner of a house of one storey and attics, Nos. 5 and 6 Hope Street, Leith, over which she had granted a bond for £170 in favour of the Standard Investment Company. The titles of the property contained the following conditions:—"That the said piece of ground above disponed is feued for the erection of a dwelling-house and for no other purpose whatever, . . . and the said George Smith and his foresaids shall be bound to leave a passage of 3 feet 4 inches in breadth on the north-east portion of the said piece of ground hereby disponed unbuilt upon, and shall also be obliged to make and keep in proper repair a door in the north-east corner, in room and place of the present [door] in the wall, with right and privilege to the said George Smith and his foresaids of free ish and entry to the back of the said dwelling-house built by him on said piece of ground by said passage and doorway, . . . and further, the said George Smith and his foresaids . . . shall not be allowed to have windows in the back wall of the upper storey of said dwelling-house, but only be allowed to use flat lights on the roof at the back thereof."

The Standard Investment Company called up the bond, and instructed their agents, Messrs Duncan Smith & M'Laren, S.S.C., to advertise the property for sale. Louis Soeder, an artist in Edinburgh, applied to Mrs Smith and her agent in reference to the advertisement, and was referred by them to Messrs Duncan Smith & M'Laren, as Mrs Smith had no longer any interest in the property. On 26th January 1894 Soeder handed to Messrs Duncan Smith & M'Laren the following offer:—"I hereby offer to purchase at the price of £170 the two-storeyed cottage, Nos. 5 and 6 Hope Street, North Leith, and the grates and gasfittings therein, so far as belonging to the proprietor. Entry to be at the term of Whitsunday 1894, when the price will be payable, and the existing searches not to be continued by your clients. Any casualties of superiority now due to be paid by me. This offer to be binding upon me until Tuesday first, at twelve o'clock noon." On 27th January Messrs Duncan Smith & M'Laren replied as follows:—"As authorised by Mrs Smith, the proprietrix of the property, Nos. 5 and 6 Hope Street, North Leith, we now hereby accept your offer, dated 26th inst., of £170 for this property, of which offer copy is hereto annexed."

After exchange of these missives, the titles of the property were sent, on Soeder's instructions, to Mr Marcus J. Brown, S.S.C., who upon 27th February returned them to Messrs Duncan Smith & M'Laren, and stated that his client renounced the sale owing to the restrictions which were found in the titles.

The Standard Investment Company, under an agreement with Mrs Smith, raised this action in her name against Soeder for implement of the sale, and alternatively for damages.

After the summons had been served, the defender called upon the pursuer and offered her £5, provided she would withdraw the summons and renounce any claims she might have upon him. The pursuer accepted the sum, and wrote upon the service copy of the summons and delivered to the defender this receipt,—"6 Hope Street, North Leith,—Received to-day from Mr Louis Soeder the sum of £5 in full of all claims. June 5th 1894. CHRISTINA SMITH."

This receipt was communicated to Messrs Duncan Smith &

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M'Laren, who wrote in reply to Mr Brown refusing to recognise the pursuer's right to discharge the summons without the consent of the Standard Investment Company, and declaring that the receipt had been impetrated from the pursuer under false pretences. The defender took this letter to the pursuer, who wrote at the foot of the letter, —"All claims made against Mr Soeder under the summons referred to herein are given up by me and withdrawn. 6 Hope Street, North Leith. CHRISTINA SMITH. June 26th 1894"; and simultaneously therewith she added to the receipt formerly granted the words "made herein."

The Standard Investment Company proceeded with the action, and the defender pleaded;—(1) In respect of the receipt and discharge above referred to the action is barred, and the said documents are valid and must be given effect to unless reduced. (3) The pursuer being bound and having failed to disclose the restrictions in the titles and the other matters above referred to affecting the subjects, *et separatim*, the defender having made the offer foresaid under essential error *in essentialibus*, there is no contract which he can be called upon to implement, and he should be assoilzied, with expenses.

On 21st December 1894 the Lord Ordinary (Wellwood) pronounced this interlocutor:—"Before answer allows the parties a proof of their averments as to the circumstances in which the receipt referred to in the defender's statement of facts and pursuer's answers thereto was granted, the pursuer to lead in the proof."

After a proof, which established the facts above narrated, the Lord Ordinary, on 15th March 1895, pronounced this interlocutor:—"Repels the first plea in law for the defender, and appoints the cause to be put to the roll for further procedure." *

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* "OPINION.— . . . The defender pleads that the action is barred by certain receipts or discharges granted to him by Mrs Smith. . . . . When the case was in the Procedure Roll I had considerable hesitation in sending it to proof in regard to the validity of these receipts, because it seemed almost incredible that a sane person of mature years could have granted two such documents without understanding what she was doing. But I must say that having seen and heard Mrs Smith in the witness-box the matter does not in the very least surprise me, because I do not think I ever saw such stupendous confusion of mind. I am quite satisfied that the pursuer is incapable of understanding or transacting business of the very simplest kind. I doubt whether she was capable of understanding what a summons meant, or of understanding any legal expressions, or what articles of roup meant. Her appearance of stupidity and confusion was such that at first I was under the impression that she was acting, but at last I came to the conclusion that it was beyond her powers as an actor to feign such obtuseness. On the other hand the defender, though a foreigner, understands and speaks English excellently, and he appears to be a very clever and a very shrewd man. I do not desire to say anything unnecessarily harsh about the defender. Up to a certain point he was very frank, and my impression is that he was not quite aware of the impropriety of his proceedings. He evidently thought that he had done a smart thing. He was dissatisfied with the bargain he had made, and was desirous of getting rid of it. He knew perfectly well that Mrs Smith had no interest whatever in the subject-matter of this summons. She knew, or had been told often enough; but he certainly knew that she had no interest in it. But then he also knew—he was sharp enough to see—that this action had been raised not in the name of the Standard Property Investment Company, who were the true owners of the property, and had the only interest in it,

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On 20th June 1895, the Lord Ordinary pronounced this interlocutor: —"Decerns and ordains the defender to implement and fulfil in all respects his part of the missives of sale libelled, in terms of the first alternative conclusion of the summons, under certification." *

but in the name of Mrs Smith; and it occurred to him that if he could get a discharge from Mrs Smith of the claims made in the summons that would protect him perhaps altogether, or at all events for a time, from any claims made by the Standard Property Investment Company. . . . He is quite open about it. He says, for instance, in the examination at the end of his evidence,—'I had no definite object except to free myself from the summons, and of course I knew that by freeing myself from the summons that would, as far as that summons was concerned, free me from the claim. I noticed that Mrs Smith was the only person mentioned in the summons. I did not trouble myself at the time with what the effect of what I was doing would be on the Standard Company. I thought I had been badly used. The words "all claims" in the passage referred to referred to the claims in the summons.' Now Mr Soeder knew, or should have known, that Mrs Smith had no claims under the summons at all, and yet he obtained a discharge from her of all claims in the summons, she having none, in respect of a payment of £5. Now, if his story is true, . . . he by that payment simply bribed Mrs Smith to give him a discharge which she had no right to give or he to take. She had had no trouble in connection with the sale or with the roup-roll. The only trouble she had had was in connection with the premises to be let to her.

"That is the history of the transaction. Having been served with the summons Mr Soeder, without communicating with Mrs Smith's agents, and without even telling his own agent, went direct to Mrs Smith and obtained the discharge, and the question is whether this woman understood what she was about. I do not think she did. She had certainly no right to grant a discharge, and Mr Soeder had no right to take it from her. I repeat that I do not wish to say anything unnecessarily harsh about Mr Soeder. His very openness enables me to hold that these two documents obtained by him from Mrs Smith cannot bar the present action."

* "OPINION.—It may be assumed in favour of the defender that the purchaser of a heritable subject will be entitled to resile from his bargain if the seller seeks to impose, or the titles contain, conditions and restrictions of an unusual character of which the purchaser was ignorant, and which he was not bound to have contemplated. In such a case it may be that a seller is bound to draw the purchaser's attention to conditions of that kind, and if he does not do so, and the purchaser has not had an opportunity of examining the titles for himself, he may be entitled to resile. I do not know that the cases founded on by the defender exactly establish that proposition, because both in the case of *Robertson* v. *Rutherford*, 4 D. 121, and *White* v. *Lee*, 6 R. 699, the seller was unable to give a good title to the whole of the subjects sold. But undoubtedly the former judgment proceeded to a great extent upon the purchaser's ignorance of the restrictions, some of which were of a very unusual and serious character.

"In the present case, however, I do not think that the restrictions to which the defender objects are so unusual in the case of an urban subject as to entitle the defender, who admittedly has had an opportunity of examining the subjects, and who must have seen, from the structure of the building and the way in which the ground was laid out, evidence of the existence of some at least of the restrictions, to resile from his bargain.

"What the defender purchased was a two-storeyed cottage as it stood. Now, the three conditions to which the defender objects are these: Under the feu-contract nothing but dwelling-houses are to be erected on the ground. That is not an unusual condition; but if it is the case that it has been departed from in the case of other houses in the neighbourhood, the

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[illegible] v. [illegible]

The defender [illegible] and signed.—He had not been fairly used in the transaction. The restrictions should have been disclosed to him before the sale were completed, as he had not the advice of an agent. Apart from this the restrictions were of themselves so unusual that he was entitled to relief. The prohibition of windows in the back wall was enough to render the property practically valueless.

Argued for the pursuer—[illegible]. The defender acted at least negligently in going to the pursuer without her agents. He went at his own risk and the onus was on him to shew that the contract was fair. The Court was slow in rescinding any such transaction [illegible] agent's hands [illegible] the restrictions. These were of a usual kind. [illegible] was the most important, and it was very familiar in urban property.[1]

At advising—

LORD YOUNG.—This is an action for implement of a contract of sale with an alternative conclusion for damages. The defender has two pleas in law on which he grounds his defence to the action. The first of these is practically that the pursuer had discharged the bargain, and in support of that he founds upon two receipts which he obtained from the pursuer—one written upon the service copy of the summons in this action, and the other upon a letter. These bear on the face of them that in consideration of the payment of £5, the pursuer discharges all claims made by her against the defender in the summons.

The other ground of defence is that the subjects sold were by the titles under restrictions of which the defender was ignorant at the time of the sale, and that these restrictions were of such a kind that he was entitled to be relieved of his bargain.

It was contended by the pursuer that these receipts ought not to have effect, because the pursuer did not know what she was doing at the time she granted them, or at least was under essential error as to their meaning

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defender should have no difficulty in getting the superior's leave to depart from it. He next objects that the feuar is bound to leave a passage of 3 feet 4 inches to afford a means of access to reserved premises at the back. That passage, I understand, is to be seen by anyone who inspects the house. Thirdly, he objects to the condition that the feuar should not be allowed to have windows in the back wall of the upper storey of the dwelling-house, but will only be allowed to use flat lights on the roof thereof. This also is not an unusual condition, and an inspection of the house should have drawn the defender's attention to its existence.

"It is said that the defender is a foreigner, and that that made it the more incumbent upon the pursuer to explain the existence of the conditions. I have had an opportunity of seeing the defender in the box, and although he is a foreigner he speaks English excellently, and is a man of more than average intelligence, and there is nothing in his manner, appearance, or conversation to lead anyone to suppose that he was not conversant with and able to transact an ordinary piece of business.

"On the whole matter I think there is no necessity for proof, and that the pursuer is entitled to decree in terms of the first declaratory conclusion of the summons, under certification."

[1] M'Donagh v. P. & W. MacLellan, June 18, 1816, 13 R. 1000; North British Railway Co. v. Wood, July 2, 1891, 18 R. (H. L.) 27.

[2] Robertson v. Rutherford, Nov. 27, 1841, 4 D. 120, 14 Scot. Jur. 51; Whyte v. Lees, Feb. 22, 1879, 6 R. 699.

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and effect. The Lord Ordinary allowed parties a proof as to this, and after the proof had been taken, he, by an interlocutor, dated 15th March 1895, repelled the first plea in law for the defender, and appointed the case to be heard on the plea dealing with the restrictions in the titles to the subjects. After hearing parties on that plea, the Lord Ordinary, by interlocutor of 20th June 1895, ordained the defender to implement the sale in terms of the first alternative conclusion of the summons, under certification that in the event of his failing to do so within one month decree would be pronounced under the alternative conclusion of the summons. This reclaiming note brings up for our consideration both these interlocutors.

I think that the first question which we ought to consider here (because there may be doubt about the other question raised in the case) is, whether the restrictions on the subject are such that the defender's ignorance of them entitles him to be relieved of his bargain. The facts material to this contention lie in small compass.

The purchase took place by missives prepared by the pursuer's man of business. The defender, on the other hand, was without professional assistance at the time when the missives were exchanged and the contract of sale concluded. The missives, which are in the form of an offer and acceptance, are dated, the offer by the defender on 26th January 1894, and the acceptance by the pursuer's man of business, on her behalf, and with her authority, on 27th January 1894, and the contract of sale was completed then as far as it was completed at all. The defender naturally desired that, before implement, the titles should be sent to his man of business to be examined, and they were accordingly sent upon 2d February 1894. The purchaser was not to have entry to the subjects until the Whitsunday term following, and the defender's man of business was not able to attend to the matter at once, bnt upon 26th February he intimated to the pursuer that the titles contained the restrictions set forth in the feu-contract, that these restrictions were not known to the defender or disclosed to him by the pursuer at the time of his purchase, and that in consequence the defender declined to implement the purchase.

It was the fact that the defender had bought the property under these restrictions, which were known to the pursuer's man of business, but not known to the defender, and in these circumstances is it right to force him to go on with his contract? I think that the professional man who acted for the pursuer ought to have informed this artist, who had no professional assistance on his side, of the restrictions which appeared on the face of the titles. He did not do so, and as the defender informed him of his refusal to go on with the contract whenever he was told of the existence of these restrictions, I think he is entitled to be relieved of his bargain.

That is enough for the decision of the case, but I do not think we can dispose of it altogether without some allusion to the conduct of the purchaser in the matter of obtaining the two receipts. I think he was entitled to go to Mrs Smith and make a true representation of the facts to her,—and it is not said that he did not represent the true state of the facts when he said that he was ignorant of the existence of these restrictions,—and I also think that he was entitled to offer to give her £5 to be free of the bargain, and to take the discharge which she granted on that footing. The Standard

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Investment Company now interpose and say that the discharge by Mrs Smith is of no avail, because they, in virtue of their bond over the property for its full value, had the real interest in the matter. Now, I think it material to observe that so far as appears on the face of the transactions Mrs Smith is the only person who has an interest in the matter. The Standard Investment Company did not appear in the transaction, and were not in any way parties to it. She was the sole seller—indeed, the Investment Company could not have sold the property by private bargain at all, and she was the only person entitled to give a discharge of the action raised in her name for implement of the contract. The idea that the holder of a bond over heritable property is entitled to enforce a sale made by the owner of the property, or to recover damages from the buyer on account of his failure to implement the contract, is untenable. Bondholders may sell under the powers of their bonds and of the Act of Parliament applicable to such sales, and will have their remedy for breach of contract on the part of purchasers from them, but there is no such case here.

Of course, if the defender had taken a discharge from Mrs Smith when her state of mind was such that she did not know what she was doing, that discharge would not avail him. But it is not necessary for us to inquire into the pursuer's state of mind or knowledge of the circumstances under which the receipts were granted to enable us to decide this case, because, as I have said, the fact that information was withheld as to the restrictions is enough for the decision. But the Lord Ordinary has stated that he is quite satisfied that the pursuer is incapable of understanding or transacting business of the very simplest kind, and he doubts whether she was capable of understanding what a summons meant, or of understanding any legal expressions, or what articles of roup meant.

I do not agree with that opinion of the Lord Ordinary. The sale bears to be by the pursuer alone, and there is nothing to shew she did not understand what she was doing, or that the estate was sold. If I had formed the same opinion as that entertained by the Lord Ordinary as to her state of mind, I should have had difficulty in dealing with this action, which proceeds entirely in her name, and I should also have had difficulty in giving any effect whatever to a sale effected by a person in such a state of mind. I think, however, that the facts appear sufficiently clear for us to hold that she was a woman capable of effecting a sale of her property and of raising an action in the Court of Session. While I am of that opinion, I think the preferable course will be to decide this action on the ground that the buyer is entitled to be relieved of his bargain because the restrictions in the title were not communicated to him.

Lord Trayner and the Lord Justice-Clerk concurred.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

Duncan Smith & M'Laren, S.S.C.—Marcus J. Brown, S.S.C.—Agents.

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Morier v. Brownlie & Watson.

MRS MARIA MORIER AND OTHERS, Pursuers (Reclaimers).—*Rankine—Younger.*
BROWNLIE AND WATSON AND EDWARD GIBBON, Defenders (Respondents).—*Johnston—Craigie.*
THE GLASGOW GENERAL EDUCATIONAL ENDOWMENTS BOARD AND OTHERS, Defenders.—*Cooper.*

Superior and Vassal—Property—Servitude—Real burden—Building restrictions—Personal objection.—In 1871 Harper, the proprietor of an area of unbuilt-on ground in Glasgow granted a bond and disposition in security over the ground, reserving power to feu the same, but that only at the rate of not less than £60 yearly of feu-duty, it being declared that the superiority of the lands feued and all other rights reserved to Harper as superior should be subject to the security as fully and effectually as the *dominium utile* prior to the constitution of the feu-rights. Thereafter Harper feued out building plots Nos. 1 to 15 as shewn on a feuing-plan according to which the ground was to be occupied by a crescent of dwelling-houses with back-greens behind and a common pleasure ground in front. The feu-contracts of these plots took the vassal bound to erect and maintain on the plot a self-contained dwelling-house of three square storeys in height upon the building lines as shewn on the plans indorsed on the feu-contract, and according to the elevations and other plans therein specified, and the superior bound himself to take the feuars in the unfeued plots bound to conform to these elevations and other stipulations, all the conditions, provisions, and others before written being declared to be essential qualifications of the feu-contract and real liens and burdens upon the plots thereby disponed, and in so far as declared in favour of the vassal, a real lien and burden on the remainder of the ground. Thereafter buildings were erected on the plots feued in conformity with the feu-contracts.

In 1878 and 1881 the superiorities of the plots feued were sold with the consent of the bondholder, and part of the debt having been repaid, the security was restricted to the remainder of the ground, which was still in Harper's hands and was unbuilt upon.

In 1894 the bondholder, under the powers in his bond, sold the unfeued ground still forming the security subjects, and the purchasers having proposed to erect on the ground a row of flatted houses, four storeys in height, and not following the line of building shewn upon the feuing-plan, the proprietors of the feus granted by Harper brought an action against the purchasers of the unfeued ground to have it declared that the ground was subject to the building restrictions and conditions contained in Harper's feu-contracts. The pursuers averred that the defenders were at the time they purchased the unfeued ground aware of these conditions and restrictions.

The Court *assoilzied* the defenders, holding (1) that as the defenders had not acquired the superiorities of the feus granted by Harper they were not liable in the personal obligations undertaken by him to the feuars; (2) that the personal obligations undertaken by Harper to the feuars after he had granted the bond with power of sale could not affect the right of the bondholder or of his successors in the unfeued ground; (3) that the restrictions had not validly been made real burdens on the unfeued ground, as they did not enter the titles thereof; (4) that the feu-contracts granted by Harper could not create a servitude *altius non tollendi* over the unfeued ground, in respect that there was no separate and distinct condition as to height, although a limitation as to height might be inferred from the conditions of the feu-contracts as a whole; (5) that assuming the defenders to have been in the knowledge of the conditions in Harper's feu-contracts, they were not thereby barred from erecting buildings inconsistent with these conditions.

Question, whether, if Harper had made the obligations real burdens on the unfeued ground, they would have been effectual against the bondholder.

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2D DIVISION. Lord Low.

BY disposition dated 24th, and recorded 28th November 1871, John Ewing Walker, coach proprietor in Glasgow, disponed three contiguous plots of ground, extending in all to about nine acres, at Kelvinside, Glasgow, to Archibald & James Harper, cabinetmakers, Glasgow, the disposition declaring that it should not be in the power of the Harpers, or their successors, to erect upon the ground disponed any buildings except self-contained villas, self-contained lodgings, or fitted tenements of a superior description, the said buildings not to exceed four storeys in height above the surface of the ground.

By bond and disposition in security dated 24th and 26th, and recorded 27th February 1873 the Harpers, in consideration of the sum of £7500 borrowed by them from John Ross junior, merchant in Glasgow, disponed to Ross in security the three plots of ground just mentioned,—"But always with and under, in so far as applicable to the said three lots of ground hereby disponed, the whole real liens, burdens, servitudes, reservations, conditions, restrictions, prohibitions, provisions, declarations, obligations, and others specified" in the disposition by John Ewing Walker; "but declaring that, notwithstanding the above conveyance, it shall be competent to and in the power of us and our heirs and successors, at any time hereafter, to dispone in feu-farm, to be holden under us and our foresaids, all or any part of the said lands and others above disponed, but that only at the rate of not less than £60 of yearly feu-duty for each acre of ground, and so that no grassum price or other consideration shall be taken or stipulated to be taken for the ground so feued, other than an annual feu-duty at the rate foresaid, with or without casualties of superiority, or a duplication of the feu-duty every nineteenth year in full of such casualties: And it shall not be in the power of us or our foresaids to make or consent to any conditions or stipulations whereby any right competent by law to us or our foresaids as superiors of any part of said lands to be feued as aforesaid for security or recovery of the said feu-duties, duplications thereof, or casualties, may be in any way prejudiced or injured: And it is hereby declared that the superiority of the lands so to be feued as aforesaid, and the feu-duties, duplications thereof, and casualties of superiority, and any other right, title, or interest in or to the lands and others so to be feued, which may belong to or be reserved by us or our foresaids as superiors thereof, shall be subject to the security hereby created in the same manner, and as fully and effectually to the said John Ross junior and his foresaids, as the *dominium utile* or right of property of said lands prior to the constitution of such feu-rights."

After acquiring the property from Walker the Harpers had a feuing-plan prepared, shewing the ground laid out in a crescent of dwelling-houses (to be called "Derby Crescent"), with back-greens behind, and a common pleasure ground in front; and by feu-contract, dated 16th and 17th October, and recorded 4th November 1874, they feued out to George Pearson, builder in Glasgow, lots 10 to 15 as shewn on the feuing-plan. By the feu-contract Pearson and his heirs and successors in the lots feued were taken bound "to build and erect, and in all time coming maintain, upon each of the said plots of ground a self-contained lodging or dwelling-house of three square storeys in height upon the building lines, as shewn on the plans indorsed hereon, and conform to the elevation and other plans prepared by Robert Stevenson, architect in Glasgow, which lodging shall be kept up and maintained in all time coming according to said elevation,

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and shall be rebuilt or renewed in case of total or partial destruction; and the said first parties [the Harpers] shall take their feuars of the other plots of ground in Derby Crescent validly bound to conform to and carry out the said elevations, and likewise the stipulations herein contained, as to the description, elevation, and quality of houses to be erected, and the formation and maintenance of pleasure ground, and the formation and maintenance of said carriage-way and meuse lane, and these conditions and stipulations are hereby declared real liens and burdens upon the other steading of ground in Derby Crescent in favour of the second party and his successors in the said plots of ground hereby disponed." Then followed a number of stipulations as to the formation, maintenance, and use of the houses, the pavement, and carriage-way in front, and the common ground, and in regard to the back-greens there was this stipulation, "declaring that the back-ground attached to said dwelling-houses shall remain unbuilt on, and be used solely as a washing-green, with suitable offices, which offices shall not exceed in height 30 feet to the ridge of the roof." There was no obligation by the superior to take his feuars in the remainder of the ground bound by these restrictions as to back-greens. The feu-contract also contained this general declaration, "all which conditions, provisions, and others before written are hereby declared to be essential qualifications of this feu-contract and real liens and burdens and servitudes upon the several and respective lands hereby disponed, and, in so far as declared to be in favour of the second party, shall be and remain a real lien and burden upon the first parties' other lands."

The parties to the action after mentioned were at issue as to whether the feuing-plan referred to in the feu-contract was prepared before or after the date of the bond and disposition in security in favour of Ross, but the feuing-plan was not referred to in the bond and disposition in security, and it was not averred that Ross knew of the feuing-plan.

In 1875 and 1876 the Harpers feued out to Pearson lots 1 to 9 of the Derby Crescent, under feu-contracts *mutatis mutandis* identical with those of the feu-contract of 1874, and Pearson erected dwelling-houses upon the lots feued to him in conformity with the feu-contracts.

In 1878 and 1881 the Harpers sold the superiority of the fifteen lots thus feued, in part to the incorporation of Miller's Charity (whose rights were subsequently vested in the Glasgow General Educational Endowments Board) and in part to the trustees of Alexander MacArthur. The price obtained for the superiority was paid to Ross in part extinction of the sum due under his bond, and he discharged the bond in so far as regarded the ground feued, and restricted his security to the ground unfeued still belonging to the Harpers, and extending to 7666 square yards.

The Harpers' estates having been sequestrated, and the interest on Ross's bond having fallen into arrear, Ross's trustees in 1894 sold under the powers in the bond the 7666 square yards then forming the sole subject of his security to Brownlie and Watson, writers, Glasgow. Thereafter in April 1894 Brownlie & Watson feued out the ground to Edward Gibbon under a feu-contract which contained no reference to the restrictions and feuing-plan set forth and referred to in the feu-contracts granted by the Harpers to Pearson; and Gibbon lodged an application in the Dean of Guild Court for warrant to erect on

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the ground feued to him a row of flatted dwelling-houses four storeys in height, and not following the line of building shewn upon the Harpers' feuing-plan, but running diagonally across what was there shewn as back-greens.

In consequence, in August 1894, Mrs Maria Morier and other proprietors of houses built on the feus originally granted to Pearson brought an action against Brownlie and Watson, Gibbon, The Glasgow General Educational Endowments Board, and MacArthur's trustees, concluding for declarator that the obligations, conditions, and restrictions contained in the feu-contracts granted to Pearson formed continuing obligations, conditions, and burdens on the superiority of the whole subjects which had belonged to the Harpers, and were binding on their successors in the superiority, and, in particular, were binding on Brownlie and Watson, as vested in the unbuilt-on ground, and also for declarator that Brownlie and Watson were bound in feuing that ground to insert the said obligations, &c., in all feu-contracts, feu-charters, or other feu-dispositions granted by them, as real burdens on the right of the feuars in favour of the pursuers, their heirs and successors, and further for declarator that the unbuilt-on ground was subject to a real condition, real burden, and servitude in favour of the pursuers and their successors, by which right was conferred upon and vested in the pursuers and their foresaids to restrain the erection upon the same of any buildings other than self-contained lodgings or dwelling-houses of the description and conform to the elevation and plans set forth in the feu-contract in favour of Pearson. The summons also concluded for interdict, damages, and reduction of Gibbon's feu-contract.

The pursuers set forth the feu-contracts granted to Pearson, the feu-contract granted by Brownlie and Watson to Gibbon, and averred further, *inter alia*, that "the said Archibald Brownlie, Joseph Watson, and Edward Gibbon were and have all along been fully aware of the conditions and obligations in the feu-contracts with Pearson."

The pursuers pleaded, *inter alia*;—(2) The obligations by the superiors in the said feu-contracts with Pearson being undertaken by them as such superiors, run with the lands, and are binding upon them and their successors as superiors of said lands. (3) Under the said feu-contracts, the Messrs Harper and their successors are effectually prohibited from erecting on the vacant ground in Derby Crescent any buildings other than self-contained houses conform to the building plan and elevations foresaid. (4) The ground belonging to the defenders in Derby Crescent being subject to a real condition, real burden, restriction, and servitude in favour of the pursuers, under which the pursuers are entitled to restrain the erection of buildings other than self-contained houses of the description foresaid, the pursuers are entitled to decree as concluded for. (5) The pursuers being the holders of a servitude *non altius tollendi* over the ground belonging to the defenders, with which the defenders' proposed buildings are inconsistent, the erection of these buildings should be interdicted. (6) The said feu-contract between Messrs Brownlie and Watson and Gibbon being executed in contravention of the superiors' obligations in the feu-contracts with Pearson, which were well known to both the parties thereto, should be reduced, and declared null and void. (7) The power to feu reserved in the bond and disposition in security granted to Mr John Ross, implied and included power to prepare feuing-plans, and to insert such reasonable conditions as were

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necessary to induce feuars to take up building ground, and to secure adherence to the plans.

The defenders Brownlie and Watson pleaded;—(3) The said Messrs Harper having no power, on a sound construction of said bond and disposition in security, to impose, without the consent of the bondholder, the conditions founded on by the pursuers on the ground sold thereunder to the defenders, and, *separatim*, the said conditions not having been imposed thereon, the defenders are entitled to decree of absolvitor. The defender Gibbon had a plea to the same effect.

The action having been sisted *quoad* the remaining defenders, it is not necessary here to consider their defences.

On 30th May 1895 the Lord Ordinary (Low) pronounced this interlocutor:—"Sustains the defences for the defenders Archibald Brownlie, Joseph Watson, and Edward Gibbon: Assoilzies the said defenders from the conclusions of the action, so far as directed against them: Finds them entitled to expenses," &c.*

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* "OPINION.— . . . A question which was anxiously argued upon both sides was whether, considering that the disposition in security in favour of Ross was granted prior to the feu to Pearson, and the limited terms in which in the disposition right was reserved to the Harpers to feu, it was competent for the latter in a question with Ross and those taking in his right, to impose building restrictions upon ground not actually feued, or, at all events, restrictions going beyond those specified in the disposition by Walker to the Harpers. That is a question of difficulty, and, if the superiority of the ground feued had not been sold and discharged of Ross' bond, it would have been material; but, as the facts stand, I do not think, for reasons which I shall presently give, that it is necessary to decide the question.

"After the superiority of the ground feued was sold, I think that it was practically admitted that, although the Harpers ceased to have any connection with that ground, they still remained bound to the feuars by contract in the personal obligation that they should take their feuars in the other plots of ground bound to conform to and carry out the stipulations in the feu-contract as to the elevation, description, and quality of the houses. The question therefore is, was that personal obligation binding upon, and enforceable by the feuars against Ross, or anyone to whom he should sell the unfeued ground?

"I am of opinion that that question must be answered in the negative. If the superiority of the ground feued had not been sold, and if what Brownlie and Watson had acquired from Ross's trustees had been both the superiority of the ground feued and the unfeued ground, I am inclined to think that the former would have been bound by the personal obligation to which I am referring, assuming that it was in the Harpers' power in a question with Ross to put such a restriction upon the unfeued ground. Because, in the case supposed, Brownlie and Watson would have become superiors of the ground feued, and there would have been privity both of contract and estate between them and the feuars. The superiority having been sold, however, there was no connection whatever between the ground feued, or the feuars, and Ross. There was no contract between them; and they were not interested in any common estate. In these circumstances, I do not think that the feuars could have any title to enforce the Harpers' personal obligation against Ross and his successors.

"It was argued that Ross's disponees were liable to implement the obligation, because Ross sold only under mandate from the Harpers, and therefore could not give any higher right than the latter could have given. That argument assumes that if the Harpers had sold the unfeued ground their

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The pursuers reclaimed, and argued;—It was not beyond the powers of the Harpers, as in a question with Ross, the bondholder, to undertake the obligations in the pursuers' feu-contracts. The bond reserved power to feu, and this imported power to insert in the feu-contracts all reasonable and ordinary conditions which were not inconsistent with the express terms of the bond; and, if the conditions might validly be inserted as in a question with Ross, the fact that they were not made real burdens could not prejudice him. Further, a bondholder in selling the security subjects under his power of sale, was acting as the mandatary of the debtor, and the purchaser was therefore to be taken as if he had acquired the property from the debtor directly, and as liable in all the obligations which he would have incurred had he so acquired the property. But the Harpers being under the obligations in the pursuers' feu-contract could not have sold the property to Brownlie and Watson free of these obligations, thereby giving Brownlie and Watson a higher right in the subjects than they themselves possessed. If Brownlie and Watson in purchasing from the Harpers were in *bona fide* ignorance of these obligations, they had their remedy against the Harpers, either for damages for breach of con-

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disponee would have been liable in the obligation. I am not prepared to assent to that assumption. If the Harpers had sold the unfeued ground, I do not think that the purchaser would have been bound by a restriction not appearing in the titles, and resting only upon the personal obligation of the seller granted to a third party. In such a case it appears to me that the only remedy of the feuars would have been to claim damages from the Harpers for breach of contract. But, however that may be, I do not think that a purchaser from Ross under his power of sale could be affected by the obligation. The ground was disponed in security to Ross, and a power of sale conferred upon him, a year before the personal obligation was granted, and the argument involves that, without his knowledge and consent, the Harpers could, by giving a mere personal obligation, do what amounted to a partial recall of the mandate to sell, and a diminution of the value of the security. I am of that opinion, even upon the assumption that the Harpers were, in a question with Ross, entitled to impose the building restrictions on ground not actually feued. Assuming that the Harpers were entitled to do so, they could only have done so by inserting the restrictions in some deed (such as a disposition of the unfeued ground to themselves) placed upon record. But, if that had been done, it may well be that Ross would not have consented to discharge the feued ground of his security when the superiority was sold, and therefore it cannot be assumed that Ross's disponees would be in no worse position, if the personal obligation was held to be enforceable against them, than they would have been in if the restrictions had been validly imposed on the unfeued ground.

"Further, the fact (assuming it to be so) that the Harpers would have been entitled to make the building restrictions real burdens or servitudes upon the unfeued ground appears to me to be no reason for holding the purchaser bound by the personal obligation, because the feuars with whom the Harpers contracted were content with the personal obligation, and must be presumed to have known that it would not be enforceable against an onerous disponee in the event of the unfeued ground being sold.

"Then it was argued that the building restrictions, being of the nature of servitudes, were validly constituted burdens upon the unfeued ground by the contract entered into between the feuars and the Harpers, although they did not enter the record. It seems to me to be settled that only the known servitudes are effectual without entering the record, and conditions as to the character and use of houses, although familiar as building restrictions, are not among the proper servitudes known to the law. But it was argued that

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tract or for rescission of the contract. The allegation of the pursuers, however, was that Brownlie and Watson, when they made the purchase, were well aware of the conditions in the pursuers' feu-contracts; and their knowledge, assuming it to be proved, would have been a complete answer to any action at their instance against the Harpers for breach of contract. Even assuming that Brownlie and Watson, if they had purchased in ignorance of the restrictions in the pursuers' titles, would not have been bound by these restrictions, their knowledge of these restrictions made the state of their own titles immaterial.[1] But further, if the conditions had not been effectually constituted real burdens on the unfeued property, because they did not appear in the titles to that property, they were binding as servitudes duly constituted by the Harpers. A servitude *altius non tollendi* might be validly constituted, although it did not appear on the recorded titles of the servient tenement;[2] and it was no objection to the validity of such a servitude that the height forbidden was not expressly specified in the deed constituting the servitude,—the height might be a matter of inference from the terms of the deed.[3] Further, building restrictions of an ordinary character, which might

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the conditions in regard to the dwelling-houses, and in regard to the back-greens, included the known servitudes of *altius non tollendi* and *non ædificandi*, and to that extent were effectually constituted against the unfeued ground. It might be a nice question whether a building restriction which prescribed the position, character, architectural construction, and also, and separately, the height of houses to be erected, could be split up into its component parts, and the prohibition against building above a certain height alone regarded. But in this case the question does not, in my judgment, arise. I think that it is the case that, if the whole conditions of the building restrictions are read together, uniformity in the height of the houses is secured. Because, although it is not specified that the houses are not to be more than three square storeys in height, and although a storey is not a standard of height, yet, as the houses were to be built, and in all time maintained, according to the elevation shewn upon the plan prepared by Mr Stevenson, uniformity of height, as well as of appearance, necessarily followed. But that shews that there is no limitation on the height of the houses, unless the whole conditions imposed are taken into consideration. The limitation in height is merely an inference from, or result of, the conditions as a whole, and not a distinct and separate condition. Therefore a servitude *altius non tollendi* could not be imposed upon the unfeued ground, unless the whole conditions as to the houses were imposed upon that ground. But, as I have said, these conditions not being known servitudes could not be imposed upon the unfeued ground without entering the record.

"In regard to the back-greens, the restrictions are, that they are to remain unbuilt upon, except that offices, not exceeding in height 30 feet at the ridge of the roof, may be erected. These conditions are no doubt equivalent to the known servitudes of *altius non tollendi* and *non ædificandi*, but then the Harpers came under no obligation to impose these obligations upon the unfeued ground.

"I am therefore of opinion that the feu-contracts between the Harpers and Pearson had not the effect of imposing any servitude upon the unfeued ground.

"It was finally argued that Brownlie and Watson knew of the obligation

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[1] Lang v. Dixon, June 29, 1813, F. C.; Petrie v. Forsyth, Dec. 16, 1874, 2 R. 215; Stoddart v. Dalzell, Dec. 16, 1876, 4 R. 236.

[2] Young v. Dewar, Nov. 17, 1814, F. C.

[3] Banks & Co. v. Walker, June 5, 1874, 1 R. 981.

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The defender reclaimed, and argued;—He had not been fairly used in the transaction. The restrictions should have been disclosed to him before the sale, more especially as he had not the advice of an agent. Apart from this the restrictions were of themselves so unusual that he was entitled to relief. The prohibition of windows in the back wall was enough to render the property practically valueless.

Argued for the pursuer;—(1) *On the discharge.* The defender acted at least irregularly in going to the pursuer without her agents. He went at his own risk, and the *onus* was on him to shew that the bargain was fair. The Court was strict in criticising any such transaction behind an agent's back.[1] (2) *On the restrictions.* These were of a usual kind. *Altius non tollendi* was the most important, and it was very familiar in urban property.[2]

At advising,—

LORD YOUNG.—This is an action for implement of a contract of sale with an alternative conclusion for damages. The defender has two pleas in law on which he grounds his defence to the action. The first of these is practically that the pursuer had discharged the bargain, and in support of that he founds upon two receipts which he obtained from the pursuer—one written upon the service copy of the summons in this action, and the other upon a letter. These bear on the face of them that, in consideration of the payment of £5, the pursuer discharges all claims made by her against the defender in the summons.

The other ground of defence is that the subjects sold were by the titles under restrictions of which the defender was ignorant at the time of the sale, and that these restrictions were of such a kind that he was entitled to be relieved of his bargain.

It was contended by the pursuer that these receipts ought not to have effect, because the pursuer did not know what she was doing at the time she granted them, or at least was under essential error as to their meaning

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defender should have no difficulty in getting the superior's leave to depart from it. He next objects that the feuar is bound to leave a passage of 3 feet 4 inches to afford a means of access to reserved premises at the back. That passage, I understand, is to be seen by anyone who inspects the house. Thirdly, he objects to the condition that the feuar should not be allowed to have windows in the back wall of the upper storey of the dwelling-house, but will only be allowed to use flat lights on the roof thereof. This also is not an unusual condition, and an inspection of the house should have drawn the defender's attention to its existence.

"It is said that the defender is a foreigner, and that that made it the more incumbent upon the pursuer to explain the existence of the conditions. I have had an opportunity of seeing the defender in the box, and although he is a foreigner he speaks English excellently, and is a man of more than average intelligence, and there is nothing in his manner, appearance, or conversation to lead anyone to suppose that he was not conversant with and able to transact an ordinary piece of business.

"On the whole matter I think there is no necessity for proof, and that the pursuer is entitled to decree in terms of the first declaratory conclusion of the summons, under certification."

[1] M'Donagh v. P. & W. MacLellan, June 18, 1816, 13 R. 1000; North British Railway Co. v. Wood, July 2, 1891, 18 R. (H. L.) 27.

[2] Robertson v. Rutherford, Nov. 27, 1841, 4 D. 120, 14 Scot. Jur. 51; Whyte v. Lees, Feb. 22, 1879, 6 R. 699.

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and effect. The Lord Ordinary allowed parties a proof as to this, and after the proof had been taken, he, by an interlocutor, dated 15th March 1895, repelled the first plea in law for the defender, and appointed the case to be heard on the plea dealing with the restrictions in the titles to the subjects. After hearing parties on that plea, the Lord Ordinary, by interlocutor of 20th June 1895, ordained the defender to implement the sale in terms of the first alternative conclusion of the summons, under certification that in the event of his failing to do so within one month decree would be pronounced under the alternative conclusion of the summons. This reclaiming note brings up for our consideration both these interlocutors.

I think that the first question which we ought to consider here (because there may be doubt about the other question raised in the case) is, whether the restrictions on the subject are such that the defender's ignorance of them entitles him to be relieved of his bargain. The facts material to this contention lie in small compass.

The purchase took place by missives prepared by the pursuer's man of business. The defender, on the other hand, was without professional assistance at the time when the missives were exchanged and the contract of sale concluded. The missives, which are in the form of an offer and acceptance, are dated, the offer by the defender on 26th January 1894, and the acceptance by the pursuer's man of business, on her behalf, and with her authority, on 27th January 1894, and the contract of sale was completed then as far as it was completed at all. The defender naturally desired that, before implement, the titles should be sent to his man of business to be examined, and they were accordingly sent upon 2d February 1894. The purchaser was not to have entry to the subjects until the Whitsunday term following, and the defender's man of business was not able to attend to the matter at once, but upon 26th February he intimated to the pursuer that the titles contained the restrictions set forth in the feu-contract, that these restrictions were not known to the defender or disclosed to him by the pursuer at the time of his purchase, and that in consequence the defender declined to implement the purchase.

It was the fact that the defender had bought the property under these restrictions, which were known to the pursuer's man of business, but not known to the defender, and in these circumstances is it right to force him to go on with his contract? I think that the professional man who acted for the pursuer ought to have informed this artist, who had no professional assistance on his side, of the restrictions which appeared on the face of the titles. He did not do so, and as the defender informed him of his refusal to go on with the contract whenever he was told of the existence of these restrictions, I think he is entitled to be relieved of his bargain.

That is enough for the decision of the case, but I do not think we can dispose of it altogether without some allusion to the conduct of the purchaser in the matter of obtaining the two receipts. I think he was entitled to go to Mrs Smith and make a true representation of the facts to her,—and it is not said that he did not represent the true state of the facts when he said that he was ignorant of the existence of these restrictions,—and I also think that he was entitled to offer to give her £5 to be free of the bargain, and to take the discharge which she granted on that footing. The Standard

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Investment Company now interpose and say that the discharge by Mrs Smith is of no avail, because they, in virtue of their bond over the property for its full value, had the real interest in the matter. Now, I think it material to observe that so far as appears on the face of the transactions Mrs Smith is the only person who has an interest in the matter. The Standard Investment Company did not appear in the transaction, and were not in any way parties to it. She was the sole seller—indeed, the Investment Company could not have sold the property by private bargain at all, and she was the only person entitled to give a discharge of the action raised in her name for implement of the contract. The idea that the holder of a bond over heritable property is entitled to enforce a sale made by the owner of the property, or to recover damages from the buyer on account of his failure to implement the contract, is untenable. Bondholders may sell under the powers of their bonds and of the Act of Parliament applicable to such sales, and will have their remedy for breach of contract on the part of purchasers from them, but there is no such case here.

Of course, if the defender had taken a discharge from Mrs Smith when her state of mind was such that she did not know what she was doing, that discharge would not avail him. But it is not necessary for us to inquire into the pursuer's state of mind or knowledge of the circumstances under which the receipts were granted to enable us to decide this case, because, as I have said, the fact that information was withheld as to the restrictions is enough for the decision. But the Lord Ordinary has stated that he is quite satisfied that the pursuer is incapable of understanding or transacting business of the very simplest kind, and he doubts whether she was capable of understanding what a summons meant, or of understanding any legal expressions, or what articles of roup meant.

I do not agree with that opinion of the Lord Ordinary. The sale bears to be by the pursuer alone, and there is nothing to shew she did not understand what she was doing, or that the estate was sold. If I had formed the same opinion as that entertained by the Lord Ordinary as to her state of mind, I should have had difficulty in dealing with this action, which proceeds entirely in her name, and I should also have had difficulty in giving any effect whatever to a sale effected by a person in such a state of mind. I think, however, that the facts appear sufficiently clear for us to hold that she was a woman capable of effecting a sale of her property and of raising an action in the Court of Session. While I am of that opinion, I think the preferable course will be to decide this action on the ground that the buyer is entitled to be relieved of his bargain because the restrictions in the title were not communicated to him.

Lord Trayner and the Lord Justice-Clerk concurred.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

Duncan Smith & M'Laren, S.S.C.—Marcus J. Brown, S.S.C.—Agents.

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MRS MARIA MORIER AND OTHERS, Pursuers (Reclaimers).—*Rankine—Younger.*
BROWNLIE AND WATSON AND EDWARD GIBBON, Defenders (Respondents).—*Johnston—Craigie.*
THE GLASGOW GENERAL EDUCATIONAL ENDOWMENTS BOARD AND OTHERS, Defenders.—*Cooper.*

Superior and Vassal—Property—Servitude—Real burden—Building restrictions—Personal objection.—In 1871 Harper, the proprietor of an area of unbuilt-on ground in Glasgow granted a bond and disposition in security over the ground, reserving power to feu the same, but that only at the rate of not less than £60 yearly of feu-duty, it being declared that the superiority of the lands feued and all other rights reserved to Harper as superior should be subject to the security as fully and effectually as the *dominium utile* prior to the constitution of the feu-rights. Thereafter Harper feued out building plots Nos. 1 to 15 as shewn on a feuing-plan according to which the ground was to be occupied by a crescent of dwelling-houses with back-greens behind and a common pleasure ground in front. The feu-contracts of these plots took the vassal bound to erect and maintain on the plot a self-contained dwelling-house of three square storeys in height upon the building lines as shewn on the plans indorsed on the feu-contract, and according to the elevations and other plans therein specified, and the superior bound himself to take the feuars in the unfeued plots bound to conform to these elevations and other stipulations, all the conditions, provisions, and others before written being declared to be essential qualifications of the feu-contract and real liens and burdens upon the plots thereby disponed, and in so far as declared in favour of the vassal, a real lien and burden on the remainder of the ground. Thereafter buildings were erected on the plots feued in conformity with the feu-contracts.

In 1878 and 1881 the superiorities of the plots feued were sold with the consent of the bondholder, and part of the debt having been repaid, the security was restricted to the remainder of the ground, which was still in Harper's hands and was unbuilt upon.

In 1894 the bondholder, under the powers in his bond, sold the unfeued ground still forming the security subjects, and the purchasers having proposed to erect on the ground a row of flatted houses, four storeys in height, and not following the line of building shewn upon the feuing-plan, the proprietors of the feus granted by Harper brought an action against the purchasers of the unfeued ground to have it declared that the ground was subject to the building restrictions and conditions contained in Harper's feu-contracts. The pursuers averred that the defenders were at the time they purchased the unfeued ground aware of these conditions and restrictions.

The Court *assoilzied* the defenders, holding (1) that as the defenders had not acquired the superiorities of the feus granted by Harper they were not liable in the personal obligations undertaken by him to the feuars; (2) that the personal obligations undertaken by Harper to the feuars after he had granted the bond with power of sale could not affect the right of the bondholder or of his successors in the unfeued ground; (3) that the restrictions had not validly been made real burdens on the unfeued ground, as they did not enter the titles thereof; (4) that the feu-contracts granted by Harper could not create a servitude *altius non tollendi* over the unfeued ground, in respect that there was no separate and distinct condition as to height, although a limitation as to height might be inferred from the conditions of the feu-contracts as a whole; (5) that assuming the defenders to have been in the knowledge of the conditions in Harper's feu-contracts, they were not thereby barred from erecting buildings inconsistent with these conditions.

Question, whether, if Harper had made the obligations real burdens on the unfeued ground, they would have been effectual against the bondholder.

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2D DIVISION. Lord Low.

BY disposition dated 24th, and recorded 28th November 1871, John Ewing Walker, coach proprietor in Glasgow, disponed three contiguous plots of ground, extending in all to about nine acres, at Kelvinside, Glasgow, to Archibald & James Harper, cabinetmakers, Glasgow, the disposition declaring that it should not be in the power of the Harpers, or their successors, to erect upon the ground disponed any buildings except self-contained villas, self-contained lodgings, or fitted tenements of a superior description, the said buildings not to exceed four storeys in height above the surface of the ground.

By bond and disposition in security dated 24th and 26th, and recorded 27th February 1873 the Harpers, in consideration of the sum of £7500 borrowed by them from John Ross junior, merchant in Glasgow, disponed to Ross in security the three plots of ground just mentioned,—"But always with and under, in so far as applicable to the said three lots of ground hereby disponed, the whole real liens, burdens, servitudes, reservations, conditions, restrictions, prohibitions, provisions, declarations, obligations, and others specified" in the disposition by John Ewing Walker; "but declaring that, notwithstanding the above conveyance, it shall be competent to and in the power of us and our heirs and successors, at any time hereafter, to dispone in feu-farm, to be holden under us and our foresaids, all or any part of the said lands and others above disponed, but that only at the rate of not less than £60 of yearly feu-duty for each acre of ground, and so that no grassum price or other consideration shall be taken or stipulated to be taken for the ground so feued, other than an annual feu-duty at the rate foresaid, with or without casualties of superiority, or a duplication of the feu-duty every nineteenth year in full of such casualties: And it shall not be in the power of us or our foresaids to make or consent to any conditions or stipulations whereby any right competent by law to us or our foresaids as superiors of any part of said lands to be feued as aforesaid for security or recovery of the said feu-duties, duplications thereof, or casualties, may be in any way prejudiced or injured: And it is hereby declared that the superiority of the lands so to be feued as aforesaid, and the feu-duties, duplications thereof, and casualties of superiority, and any other right, title, or interest in or to the lands and others so to be feued, which may belong to or be reserved by us or our foresaids as superiors thereof, shall be subject to the security hereby created in the same manner, and as fully and effectually to the said John Ross junior and his foresaids, as the *dominium utile* or right of property of said lands prior to the constitution of such feu-rights."

After acquiring the property from Walker the Harpers had a feuing-plan prepared, shewing the ground laid out in a crescent of dwelling-houses (to be called "Derby Crescent"), with back-greens behind, and a common pleasure ground in front; and by feu-contract, dated 16th and 17th October, and recorded 4th November 1874, they feued out to George Pearson, builder in Glasgow, lots 10 to 15 as shewn on the feuing-plan. By the feu-contract Pearson and his heirs and successors in the lots feued were taken bound "to build and erect, and in all time coming maintain, upon each of the said plots of ground a self-contained lodging or dwelling-house of three square storeys in height upon the building lines, as shewn on the plans indorsed hereon, and conform to the elevation and other plans prepared by Robert Stevenson, architect in Glasgow, which lodging shall be kept up and maintained in all time coming according to said elevation,

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and shall be rebuilt or renewed in case of total or partial destruction; and the said first parties [the Harpers] shall take their feuars of the other plots of ground in Derby Crescent validly bound to conform to and carry out the said elevations, and likewise the stipulations herein contained, as to the description, elevation, and quality of houses to be erected, and the formation and maintenance of pleasure ground, and the formation and maintenance of said carriage-way and meuse lane, and these conditions and stipulations are hereby declared real liens and burdens upon the other steading of ground in Derby Crescent in favour of the second party and his successors in the said plots of ground hereby disponed." Then followed a number of stipulations as to the formation, maintenance, and use of the houses, the pavement, and carriage-way in front, and the common ground, and in regard to the back-greens there was this stipulation, "declaring that the back-ground attached to said dwelling-houses shall remain unbuilt on, and be used solely as a washing-green, with suitable offices, which offices shall not exceed in height 30 feet to the ridge of the roof." There was no obligation by the superior to take his feuars in the remainder of the ground bound by these restrictions as to back-greens. The feu-contract also contained this general declaration, "all which conditions, provisions, and others before written are hereby declared to be essential qualifications of this feu-contract and real liens and burdens and servitudes upon the several and respective lands hereby disponed, and, in so far as declared to be in favour of the second party, shall be and remain a real lien and burden upon the first parties' other lands."

The parties to the action after mentioned were at issue as to whether the feuing-plan referred to in the feu-contract was prepared before or after the date of the bond and disposition in security in favour of Ross, but the feuing-plan was not referred to in the bond and disposition in security, and it was not averred that Ross knew of the feuing-plan.

In 1875 and 1876 the Harpers feued out to Pearson lots 1 to 9 of the Derby Crescent, under feu-contracts *mutatis mutandis* identical with those of the feu-contract of 1874, and Pearson erected dwelling-houses upon the lots feued to him in conformity with the feu-contracts.

In 1878 and 1881 the Harpers sold the superiority of the fifteen lots thus feued, in part to the incorporation of Miller's Charity (whose rights were subsequently vested in the Glasgow General Educational Endowments Board) and in part to the trustees of Alexander MacArthur. The price obtained for the superiority was paid to Ross in part extinction of the sum due under his bond, and he discharged the bond in so far as regarded the ground feued, and restricted his security to the ground unfeued still belonging to the Harpers, and extending to 7666 square yards.

The Harpers' estates having been sequestrated, and the interest on Ross's bond having fallen into arrear, Ross's trustees in 1894 sold under the powers in the bond the 7666 square yards then forming the sole subject of his security to Brownlie and Watson, writers, Glasgow. Thereafter in April 1894 Brownlie & Watson feued out the ground to Edward Gibbon under a feu-contract which contained no reference to the restrictions and feuing-plan set forth and referred to in the feu-contracts granted by the Harpers to Pearson; and Gibbon lodged an application in the Dean of Guild Court for warrant to erect on

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the ground feued to him a row of flatted dwelling-houses four storeys in height, and not following the line of building shewn upon the Harpers' feuing-plan, but running diagonally across what was there shewn as back-greens.

In consequence, in August 1894, Mrs Maria Morier and other proprietors of houses built on the feus originally granted to Pearson brought an action against Brownlie and Watson, Gibbon, The Glasgow General Educational Endowments Board, and MacArthur's trustees, concluding for declarator that the obligations, conditions, and restrictions contained in the feu-contracts granted to Pearson formed continuing obligations, conditions, and burdens on the superiority of the whole subjects which had belonged to the Harpers, and were binding on their successors in the superiority, and, in particular, were binding on Brownlie and Watson, as vested in the unbuilt-on ground, and also for declarator that Brownlie and Watson were bound in feuing that ground to insert the said obligations, &c., in all feu-contracts, feu-charters, or other feu-dispositions granted by them, as real burdens on the right of the feuars in favour of the pursuers, their heirs and successors, and further for declarator that the unbuilt-on ground was subject to a real condition, real burden, and servitude in favour of the pursuers and their successors, by which right was conferred upon and vested in the pursuers and their foresaids to restrain the erection upon the same of any buildings other than self-contained lodgings or dwelling-houses of the description and conform to the elevation and plans set forth in the feu-contract in favour of Pearson. The summons also concluded for interdict, damages, and reduction of Gibbon's feu-contract.

The pursuers set forth the feu-contracts granted to Pearson, the feu-contract granted by Brownlie and Watson to Gibbon, and averred further, *inter alia*, that "the said Archibald Brownlie, Joseph Watson, and Edward Gibbon were and have all along been fully aware of the conditions and obligations in the feu-contracts with Pearson."

The pursuers pleaded, *inter alia*;—(2) The obligations by the superiors in the said feu-contracts with Pearson being undertaken by them as such superiors, run with the lands, and are binding upon them and their successors as superiors of said lands. (3) Under the said feu-contracts, the Messrs Harper and their successors are effectually prohibited from erecting on the vacant ground in Derby Crescent any buildings other than self-contained houses conform to the building plan and elevations foresaid. (4) The ground belonging to the defenders in Derby Crescent being subject to a real condition, real burden, restriction, and servitude in favour of the pursuers, under which the pursuers are entitled to restrain the erection of buildings other than self-contained houses of the description foresaid, the pursuers are entitled to decree as concluded for. (5) The pursuers being the holders of a servitude *non altius tollendi* over the ground belonging to the defenders, with which the defenders' proposed buildings are inconsistent, the erection of these buildings should be interdicted. (6) The said feu-contract between Messrs Brownlie and Watson and Gibbon being executed in contravention of the superiors' obligations in the feu-contracts with Pearson, which were well known to both the parties thereto, should be reduced, and declared null and void. (7) The power to feu reserved in the bond and disposition in security granted to Mr John Ross, implied and included power to prepare feuing-plans, and to insert such reasonable conditions as were

necessary to induce feuars to take up building ground, and to secure adherence to the plans.

The defenders Brownlie and Watson pleaded;—(3) The said Messrs Harper having no power, on a sound construction of said bond and disposition in security, to impose, without the consent of the bondholder, the conditions founded on by the pursuers on the ground sold thereunder to the defenders, and, *separatim*, the said conditions not having been imposed thereon, the defenders are entitled to decree of absolvitor. The defender Gibbon had a plea to the same effect.

The action having been sisted *quoad* the remaining defenders, it is not necessary here to consider their defences.

On 30th May 1895 the Lord Ordinary (Low) pronounced this interlocutor:—"Sustains the defences for the defenders Archibald Brownlie, Joseph Watson, and Edward Gibbon: Assoilzies the said defenders from the conclusions of the action, so far as directed against them: Finds them entitled to expenses," &c.*

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* "OPINION.— . . . A question which was anxiously argued upon both sides was whether, considering that the disposition in security in favour of Ross was granted prior to the feu to Pearson, and the limited terms in which in the disposition right was reserved to the Harpers to feu, it was competent for the latter in a question with Ross and those taking in his right, to impose building restrictions upon ground not actually feued, or, at all events, restrictions going beyond those specified in the disposition by Walker to the Harpers. That is a question of difficulty, and, if the superiority of the ground feued had not been sold and discharged of Ross' bond, it would have been material; but, as the facts stand, I do not think, for reasons which I shall presently give, that it is necessary to decide the question.

"After the superiority of the ground feued was sold, I think that it was practically admitted that, although the Harpers ceased to have any connection with that ground, they still remained bound to the feuars by contract in the personal obligation that they should take their feuars in the other plots of ground bound to conform to and carry out the stipulations in the feu-contract as to the elevation, description, and quality of the houses. The question therefore is, was that personal obligation binding upon, and enforceable by the feuars against Ross, or anyone to whom he should sell the unfeued ground?

"I am of opinion that that question must be answered in the negative. If the superiority of the ground feued had not been sold, and if what Brownlie and Watson had acquired from Ross's trustees had been both the superiority of the ground feued and the unfeued ground, I am inclined to think that the former would have been bound by the personal obligation to which I am referring, assuming that it was in the Harpers' power in a question with Ross to put such a restriction upon the unfeued ground. Because, in the case supposed, Brownlie and Watson would have become superiors of the ground feued, and there would have been privity both of contract and estate between them and the feuars. The superiority having been sold, however, there was no connection whatever between the ground feued, or the feuars, and Ross. There was no contract between them; and they were not interested in any common estate. In these circumstances, I do not think that the feuars could have any title to enforce the Harpers' personal obligation against Ross and his successors.

"It was argued that Ross's disponees were liable to implement the obligation, because Ross sold only under mandate from the Harpers, and therefore could not give any higher right than the latter could have given. That argument assumes that if the Harpers had sold the unfeued ground their

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The pursuers reclaimed, and argued;—It was not beyond the powers of the Harpers, as in a question with Ross, the bondholder, to undertake the obligations in the pursuers' feu-contracts. The bond reserved power to feu, and this imported power to insert in the feu-contracts all reasonable and ordinary conditions which were not inconsistent with the express terms of the bond; and, if the conditions might validly be inserted as in a question with Ross, the fact that they were not made real burdens could not prejudice him. Further, a bondholder in selling the security subjects under his power of sale, was acting as the mandatary of the debtor, and the purchaser was therefore to be taken as if he had acquired the property from the debtor directly, and as liable in all the obligations which he would have incurred had he so acquired the property. But the Harpers being under the obligations in the pursuers' feu-contract could not have sold the property to Brownlie and Watson free of these obligations, thereby giving Brownlie and Watson a higher right in the subjects than they themselves possessed. If Brownlie and Watson in purchasing from the Harpers were in *bona fide* ignorance of these obligations, they had their remedy against the Harpers, either for damages for breach of con-

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disponee would have been liable in the obligation. I am not prepared to assent to that assumption. If the Harpers had sold the unfeued ground, I do not think that the purchaser would have been bound by a restriction not appearing in the titles, and resting only upon the personal obligation of the seller granted to a third party. In such a case it appears to me that the only remedy of the feuars would have been to claim damages from the Harpers for breach of contract. But, however that may be, I do not think that a purchaser from Ross under his power of sale could be affected by the obligation. The ground was disponed in security to Ross, and a power of sale conferred upon him, a year before the personal obligation was granted, and the argument involves that, without his knowledge and consent, the Harpers could, by giving a mere personal obligation, do what amounted to a partial recall of the mandate to sell, and a diminution of the value of the security. I am of that opinion, even upon the assumption that the Harpers were, in a question with Ross, entitled to impose the building restrictions on ground not actually feued. Assuming that the Harpers were entitled to do so, they could only have done so by inserting the restrictions in some deed (such as a disposition of the unfeued ground to themselves) placed upon record. But, if that had been done, it may well be that Ross would not have consented to discharge the feued ground of his security when the superiority was sold, and therefore it cannot be assumed that Ross's disponees would be in no worse position, if the personal obligation was held to be enforceable against them, than they would have been in if the restrictions had been validly imposed on the unfeued ground.

"Further, the fact (assuming it to be so) that the Harpers would have been entitled to make the building restrictions real burdens or servitudes upon the unfeued ground appears to me to be no reason for holding the purchaser bound by the personal obligation, because the feuars with whom the Harpers contracted were content with the personal obligation, and must be presumed to have known that it would not be enforceable against an onerous disponee in the event of the unfeued ground being sold.

"Then it was argued that the building restrictions, being of the nature of servitudes, were validly constituted burdens upon the unfeued ground by the contract entered into between the feuars and the Harpers, although they did not enter the record. It seems to me to be settled that only the known servitudes are effectual without entering the record, and conditions as to the character and use of houses, although familiar as building restrictions, are not among the proper servitudes known to the law. But it was argued that

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tract or for rescission of the contract. The allegation of the pursuers, however, was that Brownlie and Watson, when they made the purchase, were well aware of the conditions in the pursuers' feu-contracts; and their knowledge, assuming it to be proved, would have been a complete answer to any action at their instance against the Harpers for breach of contract. Even assuming that Brownlie and Watson, if they had purchased in ignorance of the restrictions in the pursuers' titles, would not have been bound by these restrictions, their knowledge of these restrictions made the state of their own titles immaterial.[1] But further, if the conditions had not been effectually constituted real burdens on the unfeued property, because they did not appear in the titles to that property, they were binding as servitudes duly constituted by the Harpers. A servitude *altius non tollendi* might be validly constituted, although it did not appear on the recorded titles of the servient tenement;[2] and it was no objection to the validity of such a servitude that the height forbidden was not expressly specified in the deed constituting the servitude,—the height might be a matter of inference from the terms of the deed.[3] Further, building restrictions of an ordinary character, which might

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the conditions in regard to the dwelling-houses, and in regard to the back-greens, included the known servitudes of *altius non tollendi* and *non ædificandi*, and to that extent were effectually constituted against the unfeued ground. It might be a nice question whether a building restriction which prescribed the position, character, architectural construction, and also, and separately, the height of houses to be erected, could be split up into its component parts, and the prohibition against building above a certain height alone regarded. But in this case the question does not, in my judgment, arise. I think that it is the case that, if the whole conditions of the building restrictions are read together, uniformity in the height of the houses is secured. Because, although it is not specified that the houses are not to be more than three square storeys in height, and although a storey is not a standard of height, yet, as the houses were to be built, and in all time maintained, according to the elevation shewn upon the plan prepared by Mr Stevenson, uniformity of height, as well as of appearance, necessarily followed. But that shews that there is no limitation on the height of the houses, unless the whole conditions imposed are taken into consideration. The limitation in height is merely an inference from, or result of, the conditions as a whole, and not a distinct and separate condition. Therefore a servitude *altius non tollendi* could not be imposed upon the unfeued ground, unless the whole conditions as to the houses were imposed upon that ground. But, as I have said, these conditions not being known servitudes could not be imposed upon the unfeued ground without entering the record.

"In regard to the back-greens, the restrictions are, that they are to remain unbuilt upon, except that offices, not exceeding in height 30 feet at the ridge of the roof, may be erected. These conditions are no doubt equivalent to the known servitudes of *altius non tollendi* and *non ædificandi*, but then the Harpers came under no obligation to impose these obligations upon the unfeued ground.

"I am therefore of opinion that the feu-contracts between the Harpers and Pearson had not the effect of imposing any servitude upon the unfeued ground.

"It was finally argued that Brownlie and Watson knew of the obligation

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[1] Lang v. Dixon, June 29, 1813, F. C.; Petrie v. Forsyth, Dec. 16, 1874, 2 R. 215; Stoddart v. Dalzell, Dec. 16, 1876, 4 R. 236.

[2] Young v. Dewar, Nov. 17, 1814, F. C.

[3] Banks & Co. v. Walker, June 5, 1874, 1 R. 981.

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reasonably be expected to exist in the particular case, were binding, on the same principles as regulated the known servitudes.[1]

The defenders Brownlie and Watson and Gibbon supported the judgment on the grounds stated by the Lord Ordinary.[2]

At advising,—

LORD JUSTICE-CLERK.—(After narrating the circumstances of the action) —It is important to keep in view the sequence of events beginning with the bond to Ross. That bond was granted when the Harpers were under no obligation except those contained in their own author Walker's disposition.

They then granted their bond to Ross, and thereafter gave out these feus to Pearson, taking themselves bound in the new conditions. If it were to be held that these conditions were binding upon Ross's disponees, that would be tantamount to holding that after the Harpers had granted their bond and disposition in security, they could by granting a personal obligation in favour of new feuars affect the value of Ross's security, giving him after their disposition to Pearson less to realise, in the event of circumstances occurring which would entitle him to exercise his power of sale. Could they, by a mere personal obligation given to their feuars, practically destroy in part the value of the security given to Ross, and affect the right of a purchaser from Ross under his power of sale? That question must be answered in the negative. It might be a question, as the Lord Ordinary points out, whether the Harpers had in a question with Ross the power, if they proceeded in proper form, to impose restrictions in favour of feuars upon the unfeued part of the lands. But assuming that they could do so by a deed entering the record,—which is, to say the least, very doubtful,—such a disclosed change of conditions might well have

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which the Harpers had undertaken in regard to the unfeued ground, and are therefore bound to implement that obligation. The cases founded upon in support of that proposition were *Petrie*, 2 R. 214, and *Stodart*, 4 R. 286. In the case of *Petrie*, the sale of land to a second purchaser was reduced upon the ground that he knew that a prior contract of sale had been previously concluded between the seller and a third party. In *Stodart's* case a similar judgment was pronounced, where a purchaser attempted to evict a person who had informally acquired a right of feu over part of the subjects purchased, the purchaser being in the knowledge that some right had been acquired over the subjects, and being thereby put upon his inquiry. It seems to me that the principle upon which these cases were decided has no application here. If, as I think was the case, the personal obligation did not affect lands, then knowledge on the part of the purchasers that such an obligation had been granted appears to me to be of no moment. Assuming that they knew of the obligation, they knew also that it did not affect the lands."

[1] Johnston v. MacRitchie, March 15, 1893, 20 R. 539, *per* Lord Young at p. 548.

[2] *Authorities.*—Heron v. Martin, July 18, 1893, 20 R. 1001, *per* Lord Low (Ordinary), at p. 1005; Tailors of Aberdeen v. Coutts, May 23, 1837, 2 S. and M. 609; Campbell v. Clydesdale Banking Co., June 19, 1868, 6 Macph. 943, 40 Scot. Jur. 539; Hislop v. MacRitchie's Trustees, June 23, 1881, 8 R. (H. L.) 95; Johnston v. MacRitchie, March 15, 1893, 20 R. 539.

deterred Ross from granting the partial discharge which he did when the superiority was sold. It is therefore not just to assume, as the reclaimer asks us to do, that Ross's trustees could be in no worse position if the personal obligation were held enforceable against them, than if the restrictions in question had been validly imposed on the unfeued portion of the ground. But whatever might have been possible to the Harpers had they executed such a deed as is above supposed, the onerous disponee of the ground sold by the bondholder's trustees cannot be held subject to what was in reality only a personal obligation of the Harpers to their feuars, nothing in point of fact having been done towards imposing the restrictions on the unfeued ground so as to make them enforceable against the bondholder, even if that were possible.

As regards the plea maintained by the pursuers, that the restrictions fall into the class of known servitudes, it is difficult to see how it can be held that any limitation in height can be held to be imposed as a servitude, when such limitation is not applied otherwise than by deducing it from other conditions not constituting known servitudes, and which conditions could not therefore be imposed upon the unfeued ground unless they entered the record. That is the case here. For there is no other way of reaching a restriction as to height than by inferring it from certain prescribed conditions taken together. It is not a definite condition by itself. As regards the back-greens, while what is contained in the Harpers' deed to Pearson is of the character of servitude, the Harpers were not by their contract taken bound to impose any servitude, obligation, or restriction on future feuars in regard to these back-greens.

It only remains to notice the contention that the knowledge of the Harpers' undertaking to their feuars on the part of Brownlie and Watson is sufficient to bind them to implement the Harpers' obligation. It is a sufficient answer, as stated by the Lord Ordinary, that if the view be sound that the personal obligation undertaken by the Harpers did not affect the lands, then a knowledge of this inoperative undertaking could not make the undertaking effectual or binding on a *bona fide* purchaser from the bondholder, whose right was not affected by the condition.

LORD YOUNG.—I concur in the result, and I am prepared to affirm the judgment on the grounds stated by the Lord Ordinary.

LORD TRAYNER.—I agree with the Lord Ordinary. I think that the conclusion at which the Lord Ordinary has arrived might have been reached on other grounds, but the grounds stated by his Lordship seem to me sufficient for the decision of the case.

THE COURT adhered.

MORTON, SMART, & MACDONALD, W.S.—F. J. MARTIN, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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Nov. 5, 1895. North British Railway Co. v. Lanarkshire and Dumbartonshire Railway Co.

NORTH BRITISH RAILWAY COMPANY, Pursuers (Reclaimers)).—*Balfour—Cooper.*

LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY, Defenders (Respondents).—*Dickson—Ure—Malcolm.*

Arbitration—Reference of differences with respect to matters referred to in a section of private Act—Jurisdiction—Lanarkshire and Dumbartonshire Railway Act, 1891 (*54 and 55 Vict. c. cci.*), *sec.* 6.—By the Lanarkshire and Dumbartonshire Railway Act, 1891, sec. 6, subsec. (4), it was enacted that a railway company should carry their line under certain ground belonging to the North British Railway Company in tunnel, and that in the construction of the tunnel the company should not "without the previous consent of" the North British Company break open the surface of the ground.

By subsec. (7) it was enacted that bridges and works passing over or under lands belonging to the North British Company should be according to plans approved of by the engineer of that company.

By subsec. (10) it is enacted that "if any difference shall at any time arise between the company and the North British Company or their respective engineers, with respect to any of the matters above referred to in this section, such difference shall be determined by an engineer to be appointed by the Board of Trade. . . ."

The tunnel having been completed, the North British Company raised an action against the company to have them ordained to remove a ventilating shaft which they had constructed from the roof of the tunnel to the surface of the ground belonging to the North British Company. The questions raised in the action were whether certain plans which had been submitted by the company to and approved of by the engineer of the North British Company disclosed the ventilating shaft, and if they did, whether the engineer's approval was equivalent to the consent required by subsec. (4), or otherwise barred the North British Company from challenging the shaft. The defenders pleaded the reference clause. The pursuers maintained that the questions did not constitute a difference in the sense of subsec. (10), in respect (1) that the erection of the shaft was altogether outwith the statutory powers of the defenders; and (2) that the questions were essentially questions of law. *Held* that a difference had arisen which fell to be referred in terms of subsec. (10).

1ST DIVISION. Ld. Kyllachy.

IN 1891 the Lanarkshire and Dumbartonshire Railway Company were authorised by Act of Parliament, 54 and 55 Vict. cap. cci., to construct a line of railway from a point near the Queen's Dock, Glasgow, to Dumbarton. The line near its commencement at Glasgow passed in tunnel under the Stobcross Station or depôt, which belonged jointly to the North British Railway Company and the Caledonian Railway Company. In 1894 the Lanarkshire and Dumbartonshire Railway Company constructed a ventilating shaft from the roof of the tunnel to the surface of the ground at the depôt where the ground was wholly dedicated to the use of the North British Railway Company.

On 22d February 1895 the North British Railway Company raised an action against the Lanarkshire and Dumbartonshire Railway Company, concluding for decree ordaining them to close up the ventilating shaft, and to restore the surface of the ground to its former state.

The undernoted clauses of the Lanarkshire and Dumbartonshire Railway Act, 1891, were referred to by the parties.*

* 54 and 55 Vict. cap. cci., sec. 6, enacts, subsec. (4),—"Railway No. 1

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The pursuers averred that the ventilating shaft had been constructed without their consent or permission, and against their remonstrances. They denied that it had been constructed with the knowledge and consent of their engineer.

The defenders stated:—In conformity with section 6, subsec. 7, of their Act, they submitted to Mr Carswell, the pursuers' engineer, a plan and section, which shewed that it was the intention of the defenders to construct the ventilating shaft objected to, and that a detailed specification was afterwards sent to him, shewing how the contractor intended to execute the work. No objection was made by Mr Carswell to any of the works included in the plans and specification. The work of constructing the ventilating shaft was proceeded with in the full knowledge of the pursuers' engineer, and under the supervision of the pursuers' inspectors.

In answer to this statement the pursuers averred that the plans submitted to their engineer did not disclose that the defenders were to construct the ventilating shaft on the pursuers' lands, and further, that their engineer had no authority to permit the defenders to make an opening in their ground.

The pursuers pleaded;—(2) The defenders not having obtained the consent of the pursuers, in terms of section 6, subsection (4) of the defenders' Act of Parliament, the works complained of are illegal, and the defenders should be ordained to remove them, and to restore the ground in terms of the conclusions of the summons.

The defenders pleaded;—(2) The defenders having constructed said ventilating shaft in the knowledge and with the consent of the pursuers, they are entitled to absolvitor, with expenses. (5) In any event, the pursuers' proper remedy was that afforded by section 6, subsection 10, of the defenders' said Act of Parliament, and the present action is excluded by said subsection.

On 11th July 1895 the Lord Ordinary (Kyllachy) found "that the question between the parties falls to be determined by an arbiter appointed by the Board of Trade, in terms of section 6, subsection 10, of the defenders' Act; therefore sists process to enable either of the parties to make application to the Board of Trade for the appointment

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shall be carried under the North British Railway Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Company at Stobcross in tunnel, and the company shall not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground."

Subsec. (7).—"All bridges and works which may be constructed by the company, so far as passing over or under, or in any manner interfering with any lines, works, or lands belonging to the North British Company, shall be of such design and materials as shall be approved of by the engineer for the time being of that company, and shall be constructed and completed under the superintendence, and to the reasonable satisfaction in all respects, of such engineer, and according to working plans, sections, and specifications to be submitted to and approved of by him previously to the commencement of the works affecting the property of the said company."

Subsec. (10).—"If any difference shall at any time arise between the company and the North British Company, or their respective engineers, with respect to any of the matters above referred to in this section, such difference shall be determined by an engineer to be appointed by the Board of Trade on the application of either of the said companies, at the cost of the company, and the decision of such engineer shall be final and conclusive."

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The tunnel having been completed, the North British Company raised an action against the company to have them ordained to remove a ventilating shaft which they had constructed from the roof of the tunnel to the surface of the ground belonging to the North British Company. The questions raised in the action were whether certain plans which had been submitted by the company to and approved of by the engineer of the North British Company disclosed the ventilating shaft, and if they did, whether the engineer's approval was equivalent to the consent required by subsec. (4), or otherwise barred the North British Company from challenging the shaft. The defenders pleaded the reference clause. The pursuers maintained that the questions did not constitute a difference in the sense of subsec. (10), in respect (1) that the erection of the shaft was altogether outwith the statutory powers of the defenders; and (2) that the questions were essentially questions of law. *Held* that a difference had arisen which fell to be referred in terms of subsec. (10).

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The defenders stated:—In conformity with section 6, subsec. 7, of their Act, they submitted to Mr Carswell, the pursuers' engineer, a plan and section, which shewed that it was the intention of the defenders to construct the ventilating shaft objected to, and that a detailed specification was afterwards sent to him, shewing how the contractor intended to execute the work. No objection was made by Mr Carswell to any of the works included in the plans and specification. The work of constructing the ventilating shaft was proceeded with in the full knowledge of the pursuers' engineer, and under the supervision of the pursuers' inspectors.

In answer to this statement the pursuers averred that the plans submitted to their engineer did not disclose that the defenders were to construct the ventilating shaft on the pursuers' lands, and further, that their engineer had no authority to permit the defenders to make an opening in their ground.

The pursuers pleaded;—(2) The defenders not having obtained the consent of the pursuers, in terms of section 6, subsection (4) of the defenders' Act of Parliament, the works complained of are illegal, and the defenders should be ordained to remove them, and to restore the ground in terms of the conclusions of the summons.

The defenders pleaded;—(2) The defenders having constructed said ventilating shaft in the knowledge and with the consent of the pursuers, they are entitled to absolvitor, with expenses. (5) In any event, the pursuers' proper remedy was that afforded by section 6, subsection 10, of the defenders' said Act of Parliament, and the present action is excluded by said subsection.

On 11th July 1895 the Lord Ordinary (Kyllachy) found "that the question between the parties falls to be determined by an arbiter appointed by the Board of Trade, in terms of section 6, subsection 10, of the defenders' Act; therefore sists process to enable either of the parties to make application to the Board of Trade for the appointment

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shall be carried under the North British Railway Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Company at Stobcross in tunnel, and the company shall not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground."

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of an arbiter, with a view to the cause being remitted to such arbiter upon his appointment."*

The pursuers reclaimed, and argued;—The reference clause did not apply. The operation complained of was really outwith the statute altogether, for the ventilating shaft, entailing as it did the permanent occupation of a part of the pursuers' lands, was not a work incidental to the construction of the railway. But in any view under subsection 4 of section 6 the pursuers' consent was required, and they had not

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* "OPINION.—The question in this case is whether a certain ventilating shaft, constructed by the defenders in the roof of a tunnel on their railway where it passes under certain property of the pursuers, was constructed with the consent of the pursuers. If there was no consent, it seems to be conceded that the structure was illegal and must be removed. But the defenders maintain that the pursuers did consent to the work, and their consent is said to have been obtained in this way: That the plans of the tunnel, which required under the statute to be submitted to the pursuers' engineer, shewed the ventilating shaft in question as part of the proposed works, and that the engineer approved of this plan, including the proposed shaft. The pursuers, on their part, deny that the plan shewed a ventilating shaft, or any work of that description, and they further maintain that the engineer of their company had no authority to consent to the construction of the shaft, his authority being, as they say, limited to the approval or disapproval of the plan of the tunnel.

"In these circumstances there is plainly an issue of fact which has arisen between the parties, an issue, at all events, involving the construction of the plans of the tunnel which were submitted to the pursuers' engineer; and what I have to determine is whether the issue thus arising is one which falls to be remitted to an arbiter in terms of subsection 10 of section 6 of the defenders' Act. That subsection provides that 'if any difference shall at any time arise between the company and the North British Company, or their respective engineers, with respect to any of the matters above referred to in this section, such difference shall be determined by an engineer to be appointed by the Board of Trade on the application of either of the said companies.' The defenders contend that that arbitration clause applies, and that the action should be sisted to enable an application to be made to the Board of Trade, and should then be remitted to the arbiter to be appointed by that Board.

"I have come to the conclusion that there is no sufficient reason for denying to the language of the arbitration clause its *prima facie* and natural latitude. I think that the language of the clause is wide enough to cover any dispute which may arise under the section in question,—that is to say, any dispute with regard to the execution of the works in question which may arise between the parties. But even if it were to be held implied—as the pursuers maintain—that the matters to be referred to the engineer appointed by the Board of Trade were only matters of engineering, I am not prepared to say that that construction would exclude the remit which is asked in this case, because, as I have said, the one question—perhaps the main question—between the parties is as to the true reading of certain plans submitted by one engineer to another; and that seems a matter peculiarly appropriate for the determination of an engineer. I propose, therefore, not to dismiss the action, because a clause of that kind does not oust the jurisdiction of the Court, but to find that the question between the parties falls to be determined by the arbiter appointed by the Board of Trade, in terms of section 6, subsection 10, of the defenders' Act, and therefore to sist process to enable either of the parties to make application to the Board of Trade for the appointment of such arbiter, with a view to the case being remitted to such arbiter upon his appointment."

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given it. The defenders said that they had, by their engineer, who had approved of certain plans. But the engineer had no authority to bind the pursuers, and besides, his approval of the plans—even if they shewed the shaft as a permanent structure, which was also disputed—could not be held equivalent to the consent required by the statute. Now, these differences raised questions of the meaning of subsections 4 and 7, and of simple fact, but not questions of engineering skill. The statutory reference, however, was to an engineer, and was clearly intended to cover only technical matters arising during the construction of the railway. The jurisdiction of the Court, therefore, was not excluded.

Argued for the defenders;—The pursuers were barred under subsection 7 from now objecting to the shaft, because the plans which shewed it had been approved by their engineer, and further, his approval was tantamount to the consent required by subsection 4. These propositions were disputed by the pursuers, and a difference had thus arisen. But the words of the reference clause were very general, and amply covered the dispute.[1] The *onus* lay on the pursuers to shew that some good reason existed why the dispute should not be referred to arbitration,[2] and they had failed to do so.

At advising,—

LORD PRESIDENT.—The question in dispute, as the Lord Ordinary says in the first sentence of his opinion, is whether this ventilating shaft was constructed with the consent of the pursuers. Although, however, this is the ultimate question, the dispute, as it was explained to us, involves more than a question of fact or of engineering, and indeed depends largely on the construction and relation of the 4th and 7th subsections of the 6th section of the defenders' statute.

On the one hand, it is said for the defenders that they having presented to the pursuers' engineer plans shewing a ventilating shaft he approved of it, and that this having been done under subsection 7, the pursuers cannot challenge the shaft. The defenders say also that the engineer's approval may also be held to be the consent of the company under subsection 4, and thus to legalise the shaft.

On the other hand, the pursuers say that even assuming (which they did not unreservedly do) that a ventilating shaft may be treated as a work incidental to the railway, yet that, inasmuch as it necessarily involves breaking open the surface of the ground, the previous consent of the company was necessary under subsection 4 to its construction at this place; that the engineer had no authority, express or implied, to grant such consent; and that his approval of the plans cannot supply the want of the company's antecedent consent. The question is also complicated by the defenders not having served notices to take the land on which the shaft is constructed.

This, or something like this, is the controversy; and if it contains the

[1] Magistrates of Glasgow v. Caledonian Railway Co., June 17, 1892, 19 R. 874; Great North of Scotland Railway Co. v. Highland Railway Co., 1871, 9 S. L. R. 92; Caledonian Railway Co. v. Greenock and Wemyss Bay Railway Co., March 30, 1874, 1 R. (H. L.) 8.

[2] Hodgson v. Railway Passengers Assurance Co., 1882, L. R., 9 Q. B. D., 188.

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elements of fact and engineering skill, it is, or may prove ultimately to be mainly a question of law.

Not the less, however, do I hold that the dispute is a difference or differences with respect to some of the matters referred to in section 6, and therefore must be determined in manner provided in subsection 10. I see no warrant for limiting the very wide terms of the clause to matters in which an engineer is a peculiarly well qualified arbiter by reason of his professional skill. The statute has drawn no such distinction.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

JAMES WATSON, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

No. 19.
Nov. 6, 1895.
Murray v. Macfarlane's Trustees.

JOHN GILLESPIE MURRAY (Downie's Curator Bonis) AND ANOTHER, Pursuers.—*C. K. Mackenzie—Constable.*
GEORGE LAWRIE AND OTHERS (Mrs Macfarlane's Trustees—Patterson Trust), Defenders.—*C. J. Guthrie—James Reid.*
PETER FAIR HUSBAND (Mrs Macfarlane's Trustee—Cook Trust), Defenders.—*W. Campbell—Crole.*
MRS MARGARET DEWAR OR MILLER, Defender.
WILLIAM DONALDSON HUSBAND AND OTHERS (Mrs Macfarlane's Testamentary Trustees), Defenders.

Expenses—Separate defences—Objection to Auditor's report.—Observed by the Lord President that, where successful defenders have appeared separately, the appropriate time for determining whether they are entitled to the expense of separate defences is when the motion for expenses is made.

1ST DIVISION.

(REPORTED *ante*, July 17, 1895, vol. xxii., p. 927.)

In this case the Court, on 9th July 1895 (22 R. 940), dismissed the first and second declaratory conclusions of the summons in so far as directed against the defenders the trustees under the Patterson Trust, the trustees under the Cook Trust, and Mrs Miller, assoilzied them from the remaining conclusions of the summons, and found them entitled to expenses. The trustees under the Patterson and Cook Trusts who had conducted their defences separately lodged separate accounts of expenses. At the audit the pursuers' agents contended that these defenders ought to have had only one account, as their interests were identical, but the Auditor did not give effect to this contention in taxing the accounts, holding "that the matter is one for the Court to deal with, and they having awarded expenses to all the defenders without any qualification, he feels that he has no power to restrict them to the effect contended for."

The pursuers objected to the Auditor's reports on the ground that he should only have allowed these defenders the expense of a joint defence.

Argued, *inter alia*, for the pursuers;—The present was an appropriate stage for raising the question whether the expense of separate defences should be allowed.[1]

Argued, *inter alia*, for the defenders;—The objection came too late.

[1] Cameron v. French, Oct. 26, 1893, 1 Scots Law Times, 259.

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Lord Young's *dicta* in *Cameron's* case did not represent the practice of the profession. The regular practice, which was certainly the most convenient, was that an objection of this character should be taken when the finding as to expenses was pronounced.[1]

LORD PRESIDENT.—I think both sets of expenses should be allowed.

I may add that I think this discussion very forcibly illustrates the convenience of the practice of determining this question when the finding as to expenses is made, because at this stage the whole subject requires to be rediscussed and brought back to the mind of the Court, but when the case is fresh in our minds the discussion is necessarily of a more simple character.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT repelled the objection, and approved of the Auditor's reports.

DUNDAS & WILSON, C.S.—THOMSON, DICKSON, & SHAW, W.S.—W. B. RAINNIE, S.S.C.—Agents.

No. 20.

Nov. 6, 1895.
Glasgow District Subway Co. v. Albin & Son.

THE GLASGOW DISTRICT SUBWAY COMPANY, Complainers (Respondents).—*D. Dundas—W. Thomson.*
T. ALBIN & SON, Respondents (Reclaimers).—*Salvesen—A. M. Anderson.*
CHARLES YULE AND ANOTHER, Defenders.

Railway—Construction of railway—Compensation—Yearly tenant—Procedure—Arbitration—Sheriff—Railway Clauses Consolidation (Scotland) Act, 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 6—*Lands Clauses Consolidation (Scotland) Act*, 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 114.—A claim by a yearly tenant against a railway company for compensation under sec. 6 of the Railway Clauses Consolidation (Scotland) Act, 1845, falls to be determined by the Sheriff under sec. 114 of the Lands Clauses Consolidation (Scotland) Act, 1845—and not by arbitration—whether the claim is on account of lands injuriously affected or is on account of lands taken.

Caledonian Railway Company v. *Barr*, 17 D. 312, *followed.*

2D DIVISION. Lord Kincairney.

BY the Glasgow District Subway Act, 1890 (53 and 54 Vict. cap. clxii.), the Glasgow District Subway Company was incorporated, and was empowered to construct a subway below certain streets in Glasgow.

On 30th January 1895, T. Albin & Son, hairdressers, lessees and occupants of the premises, 1½ West Milton Street, Glasgow, served the Subway Company with a deed of nomination of an arbiter under the Lands Clauses Consolidation (Scotland) Act, 1845 (which was incorporated with the company's special Act), for the purpose of determining a claim by them against the company for compensation "for loss and damage to our stock and effects, business premises, and loss of and interference with the access to the said premises caused through the construction of the subway and the operations of the company." The claim was based on the 6th section of the Railway Clauses Consolidation (Scotland) Act, 1845,* which was incorporated with the special Act.

[1] Duncan v. Salmond, March 17, 1874, 1 R. 839.

* The Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), section 6, enacts,—"In exercising the power given to the

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The company having also nominated an arbiter, but under protest, brought a note of suspension and interdict against Albin & Son and the arbiters to have the proceedings in the arbitration interdicted, and a record was made up.

The company maintained that interdict ought to be granted, *inter alia*, on the ground that Albin & Son's claim to compensation fell to be determined by procedure before the Sheriff under section 114 of the Lands Clauses Consolidation (Scotland) Act, 1845,* and not by arbitration, in respect that Albin & Son were yearly tenants of their premises.

Albin & Son admitted that they were yearly tenants, but averred (and the company admitted) that no land was taken, and maintained that section 114 of the Lands Clauses Act did not apply to cases in which compensation for injurious affection only was claimed, and no land in possession of the tenant taken.

On 9th August 1895 the Lord Ordinary (Kincairney) pronounced an interlocutor, *inter alia*, granting interdict as craved.†

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company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act, and in the said Lands Clauses Consolidation (Scotland) Act, and the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise as regards such lands of the powers by this or the special Act, or any Act incorporated therewith, vested in the company, and except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last mentioned Act shall be applicable to determine the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

* The Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19), section 114, enacts, with respect to lands subject to leases, that "if any such lands shall be in possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain, or if part only of such lands be required, compensation for the damage done to him in his tenancy by the severing of the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by the Sheriff in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act."

† "OPINION.— . . . The complainers . . . maintained that . . . the respondents . . . could, as yearly tenants, only proceed before the Sheriff under the 114th section of the Lands Clauses Act. I am of opinion that I am bound to sustain that argument. The precise point was decided in the case of *The Caledonian Railway Company* v. *Barr*, January 27, 1855, 17 D. 312. No Scottish case was quoted on the

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Albin & Son reclaimed, and argued;—Section 114 of the Lands Clauses Consolidation Act, 1845, applied only where land was taken by the company from the tenant. The words of the section were, if such person should be "required to give up possession of any lands" he should be entitled to compensation. The case of *Barr*,[1] which was admittedly adverse to that construction, was wrongly decided, and was inconsistent with subsequent English decisions upon the practically identical terms of the English Act.[2] *Barr's* case therefore ought not to be followed.

Argued for the company;—If the terms of the 114th section were regarded by themselves merely, the construction maintained on the other side was perhaps the sound one; but the difficulty arose in consequence of the importation of a section of an Act which dealt only with the taking of lands into a provision in another Act dealing with compensation for the injurious affection of lands. That difficulty did not occur in the English cases cited on the other side, for in them the Courts had to construe a single Act only, consequently the English cases were not in point. In *Barr's* case the Court had put a reasonable construction on the 114th section of the Lands Clauses Act regarded as part of the Railway Clauses Act, by holding that the 114th section was not limited to cases in which land was actually taken. *Barr's* case, therefore, was well decided. At all events it was a deliberate decision pronounced forty years ago upon the very question now in dispute, and must be held to have settled that question in so far as the Courts in Scotland were concerned.

At advising,—

LORD JUSTICE-CLERK.—It was admitted at the bar that this question had been decided in the Court of Session by the case of *The Caledonian Railway Company* v. *Barr*,[1] and the respondents in the suspension endeavour to get over that case by quoting to us several English cases which turn, not upon the same Acts of Parliament, nor upon the same words as those upon which the present case turns. Still it is argued that these English cases are so exactly analogous that we should disregard the case of *Barr*[1] and give effect to these cases by holding that—as it has been decided in England that such a case as this cannot competently be brought before two Justices—that being the corresponding tribunal—but must be brought before an arbiter under the arbitration section of the Act—we should, following

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other side. It appears, however, that the decisions in England have been different. The difference is noticed in Deas on Railways, p. 161, *et seq.* In the cases referred to by him it was held that the 121st section of the English Act, which corresponds to the 114th section of the Scottish Act, applied only when land was taken. I consider, however, that I am bound to follow the decision in our own Courts. It may be that in the Inner-House the decision in *The Caledonian Railway Company* v. *Barr* might be reconsidered with reference to the English cases. But it must, in the meantime, be followed in the Outer-House."

[1] Caledonian Railway Co. v. Barr, Jan. 27, 1855, 17 D. 312, 27 Scot. Jur. 312.

[2] Queen v. Sheriff of Middlesex, 1862, 31 L. J., Q. B. 261; Queen v. Stone, 1866, L. R., 1 Q. B. 529; Brand v. Hammersmith Railway Co., L. R., 4 Eng. and Ir. App. 171, *per* Lord Colonsay, p. 209.

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these cases and disregarding the case of *Barr*,[1] hold that the present application for arbitration is competent.

I am not prepared to disregard the case of *Barr*.[1] Whether that case can be differentiated from those cases in England, I do not say. There may be considerable ground for saying that it might; but when there is a distinct and clear decision in this Court that decision in my opinion is binding upon us, and we are not entitled to set aside by our judgment a case that has been deliberately decided in this Court.

LORD ADAM.—It is not disputed that if the case of *The Caledonian Railway Company* v. *Barr*[1] has been properly decided, procedure to have this claim of alleged damage submitted to arbitration is incompetent. I am of opinion that we must follow the case of *The Caledonian Railway Company* v. *Barr*.[1] I am not disposed to express any opinion as to the soundness of that decision.

LORD TRAYNER.—I am of the same opinion. The respondents in the suspension are admittedly yearly tenants of the premises in question, and their claim, so far as it is before us, is a claim for injury to their business premises, and to their stock and effects therein.

Now, in these circumstances, the first question that arises is, Is a yearly tenant making such a claim entitled to have that claim submitted to arbitration, or must he submit it, in terms of the 114th section, to the Sheriff? I think that question is not open. I think it is concluded, so far as we are concerned, by the decision in *The Caledonian Railway Company* v. *Barr*.[1] I express no opinion as to the soundness of that decision, but as it is a decision pronounced many years ago, and has no doubt been acted upon in Scotland since, I think we are bound to follow it.

LORD YOUNG and LORD RUTHERFURD CLARK were absent.

THE COURT recalled the Lord Ordinary's interlocutor (which dealt with questions as to the relevancy of Albin & Son's claim to compensation, as to which no opinion was expressed in the Inner-House), and interdicted, prohibited, and discharged, in terms of the prayer of the note.

W. & J. BURNESS, W.S.—JOHN VEITCH, Solicitor—Agents.

No. 21.

Nov. 7, 1895. Graham & Co. v. Raeburn & Verel.

W. & R. GRAHAM & COMPANY, Pursuers (Reclaimers).—*Lees—Aitken.*
RAEBURN & VEREL, Defenders (Respondents).—*Johnston—Graham Stewart.*
JAMES BAIN AND OTHERS, Defenders.—*Johnston—Graham Stewart.*
THE BANK OF SCOTLAND, Defenders (Respondents).—*W. Campbell.*
THE STEAMSHIP "BONNINGTON" COMPANY, LIMITED, Defenders.—*Johnston—Graham Stewart.*

Right in Security—Loan—Agreement for repayments out of profits—Specific appropriation—Breach of trust.—A offered to advance to a shipping company £15,000 on a mortgage over a steam vessel, "on condition that all profits earned by the steamer to be paid to us towards reducing the

[1] 17 D. 312.

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loan till the loan shall have been reduced to £10,000." The managing committee of the company agreed to accept the offer, subject to the modification "that instead of all the profits being paid to A till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then." A agreed to the modification, and the arrangement was approved by the company. Subsequently the advance was made, and the mortgage granted. The company went into liquidation.

Held that the agreement imported merely a personal obligation by the company to pay to A £2000 per annum from profits, and that A had no preference over the profits.

1st Division Lord Low.

W. & R. GRAHAM & COMPANY, merchants in Glasgow, raised an action against (1) Raeburn & Verel, shipowners, Glasgow; (2) the Bank of Scotland; (3) James Bain, assistant manager of the Bank of Scotland, and three other gentlemen who were the managing committee of the Steamship "Bonnington" Company, Limited; and (4) the "Bonnington" company.

The first conclusion of the summons was for payment to the pursuers by the defenders "jointly and severally or severally, or in such proportions as shall be ascertained in the course of the process," of the sum of £3181, 3s. 7d.

The pursuers averred;—(Cond. 1) "The defenders, The Steamship 'Bonnington' Company, Limited, are the owners of the steamship 'Bonnington' of Glasgow, of which the other defenders Messrs Raeburn & Verel are the managers. The defenders James Bain" and others, "were a committee of the shareholders of said Steamship 'Bonnington' Company, appointed to represent the interests of the shareholders of said company with reference to the loan transactions after mentioned," and under special resolutions of the company "exercised all the powers of directors of a limited company, and they managed and controlled the financial arrangements of the company, Messrs Raeburn & Verel, as managers, taking their instructions from said committee in the disposal of the funds or profits passing through their hands. The Bank of Scotland were represented by the said James Bain on the said committee, as being largely interested in the said company, and particularly as creditors of the same, or of the steamship 'Bonnington.' In their character as the leading creditors of the steamship company, the said James Bain was their agent and nominee, deputed by them to protect their interests." (Cond. 2) "On or about 17th July 1889 the pursuers offered, at the request of the defenders Messrs Raeburn & Verel, who acted on behalf of the Steamship 'Bonnington' Company, and the said committee of said company, to lend to the said company the sum of £15,000 in cash on the following conditions, as expressed in a letter from the pursuers to said Raeburn & Verel:—'(1) The "Bonnington" s.s. to be mortgaged by the said company to us as security therefor. . . . (5) All profits earned by the steamer to be paid to us towards reducing the said loan till the loan shall have been reduced to £10,000. (6) After the loan shall have been reduced to £10,000 the company shall, if possible, repay to us at least £1500 per annum till the amount on loan shall have been all repaid. . . .' The said offer was accepted on or about 22d July 1889 by letter signed by the defenders Raeburn & Verel on behalf of the Steamship 'Bonnington' Company, Limited, and, as stated in said letter, on the express authority of the other defenders who formed the committee of the company, subject to the following modifications:—That instead of all the profits being paid to

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the pursuers till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then, and £1500 thereafter, as per the sixth condition above mentioned. The pursuers agreed to this modification, and the transaction was arranged on that footing. . . ."

The pursuers further averred;—The steamer was duly mortgaged to them, and the £15,000 advanced by them in August 1889. No payment was made to them out of the profits of the steamer until January 1891. The company then paid £500, and that was the only sum received on account of principal. The interest on the loan continued to be paid until February 1892. The pursuers for the first time saw the accounts of the steamship company in August 1893, "and they then learned that the defenders, in breach of their agreement with the pursuers, and in breach of their duty to the pursuers, had paid the earnings or profits of the steamer—which were specially appropriated to the pursuers—to other parties. The total sum so paid away to the pursuers' prejudice amounts to £3181, 3s. 7d.," the sum first concluded for. James Bain, who was the assistant manager of the Bank of Scotland, was the representative of the bank on the committee, and was attending to its interests, and of the profits paid away to creditors the sum of £1783 was paid to the bank by the committee "in breach of said arrangement, which it was said defenders' duty to carry out. On the pursuers ascertaining the manner in which the profits of the steamer were being dealt with they entered into possession of the steamer under their mortgage."

The steamship company went into liquidation on 8th November 1894.

The pursuers pleaded;—(1) The defenders having wrongfully, and in breach of their duty to the pursuers, paid away to third parties the profits of the said vessel specially appropriated to the pursuers under the foresaid arrangement, the pursuers are entitled to decree for the amount thereof, being the sum first concluded for. (2) *Separatim*, The defenders who received the sums specifically appropriated to the pursuers as aforesaid, in the knowledge that they had been so appropriated, are bound to replace the amounts severally received by them.

The defenders severally pleaded;—(2) That the pursuers' averments were irrelevant and insufficient to support the conclusions of the summons.

On 14th June 1895, the Lord Ordinary (Low), *inter alia*, sustained the second plea in law for each of the defenders, and dismissed the action so far as regarded the first conclusion of the summons.*

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* "OPINION.— . . . The action, I take it, is mainly directly against the defenders other than the 'Bonnington' Company, because there is no dispute as to the debt due by the company to the pursuers, or as to the validity of the mortgage over the ship. The claim against the other defenders is based upon the allegation that the earnings or profits of the steamer, to the extent of £2000 a year, were specially appropriated to the pursuers, and that Raeburn & Verel and the committee acted in breach of their duty to the pursuers in paying other creditors out of profits which should have been paid to the pursuers, and are thus personally liable for the amount so paid away. The case against the bank is that their assistant manager, Mr Bain, was on the committee, that he was the agent and nominee of the bank, and that in their interests he obtained payment of their debt in breach of his

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The pursuers reclaimed, and argued;—The effect of the contract was that the profits were to the extent of £2000 each year specially appropriated to the payment of the pursuers' loan, and as soon as the profits came into the hands of Raeburn & Verel and the committee, these defenders held them as trustees for the pursuers.[1] They committed a breach of trust therefore in applying them to the payment of the debts of other creditors. The representative and agent of the bank—Mr Bain—was a party to the agreement, and he was acting *in fraudem* of the pursuers' right in applying the profits in liquidation of the bank's debt. The bank were not entitled to take advantage of their own agent's breach of duty, and were liable therefore to repay the money received by them.[2]

Argued for Raeburn & Verel and the Committee;—The action was irrelevant. There could be no breach of trust *quoad* the profits, unless these were specifically appropriated. There was nothing on record, however, to infer even an obligation to appropriate, much less to instruct an actual appropriation. There was no averment that in fact the profits had been set aside to be retained for the pursuers, and that was essential to appropriation.[3]

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duty to the pursuers. The bank is therefore asked to repay to the pursuers the money which it received.

"The contract, according to pursuers' construction, was that the company should pay the profits to them to the amount of £2000 a year until the mortgage was reduced to £10,000. I think that it is at all events doubtful whether that is the true construction of the contract. The letters by which the contract was made are not in process, and I am dealing only with the pursuers' averments. But upon their own statement, I am inclined to think that the fifth condition in Raeburn & Verel's letter was altogether departed from, and that the modification proposed by the company and agreed to was, that instead of the profits being paid to the pursuers, the company should pay to them £2000 a year until the debt was reduced to £10,000, and £1500 a year thereafter. But assuming that the contract was that the profits should be paid to the pursuers to the extent of £2000 a year until the debt was reduced to £10,000, I am of opinion that the pursuers have not stated a relevant case.

"The pursuers' argument, as I understand it, is that the contract (as construed by them) involved a 'special appropriation' of the profits as they were earned in each year to the amount of £2000 to payment of their debt; that the shareholders, in approving of the action of the committee, authorised and directed the committee and Raeburn & Verel to hold the profits for and pay them to the pursuers to the extent of £2000; that the pursuers thereby acquired a *jus quæsitum* entitling them to demand that Raeburn & Verel and the committee should account to them for all the profits earned; and it is no defence to the claim that the money was paid to other creditors of the company.

"Now, if an agent receives money from his principal to pay a particular debt of the latter, and applies it to a different purpose, it may well be that the creditor would have a direct action against the agent, especially if the principal had become bankrupt.—(*Stewart* v. *Bisset*, M. App. Compensation, No. 2.)

"But I do not think that a case of that description is averred here. It

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[1] Gas-Light Improvement Co. v. Terrell, 1870, L. R., 10 Eq. 168, M. R. (Lord Romilly) at p. 175; Willmott v. London Celluloid Co., 1886, L. R., 34 Ch. Div. 147.

[2] Taylor v. Forbes & Co., Dec. 14, 1830, 4 W. and S. 449.

[3] Baird v. Murray's Creditors, 1744, M. 7757.

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Argued for the Bank of Scotland;—There was nothing on record to infer that the profits in question were the property of the pursuers, and as such held in trust for them; unless, however, that was the fact the bank were not disabled from taking payment of the debt due to them by the company, merely because their assistant manager was one of the company's committee who had entered into the agreement with the pursuers.

At advising,—

LORD M'LAREN.—Under this reclaiming note we are only concerned with the first conclusion of the action, which is for payment of the sum of £3181, 3s. 7d. with interest. The Lord Ordinary has dismissed the action *quoad* that conclusion, being of opinion that the facts as stated do not disclose a relevant ground of liability against any of the defenders.

The pursuers, in the year 1889, agreed to lend the sum of £15,000 to the Steamship "Bonnington" Company on mortgage. In their letter agreeing to advance this sum the pursuers made certain conditions, and amongst others it was proposed (5) that all profits earned by the steamer should be paid to the pursuers towards reducing the loan until the loan should be reduced to £10,000; and (6) thereafter that the company should repay the loan by annual instalments of £1500 until the amount on loan

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was not part of the contract that the profits should be set aside or earmarked for the pursuers in any way, and as matter of fact that was not done. There was only, at most, an obligation on the part of the company to pay the pursuers £2000 a year out of the profits. It therefore seems to me to be impossible to hold that the profits as they accrued became the property of the pursuers. But if they were not the property of the pursuers—if the pursuers had not the *jus in re*—I think that their case fails. Take for example the case against the bank. The bank have done no more than obtain payment from their debtor of a debt which was due to them. I therefore do not understand how the bank can be asked to repay the money to the pursuers, unless it belonged to them before it was paid to the bank. Again, upon what ground is the claim against Raeburn & Verel and the committee rested? It cannot be rested upon contract, because there was no contract between the pursuers and these parties. Nor is it a claim of damages. There is no statement of a claim of damages in the record. The claim is obviously rested entirely upon what the pursuers call 'special appropriation' of the profits. That is a familiar expression in connection with payments of money, but I am not sure what it means in a case of this sort. If it merely means that the company were under obligation to pay the pursuers £2000 out of the profits, that will not entitle the pursuers to sue parties with whom they did not contract. If it means that the money was set apart and held as a specific sum, for the pursuers, then upon their own shewing no such thing was ever done.

"It seems to me that notwithstanding the contract with the pursuers, the profits remain the property of the company, the pursuers being only the creditors in the personal obligation of the company. I think therefore that a creditor of the company could have used arrestments—for example, of freight—in the hands of Raeburn and Verel; and, if the profits had been extant, I think that the other personal creditors of the company in the liquidation would have been entitled to participate in them. But if that is so, the claim of the pursuers for £3181 necessarily fails, because that claim is entirely based upon the supposition that that sum belonged to the pursuers and did not belong to the company.

"I am therefore of opinion that the action must be dismissed as regards all the defenders, so far as the first conclusion is concerned."

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should be all repaid. The condescendence then proceeds (art. 2),—"The said offer was accepted on or about 22d July 1889 by letter signed by the defenders Raeburn and Verel on behalf of the Steamship 'Bonnington' Company, Limited, and as stated in said letter, on the express authority of the other defenders, who formed the committee of the company, subject to the following modifications:—That instead of all the profits being paid to the pursuers till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then, and £1500 thereafter as per the 6th condition above mentioned." It is added,—"The pursuers agreed to this modification, and the transaction was arranged on that footing."

The Steamship Company did not perform their obligation to pay £2000 a year in reduction of the debt. The only payment made in repayment of principal was a sum of £500 paid in 1891. The company is now in liquidation. It is averred that during the years 1890, 1891, and 1894 the Steamship Company earned profits amounting to £3181, and that such profits were paid to certain prior but unsecured creditors, including a sum of £1783 paid to the Bank of Scotland.

The action is directed against (1) the Bank of Scotland; (2) James Bain, assistant manager of that bank, and three other gentlemen who were a committee of the shareholders of the company; and (3) the company; and it concludes for payment of the sum of £3181, being the profits alleged to have been earned.

As regards the defendant company, it is not disputed that its estate is responsible, not only for the sum claimed, but for the entire mortgage debt of £15,000, less £500 paid to account, but I agree with the Lord Ordinary that a petitory action is not the proper way of establishing the liability of the company. The right of the pursuers is to enforce their mortgage by bringing the ship to a sale, and if necessary to make a claim in the liquidation for the deficit, if any. But as the theory of the pursuers' case is that they have a preferential claim to the profits earned by the ship subsequent to the agreement, it may be proper to consider this claim more narrowly. If the pursuers have a preference, it must be of the nature of a voluntary security, because they do not say that they have a preference by the use of diligence. Now, it is conceded that they are creditors under the obligation of the defendant company to pay instalments of the debt out of profits. But it is perfectly clear that a mere pecuniary obligation is not a security, and that it does not become one by reason of a fund being designated out of which payments shall be made. The question is not whether the company acted honestly in paying away their profits to other creditors, but whether the pursuers have a preferable claim in competition with other creditors who have not been paid. I think that according to elementary principles in the law of debtor and creditor, an obligation to pay out of profits is in legal effect no more than an obligation to pay, and that it only entitles the creditor to a dividend in the liquidation.

The claim against the Bank of Scotland is founded on the fact that the bank's assistant manager was a member of the committee of the steamship company at the time when payments were made to the bank out of profits. In my opinion the Bank of Scotland was entitled to take payment from its debtor out of any unsecured fund in the debtor's hands, and the bank

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would not be the less entitled to accept such payments if its officers knew that their debtor had promised to another creditor to make the fund available to him. It is not a case of trust, because the freights were the property of the steamship company. Then the fact that Mr Bain was a member of the committee of management is, in my judgment, altogether irrelevant, because the payment to the Bank of Scotland was the act of the company, and in general the validity of a corporate act cannot depend on the relation which its members may sustain towards any other contracting party. Such relation could only be material if the act complained of amounted to a fraud or a breach of trust.

There remains for consideration the claim against the individuals who constituted the committee of management of the defendant company. As I read the record this claim is not founded on contract but on breach of duty on the part of these gentlemen. It is plain enough that the contract founded on was with the limited company, and the members of the committee were only responsible as shareholders for its fulfilment,—that is, to the extent of their subscriptions to the company's capital. But apart from contract the individual defenders owed no duty to the pursuers; it is not said that they came under any guarantee on behalf of the company, or that they gave their personal assurance that the company would fulfil its obligations. I assume that they were the instruments or agents of the company in the commission of a breach of contract, but I fail to see how a matter which is no more than a breach of contract in a question with the principal, can change its nature and become a breach of duty in a question with the company's agents.

It is unnecessary that I should elaborate this view, because I concur entirely in the reasoning of the Lord Ordinary on the question of individual responsibility, and in his Lordship's observations on the fallacy involved in the use of the expression "special appropriation" as applied to an obligation to make payments out of profits. I am of opinion that the reclaiming note should be refused.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—DAVIDSON & SYME, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 22.
Nov. 7, 1895.
Campbell v. Barber.

MRS ELLEN GARDEN CAMPBELL, Petitioner (Appellant).—*Balfour—Watt.*

MRS LAURA AGNES BARBER AND ANOTHER, Respondents.—*Salvesen—T. B. Morison.*

Executor—Executor-nominate—Confirmation—Danger to estate—Judicial Factor.—Circumstances in which the Court dismissed a petition for confirmation presented by the widow and executrix-nominate of a person deceased and appointed a judicial factor on the estate, in respect that *prima facie* there was risk of injury to the estate if the administration were left in the hands of the petitioner.

1ST DIVISION. Sheriff of Aberdeen.

FRANCIS W. GARDEN CAMPBELL, heir of entail in possession of the estate of Troup, in the county of Banff, died on the 10th May 1895. He was twice married. His first wife died on 6th August 1893. He

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was married to his second wife on 23d July 1894. There was no issue of either marriage. Mr Garden Campbell left a disposition and settlement dated 23d July 1894, by which he conveyed to his wife, Mrs Ellen Thorne or Garden Campbell, his whole means and estate, heritable and moveable, under burden of his debts and certain legacies to servants. He also appointed his widow to be his sole executrix.

On 10th September 1895 Mrs Garden Campbell presented a petition in the Sheriff Court at Aberdeen for confirmation as executrix-nominate of her deceased husband.

The petition was opposed by Mrs Laura A. Barber and her husband.

The respondents stated that in 1870 the deceased Mr Campbell had adopted Mrs Barber as his daughter, she being a niece of his first wife, and then unmarried, and that on the death of his first wife he had executed a deed of settlement by which he left everything which he might die possessed of to Mrs Barber.

The respondents further stated that the late Mr Garden Campbell had for the last ten years of his life been a man of very intemperate habits, that he had met his second wife about the month of February 1894, that he went through the ceremony of marriage with her on the 23d July 1894, which was the day on which the deed in question was executed, and that for days before the ceremony his condition, both mentally and physically, had become such that he was totally unfit to give directions as to the preparation of any deeds.

"The pretended deed of settlement and other documents are not the deeds of the deceased, he being weak, facile, childish, easily imposed upon, and mentally unfit to give directions as to same, or even to understand their purport, but were impetrated from him by the said Ellen Thorne, who had a dominating and undue influence over him."

The petitioner denied the respondents' material averments.

On 13th September 1895 the Sheriff-substitute (Brown) sisted the application till the 13th October. On appeal the Sheriff (Crawford), on 5th October 1895, refused the appeal, and further sisted the application till the 13th March 1896. The petitioner appealed to the Court of Session.

On 29th October 1895 the Court allowed the respondents to amend their statements, and the petitioner to answer the amendment.

The respondents lodged a minute of amendment, which contained, *inter alia*, the following averments:—"At the date of his death Mr Garden Campbell was possessed of a large amount of jewellery . . . The value of this collection was about £2000. Further, the deceased, shortly before his marriage to the appellant, purchased from a London firm of jewellers additional jewellery to the value of over £1000. . . . None of the said jewels are entered in the inventory, the only jewellery returned being the deceased's watch and chain, valued therein at £10. The objector has ascertained and avers that all these jewels have been removed by the petitioner from Troup to her present residence in London. . . . . The petitioner has also dispenished the mansion-house at Tore of Troup of the greater part of the furniture, the whole of the silver-plate and family pictures, and removed them to London. The plate, which comprised a large amount of solid silver, has only been entered at nominal values in the inventory. . . . In these circumstances the objector considers that a judicial factor should be at once appointed to take charge of the

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estate pending the decision of the action of reduction, and she is prepared at once to present a petition if the Court should consider it necessary to have such an appointment made."

The appellant answered,—"It is admitted that prior to his marriage the deceased purchased some jewellery in London, and obtained an advance from his bankers to enable him to pay for it. He presented it to the pursuer in the spring of 1894. Further admitted that after her husband's death, but before the pursuer was aware of any opposition on the part of the respondent, she removed to London the silver-plate, some pictures and curios, and a few articles of furniture of little value. *Quoad ultra* denied. Explained that after her husband's death, in the ordinary course of administration, the pursuer employed Messrs John Taylor & Son, licensed appraisers, 110 Princes Street, Edinburgh, to inventory and value all the furniture and other effects belonging to the deceased at Troup. The inventory and valuation is complete, and includes the silver-plate, which was weighed by a silversmith, and all the effects at Troup, including the small portion removed therefrom as above stated. On or about 20th June 1895 the silver-plate, some pictures and curios, and a few articles of furniture of little value, were carefully removed to London under the charge of Messrs John Taylor & Son. This was done for safe custody and in order to obtain a better sale, if it became necessary to dispose of them. . . . The pursuer has disposed of nothing belonging to the deceased, save some dogs. None of the effects have been in any way injured. . . . After his first wife's death he gave some of her jewellery as presents to friends and the rest he gave to the pursuer. . . ."

Argued for the appellant;—The appellant had by the will a title to administer independently of confirmation. The latter was only necessary to enable debtors to pay in safety. Very strong grounds must be established for refusing confirmation to an executor-nominate, and for appointing a judicial factor. There were none such here. The fact that a reduction of the will was being brought was not a sufficient ground.[1] *Quoad ultra* the allegations were irrelevant. It was not suggested that the appellant was impecunious, or that there was serious risk of the estate being injured or destroyed.

Argued for the respondents;—There was a strong *prima facie* case for the reduction of the will. As regarded the interim possession and administration of the estate it was clear from the respondents' statements that there was a serious risk of its being dissipated or injured, if left under the control of the petitioner. On the other hand, the appellant had failed to shew that any prejudice would be suffered if a judicial factor were appointed.

LORD PRESIDENT.—I am not sure that had the record stood as it did in the Sheriff Court I should have agreed with the conclusion come to by the Sheriff. But the amendment of the record presents a case different in quality from that which the Sheriff had to consider, and it appears to me to be a case which requires careful attention. The case now made is a case of the estate not being in safety, and that was an aspect of the case not presented to the Sheriff, because the record then contained no impeachment

[1] Graham v. Bannerman, Feb. 28, 1822, 1 S. 362; Hamilton v. Hardie, Dec. 7, 1888, 16 R. 192.

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of the conduct and intentions of the executrix-nominate in that regard. But as I have said the new statements do touch that delicate question, and they constitute a direct appeal for our immediate action. We must necessarily determine this on the view and on a *prima facie* regard to the admitted facts and the reasonable inferences to be drawn from the state of the pleadings. I cannot say that I think we have adequate assurance for the safety of this estate. Without entering into the various considerations which lead me to that conclusion, I think we should appoint a judicial factor on the estate. It will do no harm, whatever be the event of any pending litigation, and in the meantime it seems to me we could not disregard the pointed statements which have been made, met as they are by answers which are lacking in the precision which I think was called for by what I would call the general aspects of the case. I am, therefore, for recalling the judgments of the Court below, and appointing a judicial factor on the estate.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the interlocutor of the Sheriff-substitute dated 13th September 1895, and subsequent interlocutors: Appoint A. H. Cooper, W.S., to be judicial factor on the executry estate of the deceased Francis William Garden Campbell; and in respect of said appointment dismiss the petition, reserving right to the petitioner to present such other petition as she may be advised in the event of the action of reduction now pending being dismissed or absolvitor pronounced therein, and of the factory being recalled, and decern: Find neither party entitled to expenses."

MACKENZIE, INNES, & LOGAN, W.S.—PETER MORISON JUNR., S.S.C.—Agents.

No. 23.

Nov. 14, 1895.
Stewart's Trustees v. Stewart.

DONALD STEWART AND OTHERS (Stewart's Trustees), First Parties.—*Craigie.*
DONALD STEWART, Second Party.—*Craigie.*
DONALD STEWART AND OTHERS, Third Parties.—*Craigie.*
MARJORY STEWART, Fourth Party.—*N. J. D. Kennedy.*
JOHN M'NAUGHTON AND OTHERS, Fifth Parties.—*M'Clure.*

Process—Special Case—Competency—Failure to set out contentions of parties.—*Held* that a special case in which the contentions of parties were not set forth was not in competent form.

THIS was a special case brought to obtain the opinion and judgment of the Court upon certain questions with regard to the construction and effect of the trust-disposition and settlement of John Stewart. 1ST DIVISION.

The case set forth the deed and the circumstances in which the questions arose, but did not set forth the contentions of the respective parties.

At the hearing of the case objection was taken by the Court to the form in which the case was stated.

LORD PRESIDENT.—The Court is not satisfied that the case is properly

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placed before us, because there is nothing to shew the contentions of parties, and we do not know that they are not purely speculative questions on which the opinion of the Court is asked.

The case was continued that the parties might have an opportunity of amending their statements.

T. J. GORDON & FALCONER, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 24.
Nov. 15, 1895.
Cumming's Trustees v. Anderson.

THE REVEREND KENNETH MACKENZIE AND OTHERS (Cumming's Trustees), First Parties.—*Macphail.*
JANE ANDERSON, Second Party.—*Mac Watt.*
HUGH MACPHERSON CUMMING, Third Party.—*Macphail.*
HUGH MACPHERSON CUMMING (Cumming's Executor) AND OTHERS, Fourth Parties.—*W. C. Smith.*

Succession—Vesting—Vesting subject to defeasance—Liferent and fee.—A testatrix directed her trustees to invest the sum of £1300, and divide the annual interest therefrom equally between her nieces Jane and Isabella during their joint lives, and on the death of either without lawful issue, to pay the whole annual interest to the survivor; but in case either should die leaving lawful issue, then such issue should be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum should be paid to the lawful issue of each of Jane and Isabella; "but declaring always, that if either or both of the said Jane and Isabella shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall, on the death of the survivor, be paid by the said trustees to my brother, the said Robert Cumming." The testator was survived by the two nieces, who were not married, and by Robert Cumming.

Held that the fee of the sum of £1300 vested at the death of the testatrix in Robert Cumming, subject to defeasance to the extent of one-half in the event of Isabella leaving issue, and to the extent of the other half in the event of Jane leaving issue.

Steel's Trustees v. *Steel*, 16 R. 204, *followed.*

1ST DIVISION. MISS MARY CUMMING, Dunkeld, died on 26th March 1869, leaving a trust-disposition and settlement whereby she conveyed her whole estate to trustees for the following purposes:—(First) payment of debts. (Secondly) that the trustees should, after her death, lend out the sum of £1500 on good security, and apply the interest to the maintenance of her brother Alexander Cumming. "(Thirdly) that my said trustees may, as soon after my death as they conveniently can, lend and place out on good security, heritable or moveable, the sum of £1300 sterling, and pay and divide the annual interest to be derived therefrom equally between my nieces Jane M. C. Anderson and Isabella R. Anderson during their joint lives, exclusive always of the *jus mariti* and right of administration of any husband they may marry. . . . Providing that on the death of either of the said Jane M. C. Anderson or Isabella R. Anderson without lawful issue the whole of the said annual interest shall be paid to the survivor; but in case either shall die leaving lawful issue, then such issue shall be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum of £1300 shall be paid by the said trustees to the lawful issue of each of the said Jane Anderson and Isabella Anderson; but providing and declaring always, that if either or both of the said Jane Anderson and Isabella Anderson

shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall, on the death of the survivor, be paid by the said trustees to my brother, the said Robert Cumming."

After giving directions, in the fourth place, for payment of certain legacies, the testatrix provided:—"(Lastly) With regard to the residue and remainder of my estate, heritable and moveable, real and personal, above conveyed, I direct the said trustees, at and immediately after the decease of the said Alexander Cumming, to pay and assign the said residue (and including the sums liferented to the said Alexander Cumming) to and in favour of the said Hugh Macpherson Cumming and Robert Cumming, and their heirs, executors, and successors whomsoever."

After Miss Mary Cumming's death the trustees invested the sum of £1300, and paid the income thereof to Miss Jane Anderson and Miss Isabella Anderson equally down to the death of the latter, who died unmarried in 1873, after which the whole income was paid to Miss Jane Anderson.

Robert Cumming died on 27th October 1894, leaving a will, whereby he bequeathed his whole estate to his niece, Miss Jane Anderson.

A special case was thereafter presented, to which Miss Cumming's trustees were the first parties; Miss Jane Anderson, second party; Hugh Macpherson Cumming, third party; and parties representing the heirs *in mobilibus* of Miss Cumming, fourth parties, in order to obtain the opinion of the Court upon, *inter alia*, the following questions:—"(1) Did the legacy of £1300, contained in the third purpose of Miss Cumming's will, vest in Robert Cumming *a morte testatoris*, subject to the liferents, and subject to defeasance to the extent of one-half in the event of Isabella Robina Anderson leaving issue, and to the extent of the other half in the event of the second party leaving issue? (2) Did one-half thereof vest absolutely in Robert Cumming at the death of Isabella Robina Anderson without issue, subject to the liferent of the second party in such half? (3) Is the second party now entitled to payment of one-half of the said sum of £1300 for her own absolute use and behoof on renouncing and discharging the liferent thereof?"

The second party contended that the bequest of £1300 vested in Robert Cumming *a morte testatoris*, subject to the liferents, and subject to defeasance *quoad* the half or whole in the event of either or both of the liferentrices leaving lawful issue; that on Isabella R. Anderson's death his right to one-half of the bequest became absolute, or at all events that he then became absolutely entitled to one-half; and further, that by virtue of Robert Cumming's will in her favour she had acquired an absolute right to one-half of the bequest. She offered to renounce and discharge the liferent *quoad* the said half, and maintained that the trustees, on said discharge being granted, were bound to pay over the said half to her as her absolute property.

The third party contended that Robert Cumming did not acquire a vested right either to the half or the whole of the sum of £1300 in question, but that in consequence of his death and of the death of Miss Isabella Anderson without issue one-half of the said sum (subject to the second party's liferent) formed part of the residue of Miss Cumming's estate, and that in the event of the second party dying without issue, the other half of the said sum would fall to be disposed of as such residue.

The fourth parties contended that no part of the said sum of £1300

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vested in Robert Cumming either *a morte testatoris* or on the death of Isabella Anderson, and that that sum did not fall within the terms or operation of said residuary clause, but that one-half of the said sum (subject to the second party's liferent) was intestate moveable succession of Miss Cumming, and that in the event of the second party dying without issue, the other half of said sum would fall to be disposed of as such intestate moveable succession.

Argued for the second party;—The case was the usual one in which the principle of vesting, subject to defeasance, was applied.[1] The mere fact that one sister was substituted to the liferent enjoyed by the other did not exclude the application of that principle.

Argued for the third party;—(1) There was no vesting *a morte*, there being no direct gift by the testator in favour of the legatee, but only a direction to pay on the occurrence of an uncertain event.[2] Further, the residuary clause must be held as containing a destination over.[3] Accordingly, if there was vesting *a morte* subject to defeasance in anyone, it was in the residuary legatees.[3]

Argued for the fourth parties;—It was a question of intention whether, in the event of vesting being held to be postponed, the £1300 upon Robert Cumming's death fell into residue or intestacy. So far as could be gathered from the terms of the settlement, the legacy was not intended to be carried by the residuary clause.

LORD ADAM.—The question before us arises on the third purpose of the settlement, and is whether the bequest of £1300 vested in Mr Robert Cumming *a morte testatoris* subject to its divesting in the event of certain ladies leaving issue. I am of opinion that it did. If either of the ladies left issue, then that issue would be entitled to the fee of the half share liferented by the mother, but failing issue of both, the whole was to be paid over to Robert Cumming. Now, as was pointed out by Mr MacWatt, this is nothing more than a gift—if I may so call a right of liferent—to one lady and her issue, and, failing such, to Robert Cumming. The fact of the sum being split up between two liferenters is of no moment.

I am clearly of opinion that this case is ruled by that of *Steel's Trustees*,[1] and that it is impossible to distinguish between the two cases. The conditions of the bequest here, as already described, are precisely those that are dealt with in *Steel's Trustees*,[1] and I can see no reason why the rule laid down there should not be applied here.

I am therefore for answering the first three questions in the affirmative.

LORD M'LAREN.—The question which is of importance to the parties in this case is that which is first stated, and that question is whether the principle of vesting, subject to defeasance, is applicable to the legacy of £1300, which is one of the special provisions of the will. In the case which has

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[1] Steel's Trustees v. Steel, Dec. 12, 1888, 16 R. 204; Haldane's Trustees v. Murphy, &c., Dec. 15, 1881, 9 R. 269; Cumming's Trustees v. White, March 2, 1893, 20 R. 454; Turner v. Gaw, Feb. 20, 1894, 21 R. 563; Wright's Trustees v. Wright, Feb. 20, 1894, 21 R. 568.

[2] Gilbert's Trustees v. Crerar, &c., Nov. 3, 1877, 5 R. 49; Bryson's Trustees v. Clark, &c., Nov. 26, 1880, 8 R. 142.

[3] Storie's Trustees v. Gray and Others, May 29, 1874, 1 R. 953, *per* Lord President at p. 957.

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been referred to on both sides (*Steel's Trustees*)[1] the late Lord President sums up the conditions under which the principle of vesting subject to defeasance had been applied in previous decisions of this Court and the House of Lords. I do not read his Lordship's opinion as necessarily limiting the application of the principle to these cases, but it is needless to consider the possible extension of the principle, because, in my judgment, the present case falls directly within the category defined in the Lord President's opinion. In *Steel's Trustees*[1] there was a direct bequest to the testator's daughter in liferent and her issue in fee, and failing such issue to a conditional institute, and it was laid down that the principle of vesting subject to defeasance applied to such a case. Of course if there had been issue in existence at the death of the testator a different question would have arisen, as it would have been impossible to hold that there was vesting in a conditional institute, when there were objects in existence answering to the prior destination.

If I have correctly stated the result of the case of *Steel's Trustees*,[1] it is difficult to see why different principles should be applied to the case of a legacy to a daughter, and to the case of a legacy to any other favoured person, in liferent. At all events, where the person to whom the liferent is given is a person to whom the testator stood *in loco parentis*, I think there can be no doubt that the same principle is applicable.

Another distinction is suggested between this case and *Steel's Trustees*.[1] It is pointed out that here there are two liferents and that they are so closely connected that on the death of one liferentrix the survivor takes the liferent enjoyed by the predeceaser; but I think it is quite clear that if the principle of vesting subject to defeasance is applicable to the case of two gifts, each of one-half of a particular fund, in liferent, with the destination which I need not repeat in fee, the mere circumstance that the survivor is to take the life interest previously enjoyed by the predeceaser can have no bearing on the presumed intention of the testator with regard to the fee.

With these explanations, I think that we have here the very case in which the doctrine of vesting subject to defeasance has always been applied, and that we should, therefore, answer the first question in the affirmative.

The second question is really consequential on the first, because, if there was vesting in Robert Cumming subject to defeasance in the event of the liferenters having issue, then on the death of one of the liferenters without issue, when the possibility of there being issue ceased, Robert Cumming's right to the fee of the sum liferented by the deceased became absolute.

I may remark on the third question, viz., whether the second party is entitled to payment of one-half of the £1300 absolutely, the circumstances which raise the question are that the second party takes the liferent previously enjoyed by her deceased sister by immediate gift under the will, and also takes the fee of the same share or sum as representative of Robert Cumming. I think that the lesser right of liferent is absorbed in the more comprehensive right of fee. Questions are sometimes raised in relation to such rights, which depend on the consideration that the liferent rights are

[1] 16 R. 204.

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alimentary. Nothing was said in argument on this point, and I do not find that the liferent in question was declared to be alimentary.

LORD KINNEAR.—I am of the same opinion. The testatrix gives the sum of £1300 to two persons in liferent, and he gives the fee on the expiry of the liferents to Robert Cumming, the gift to Robert Cumming to take effect on an event certain,—namely, the death of the liferenters,—subject to one contingency only—the birth and survivance of issue. Therefore the bequest to Robert Cumming is liable to be defeated in that event and no other. This seems to me to be the normal case of vesting subject to defeasance, according to the doctrine laid down in *Steel's Trustees*,[1] and I have heard no reason for refusing to follow that decision.

The LORD PRESIDENT concurred.

THE COURT answered the first, second, and third questions in the affirmative.

MURRAY, BEITH, & MURRAY, W.S.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

No. 25.
Nov. 15, 1895.
Fleming v. District Committee of Middle Ward of Lanarkshire.

JOHN FLEMING AND ANOTHER, Pursuers (Respondents).—*Ure—Cullen.*

DISTRICT COMMITTEE OF MIDDLE WARD OF COUNTY OF LANARK, Defenders (Reclaimers).—*Rankine—Clyde.*

Lease—Compulsory Sale—Compensation to tenant—Lease with break.—A tenant of a farm under a lease to Whitsunday 1911, which gave power to the landlord or tenant to terminate it at Whitsunday 1898, being deprived of land by a Local Authority under compulsory powers, claimed, in an arbitration under the Lands Clauses Act, 1845, compensation for loss of profits on the basis of the lease extending to Whitsunday 1911. The Local Authority contended that the lease should be taken as ending at Whitsunday 1898.

Held that the tenant was entitled to compensation on the footing that the lease endured to Whitsunday 1911, subject to such deduction as the arbiter might consider due to the contingency of its being brought to an end at an earlier date.

1ST DIVISION.
Ld Stormonth-Darling.

IN March 1893 the District Committee of the Middle Ward of the County of Lanark, as the Local Authority under the Public Health Acts, in the exercise of powers conferred by their special Act and the Lands Clauses Consolidation Act, 1845, gave notice to John Fleming and James Murray, tenants of the farm of Low Plewland, of their intention to take 66 acres of their farm for the construction of water works.

The farm was held of the Duke of Hamilton under a lease for nineteen years from Martinmas 1891 and Whitsunday 1892, but with power to landlord or tenant to put an end to the lease at the end of six, eleven, or sixteen years from the respective terms of entry.

The tenants claimed compensation on the footing that the lease did not expire till Martinmas 1910 and Whitsunday 1911, at the end of the nineteen years. The District Committee, on the other hand, maintained that the lease must be taken as ending at Martinmas 1897, and that the tenants were only entitled to compensation to that

[1] 16 R. 204.

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term, and named an arbiter in terms of the Lands Clauses Act, 1845, to fix the compensation, and that alternatively, in the first place, on the footing that the lease terminated at Martinmas 1897; and, in the second place, that it terminated at Martinmas 1910.

The tenants, under protest that the condition contained in the deed of nomination that the arbiter should give two or alternative findings of the amount or amounts due to them was illegal and invalid, nominated an arbiter on their part to act along with the arbiter appointed by the District Committee.

Thereafter the arbiters appointed an oversman, and in the decree-arbitral, on 19th October 1894, they found that the District Committee were liable to pay as compensation to the tenants:—(*a*) On the footing that the claimants were entitled to compensation for loss, injury, and damages sustained and to be sustained by them to the term of Whitsunday 1898 only, the sum of £2573, 3s. 0½d. (*b*) On the footing that the claimants were entitled to compensation for loss, injury, and damages sustained and to be sustained by them to the term of Whitsunday 1911, being the natural termination of said lease, the sum of £6307, 14s. 1d.

On 6th December 1894 the tenants raised an action against the District Committee for declarator that upon a just construction of their lease, they were entitled to receive full compensation from the defenders for all loss, injury, and damage sustained and to be sustained by them to the term of Whitsunday 1911, being the natural termination of the lease, in consequence of the defenders taking the land on the farm, and for payment of £6307, 14s. 1d.

The pursuers pleaded;—(1) On a just construction of the said lease, and in the circumstances condescended on, the pursuers are entitled to receive payment from the defenders, in terms of the second branch of the first head of the said decreet-arbitral, of the sum of £6307, 14s. 1d., with interest, as concluded for. (2) The condition in the said lease with regard to a break being personal to the parties thereto, and not having come into operation, the defenders are not entitled to found upon the same, and the pursuers are entitled to compensation as stated in their first plea in law.

The defenders pleaded;—(3) On a sound construction of the pursuers' lease, they are entitled to compensation only on the footing of their tenancy expiring as at the first break therein. (4) The pursuers having no vested right or *jus quæsitum* to a continuance of their tenancy beyond the date of the first break in their lease, they are not entitled to decree as concluded for.

On 3d July 1895 the Lord Ordinary (Stormonth-Darling) found and declared in terms of the conclusions of the summons.*

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* "OPINION.—The question here is whether the tenant of a farm, holding under a lease for a term of years with breaks in it available to either party, is entitled to receive compensation under the Lands Clauses Act on the footing of his tenancy enduring for the whole period of the lease, or only till the first break after the land is taken.

"It is a new question, on which there is no direct authority. I have found it a difficult one, and I do not profess to have arrived at a very confident conclusion. But, on the whole, it seems to me that the tenant is entitled to compensation for the full term.

"I admit the force of the defenders' argument that a lease containing mutual breaks binds the parties only till the first break arrives, and that they are then perfectly free to make a new bargain. They may do so or

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The defenders reclaimed, and argued;—The question was, what was the tenancy? It was not a lease for nineteen years, but for six years only. If the tenant continued in possession beyond that period he did so by virtue of a new consent given six months before the termination of the first period. That was a contingency which was precisely on a footing with the chance of tacit relocation at the end of a nineteen years' lease, and the arbiters could not have valued the one any more than the other.

Argued for the pursuers;—The lease was not one for six years certain, but for nineteen years, subject to the chance of a break, and the pursuers were therefore entitled to declarator.[1]

At advising on 15th November,—

LORD PRESIDENT.—The arbitration proceedings out of which this action

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they may not; nobody can tell till the time comes for giving notice. But in the meantime a portion of the farm is compulsorily taken on the footing of full compensation, which can only be assessed once for all, and must be determined according to the vested rights and interests in the land as they exist at the time.

"Now, what was the nature of the pursuers' right to this farm when the defenders took 66 acres of it to form a reservoir? It was a right to possess it for nineteen years from Martinmas 1891, subject to the double contingency of the tenants being turned out of it by the landlord at the end of six, eleven, or sixteen years, or of their electing to go of their own accord at one or other of these periods. For the loss of the part taken the statute provides, in the first place, a proportional abatement of rent, and so far there is no difficulty. But when further compensation is claimed, it is on the footing that the loss of the part taken deprives the tenant of the profits which he would have made out of that part during the remainder of his lease, and also that it will diminish the profit which he is likely to make out of the part which is left to him.

"Now, profit being the postulate of the claim, it is not to be supposed that the tenant would himself make use of a break in the lease so as to terminate a beneficial contract. Indeed, this power on the tenant's part may be regarded as making the lease more valuable to him, and certainly it can never make it less so. Then, if the break be considered on its other side, as an option on the part of the landlord, it is difficult to see why a third party, like the promoters of an undertaking, coming in under compulsory powers, should take any benefit from the possibility, or even the probability, of the option being exercised so as to turn the tenant out. In short, the existence of the contingency does not destroy the tenant's vested right to possess for the full period, though it makes his right defeasible in a certain event. I do not see my way to hold that a break in favour of the tenant alone would diminish the value of a right which in truth it enhances, nor that a break in favour of the landlord alone ought to be treated as a certainty when in truth it is only a chance. But if neither of these powers standing alone would have the effect for which the defenders contend, it is very difficult to see why the mere combination of the two should make all the difference. . . .

"I do not know whether the arbiters, in arriving at the larger of the two sums, made any allowance for the possibility of the lease being terminated at one of the breaks. Certainly that was quite a proper matter for them to consider, but their award is not before me on its merits, and the decision of the present question cannot be affected by anything which they did or left undone."

[1] Solway Junction Railway Co. v. Jackson, March 12, 1874, 1 R. 831 The Queen v. Kennedy, 1893, L. R., 1 Q. B. D. 533; Bexley Heath Railway Co. v. North, 1894, L. R., 2 Q. B. Div. 597.

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arises had an unusual course. Part of the farm of which the pursuers were lessees having been taken compulsorily by the defenders, the pursuers were entitled to compensation for the damage done to them in their tenancy by reason of the severance. Instead of simply nominating an arbiter to estimate the compensation the defenders nominated their arbiter, but went on to bid him assess the compensation according to two alternative formulæ, without allowing the arbiter to choose any other principle of valuation. The pursuers, while protesting against the validity of this limitation of the inquiry, nominated their arbiter; and, so far as appears, the arbiters proceeded without further challenge on the lines laid down in the defenders' nomination. We have now before us the award stating the amount of compensation in either alternative view, and the pursuers call upon us to affirm in a declaratory finding the soundness of one of the defenders' formulæ, and to give effect to it by decerning for the sum which, in this view, the arbiters have found due.

The question which the arbiters ought to have determined was a comparatively simple one. The tenants hold under a lease bearing to be for nineteen years, but with power to either of the parties to put an end to it at the termination of six, eleven, or sixteen years from the tenant's entry on giving six months' previous notice. The tenant thus had right to possess for nineteen years subject to the contingency of the landlord availing himself of one of the breaks. It is plain that the value of the tenant's right under such a lease is less than that of a tenant who holds for nineteen years certain. The difference between the two must depend on a variety of circumstances, giving rise to a proper question of valuation. The circumstances might lead the arbiters to think that the tenants were pretty safe not to be turned out at the first break, but that they would be turned out at the second break, or they might think that they were pretty safe for the whole term of nineteen years, or they might think very little of the chance of their tenancy surviving the first break. But all these contingencies would have to be considered, and allowance made for them, the inevitable result being that the amount awarded must be less than would be due to a tenant for nineteen years certain.

On the other hand, it is equally clear that it would be erroneous in principle to confine attention to the profits to be earned before the first break. The tenant's right is definitely higher than that of a tenant for six years, and its value is necessarily greater. For the reasons already stated, the difference in money may be large or it may be small, but it exists. Accordingly, it seems to me that the sound way of proceeding is to treat the tenant as a tenant for nineteen years, subject to contingencies which must to a greater or less extent diminish the chances of his continuing in possession.

Unfortunately the arbiters have not so proceeded, and were never allowed to do so. The alternative before them was to treat the tenant as a nineteen years' tenant pure and simple, or as a six years' tenant pure and simple.

We are now asked to affirm the alternative of nineteen years pure and simple, and I cannot do so. The arbitration has miscarried, because the arbiters have not been allowed to value the damage done to the tenants, but have, instead, given the figures upon two express hypotheses of valuation, both of which are unsound.

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The result is that unless the parties can come to an agreement as to the sum which would represent the principle which I have stated, and so save the arbitration proceedings from going by the board, we must grant absolvitor. In any event, we cannot but assoilzie from the declaratory conclusion.

I am glad to see from the last sentence of his opinion that I am at one with the Lord Ordinary on the proper principle of valuation, which is by far the most important question. My difference with his Lordship is merely as to the sound construction of this award. I think that, read along with the submission which it professes to meet, the second alternative takes no account of what the Lord Ordinary says was proper matter for consideration.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

ON 17th December, it having been intimated that the pursuers had agreed to accept the smaller sum fixed by the arbiters in full of their claims, the Court recalled the interlocutor of the Lord Ordinary, dismissed the action, and found the pursuers entitled to expenses.

JOHN B. YOUNG, S.S.C.—BRUCE & KERR, W.S.—Agents.

No. 26.

Nov. 16, 1895. Clark & Macdonald v. Bain.

CLARK & MACDONALD, Petitioners.—*G. Watt—Graham Stewart.*
WILLIAM BAIN, Respondent.—*A. M. Anderson.*

Process—Decree—Correction by Clerk of Court before extract—Diligence—Suspension—Nobile officium.—In writing the interlocutor in a cause in which the Court had pronounced judgment for £41 in favour of the pursuer, the Clerk of Court, by a clerical error, wrote £14 for £41, and the interlocutor was signed by the presiding Judge. The Clerk corrected the error before extract, but failed to have the alteration authenticated by the Judge. The interlocutor having been extracted, the defender was charged to make payment, and the days of charge having expired without payment being made, the defender's goods were poinded. The defender thereupon presented in the Bill-Chamber a note of suspension of the decree and the proceedings thereon. The agents-disbursers of the pursuer, in whose name decree had been extracted and the charge given, presented a petition praying the Court to confirm and authenticate the Clerk of Court's amendment. The Lord Ordinary on the Bills reported the suspension.

The Court informed the Lord Ordinary on the Bills that the interlocutor as amended correctly expressed the judgment of the Court, and held it to be unnecessary to pronounce any order on the petition.

1ST DIVISION.

ON 2d November 1895, Messrs Clark & Macdonald, S.S.C., Edinburgh, presented this petition, in which they made statements to the following effect:—

On 20th July 1895 the First Division in an action for payment at the instance of Donald Mackenzie, 95 Shepherd's Bush Road, London, against William Bain, accountant, Edinburgh, pronounced a judgment approving the Auditor's report on the pursuer's account of expenses, and decerning against the defender for the taxed amount thereof, being £41, 2s. 8d., and allowing this decree to go out and be extracted

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in name of Clark & Macdonald, S.S.C., agents-disbursers. By an inadvertency the Depute Clerk of Court who wrote the interlocutor inserted in it the figures £14, 2s. 8d. instead of the figures £41, 2s. 8d., and Lord Adam, who was presiding, signed the interlocutor containing the error. This error was corrected by the Deputy Clerk of Court before decree was extracted.

"The petitioners, on obtaining their extract, charged the said defender, William Bain, thereon to pay the sums therein mentioned. Said charge expired without any intimation having been made by the said defender to the petitioners of the alleged default in said interlocutor, but on the petitioners instructing a poinding of the effects of the said defender, he only then presented a note of suspension and interdict of said decree and whole proceedings following thereon, and the Lord Ordinary on the Bills, on 9th October 1895, pronounced an interlocutor sisting execution.

"The defender, William Bain, is insisting in said note of suspension and interdict to the great hurt and prejudice of the petitioners, who are rightly and justly entitled to the said sum of £41, 2s. 8d., which was the taxed amount of said expenses, and which was the sum the Court intended to grant decree for, and believed they were granting decree for.

"That in these circumstances the petitioners are under the necessity of applying to your Lordships to exercise your *nobile officium*, and to confirm and authenticate the amendment by the Clerk of Court in said interlocutor."

The petitioners prayed the Court "to confirm and authenticate the amendment by the Clerk of Court in the said interlocutor, as if the said amendment had been made and duly authenticated on said 20th July 1895, being the date of the said interlocutor sought to be rectified."

William Bain lodged answers, in which he stated that on 6th and 7th August 1895 copies of the interlocutor containing the figures £14, 2s. 8d. were made in the Register House by his agent's clerk and by himself. He further stated that considering his indebtedness to be £14, 2s. 8d. he had left town for his holidays. On his return two days before the expiry of the charge for payment, he had written to the messenger-at-arms pointing out that "the interlocutor decerning and approving of Auditor's report is for £14 odds and not £41 odds. Notwithstanding this letter, his goods were poinded on 2d October, and he was compelled to take the proceedings referred to in the petition. These proceedings will come under your Lordship's notice in due course, and accordingly this petition is incompetent, or at all events premature."

At the commencement of the debate, the Junior Lord Ordinary (Low), on the suggestion of the Lord President, reported to the Court the action of suspension which was pending in the Bill-Chamber.

Argued for the petitioners;—There was admittedly a clerical error in the interlocutor, and the Clerk of Court was bound to correct it as soon as it was discovered.[1] The answers were clearly irrelevant,

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[1] Mackay's Manual of Practice in the Court of Session, p. 320; Miller v. Lindsay, June 8, 1850, 12 D. 964, 22 Scot. Jur. 437; Allan v. Wormser, Harris, & Co., June 8, 1894, 21 R. 866, *per* Lord Rutherfurd Clark, p. 875.

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for there was no dispute that the extract was correct and in conformity with the judgment of the Court.

Argued for the respondent;—A clerical error could only be corrected *de recenti* and before extract.[1] The former qualification was absent here. The real question was whether the diligence against the respondent was good. The petitioners virtually admitted it was not by coming to the Court and asking to have the warrant for extract and the charge authenticated in order to validate what followed upon it. That question ought to be determined in the suspension in the Bill-Chamber, and the petition was unnecessary.[2]

LORD PRESIDENT.—This question relates to a judgment of this Court, and the parties are agreed that in fact the judgment was given for the sum of £41, 2s. 8d., and not for £14, 2s. 8d.

Lord Low has reported to us the case at present depending before him, and it appears that the judgment was for £41, 2s. 8d.; the interlocutor bears to be for £41, 2s. 8d.; and the extract is for that sum.

Our attention has been drawn to an irregularity which occurred in the history of the interlocutor, which is the written record of the judgment, and it appears to me that, while certainly it would have been in accordance with regular practice that any alteration upon the interlocutor should be authenticated by the Judge who signed it, yet, in this case, the omission is not shewn to introduce any vice into the interlocutor, because, in point of fact, it accords with the judgment of this Court.

It therefore seems to me that the interlocutor has not been successfully impugned, and we, who pronounced it, inform his Lordship, who has reported the case to us, that the interlocutor does correctly record the judgment pronounced by us. Accordingly, I think that we should find that it is unnecessary to dispose of the petition, and that we should state to Lord Low that the interlocutor is in accordance with the actual judgment of the Court.

LORD ADAM concurred.

LORD M'LAREN.—I concur. It must always be remembered that an interlocutor is merely a brief minute of the judgment pronounced, intended for the use of the Court in the preparation of the form of extract, and that there are no statutory provisions regulating the authentication of such minutes. The signature of the Judge is all that is necessary.

I think with your Lordship that after the interlocutor is signed, the Clerk of Court ought not to make the smallest clerical alteration upon it without submitting it to the approval of the Judge.

In ordinary course, where the correction consists in the deletion of one word or figure and the substitution of another the Judge would initial it, but that is merely for the purpose of preserving evidence of the fact that the correction has been submitted to his approval.

In the present case the clerical correction was not submitted to the Judge, because probably the Clerk of Court thought the parties were agreed that

[1] Ritchie v. Ferguson, Nov. 16, 1849, 12 D. 119, 22 Scot. Jur. 3.
[2] Sykes v. Nicol, July 18, 1848, 10 D. 1499, 20 Scot. Jur. 567.

it should be done. The omission of that precaution has led to the present proceedings. But as the Court has now been satisfied that the interlocutor as it stands truly expresses the judgment of the Court, I agree that it is unnecessary that any formal correction should be made. No. 26. Nov. 16, 1895. Clark & Macdonald v. Bain.

LORD KINNEAR concurred.

THE COURT pronounced no order in the petition.

CLARK & MACDONALD, S.S.C.—ALEX. GUNN, S.S.C.—Agents.

SIR JOHN KINGSTON FULLARTON JAMES AND OTHERS (Fullarton's Trustees), First Parties.—*Lord-Adv. Sir Charles Pearson—Orr.* FRANCIS EDWARD JAMES, Second Party.—*Rankine—Pitman.* No. 27. Nov. 16, 1895. Fullarton's Trustees v. James.

Trust—Resignation of trustee—Revocation—Trusts (Scotland) Act, 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 10, *Schedule A.*—Section 10 of the Trusts Act, 1867, enacts that "any trustee entitled to resign his office . . . may do so . . . by signing a minute of resignation in the form of Schedule A, . . . or to the like effect, and may register the same in the Books of Council and Session, and in such case he shall be bound to intimate the same to his co-trustee or trustees, and the resignation shall be held to take effect from and after the expiry of one calendar month after the date of such intimation, or the last date thereof, if more than one, if the trustee or trustees to whom such intimation was given is within Scotland, or otherwise within three months from and after that date." Schedule A provides, —"I, A B, do hereby resign as from and after the date hereof the office of trustee under," &c.

Held that a minute of resignation by a trustee, in the form of Schedule A, could not be revoked after intimation to the co-trustees, although it did not take effect in terms of the statute till a subsequent date.

ON 11th August 1894 Francis Edward James, who had been assumed some years previously as a trustee under the trust-disposition and settlement of the deceased Gavin Fullarton, of Kerelaw, Ayrshire, executed a minute of resignation (in the form of Schedule A annexed to the Trusts (Scotland) Act, 1867 *), bearing "I . . . . do hereby resign as at and from the date hereof the office of trustee under," &c. 1ST DIVISION.

On the same date he intimated the minute to Sir John Kingston Fullarton James and others, his co-trustees, who were resident in England. An acknowledgment of intimation was annexed to the minute, and was signed by the co-trustees, and the minute, with the

* Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97), sec. 10, enacts,—"Any trustee entitled to resign his office may do so by minute of the trust entered in the Sederunt Book of the trust, and signed in such Sederunt Book by such trustee, and by the other trustee or trustees acting at the time, or he may do so by signing a minute of resignation in the form of the Schedule (A) to this Act annexed, or to the like effect, and may register the same in the Books of Council and Session, and in such case he shall be bound to intimate the same to his co-trustee or trustees, and the resignation shall be held to take effect from and after the expiry of one calendar month after the date of such intimation, or the last date thereof, if more than one, if the trustee or trustees to whom such intimation was given is within Scotland, or otherwise within three months from and after that date. . . ."

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acknowledgment of intimation annexed thereto, was registered in the Books of Council and Session on 14th August 1894.

On 20th September 1894 Mr James executed a minute of revocation of his resignation, and, on 17th October, this minute was registered. On 26th October intimation of the minute was made by Mr James to his co-trustees, who replied that he was not entitled to withdraw his resignation.

A special case was presented, to which the trustees were first parties, and Mr James second party, for the opinion of the Court upon the following question:—"Is the party of the second part still entitled to act as a trustee?"

Argued for the first parties;—The Trusts Act of 1861[1] conferred an unqualified power to resign upon gratuitous trustees, unless the contrary were expressed in the deed, and it was under the power so conferred that the second party had resigned. Section 10 of the Act of 1867 provided alternative modes in which resignation might be carried out, but that section did not limit the unqualified power conferred by the earlier Act.[2] The provision that a certain period was to elapse before the resignation took effect was conceived in favour of the remaining trustees, who were not bound to accept the resignation, but might take means to keep the resigning trustee in the trust. But, although the effect of the resignation was delayed, the act of resignation was complete when intimation had been made to the co-trustees, and could not be thereafter revoked.

Argued for the second party;—Section 10 of the Act of 1867 provided alternative modes in which a trustee's resignation could be effected. If the first was adopted, the resignation took effect at once. If the second, the effect was postponed. The first part of the section, which prescribes these alternative modes of resignation was permissive, the second, which dealt with the effect of resignation, was obligatory. As the second party had adopted the second alternative mode, his resolution to resign could not take effect until the expiry of three months from the date on which he intimated it to his co-trustees. The reasonable construction of the Act accordingly was that until the period of three months had expired his resolution to resign not having taken effect might be revoked. It was competent for a trustee to withdraw his resignation after he had intimated it to his co-trustees.[3]

At advising,—

LORD PRESIDENT.—This gentleman, Mr Francis Edward James, resigned his office of trustee, by minute of resignation, executed in the form of Schedule A of the Trusts Act, 1867, recorded in the Books of Council and Session, and acknowledged to have been intimated to the trustees. His resignation was therefore carried out in statutory form.

He now maintains that he effectually recalled his resignation, and he founds his claim to do so on the words in the Act of 1867, which say that a resignation under that Act shall be held to take effect three months after the date of intimation. The question is, What is the effect of those words?

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[1] 24 and 25 Vict. cap. 84.

[2] Maxwell's Trustees v. Maxwell, Nov. 4, 1874, 2 R. 71.

[3] Blair's Trustees v. Blair, Dec. 12, 1863, 2 Macph. 284, *per* Lord Kinloch, p. 286, 36 Scot. Jur. 139.

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The sound view seems to be that they merely continue the resigning trustee in the service of the trust for that period, but do not abate or make revocable the concluded act of resignation. The trustee, according to the theory of the Act, is not to throw the trust into confusion by a sudden resignation, and the remaining trustees are to have time to arrange for his successor, if need be. This view seems to me to satisfy the words in question, and at the same time to harmonise them with the *de presenti* words of the minute, and the statutory solemnities of recording and intimating, all of which point to an irrevocable act.

LORD KINNEAR.—I am of the same opinion. The minute of resignation bears that the granter does "hereby resign, as and from the date hereof, the office of trustee," and in that respect it is in accordance with the form prescribed by the statute. So far as the resigning trustee himself is concerned, the act of resignation is complete. There is nothing more which it is necessary or possible for him to do in order to further his resignation. All that is required to relieve him of the duties and liabilities of his office is not an act within his own power, but merely the lapse of a certain period of time. If the statute, while providing that the resignation should take effect within a certain period of the intimation made by the trustee to his co-trustees, had prescribed nothing as to the form in which resignation should be made, I could understand that a more difficult question might have arisen. But the Act prescribes a form of resignation, and requires, when this mode of resignation is adopted, in order to relieve the trustee of his duties and liabilities as trustee, that he must execute and deliver to his co-trustees a written instrument importing an absolute and immediate resignation from the date of the instrument.

It appears to me, therefore, that no real difficulty is raised by the provision of the statute as to the period which is to elapse before the resignation shall take effect.

LORD KYLLACHY concurred.

LORD ADAM and LORD M'LAREN were absent.

THE COURT answered the question in the negative.

CARMENT, WEDDERBURN, & WATSON, W.S.—PATRICK C. JACKSON, W.S.—Agents.

No. 28.

Nov. 16, 1895.* Kirkcaldy District Committee v. Police Commissioners of Buckhaven, &c.

KIRKCALDY DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF FIFE, First Parties.—*Dickson—D. Dundas.*
POLICE COMMISSIONERS OF BUCKHAVEN, METHIL, AND INNERLEVEN, Second Parties.—*Balfour—Lorimer.*

Public Health—Water—Whole parish supplied by one system of waterworks—Burgh formed within parish after 1889, *and created a special water supply district—Residue of parish formed into a separate water supply district—Management and maintenance—Assessment—County Council—Burgh Police Commissioners—Local Government (Scotland) Act,* 1889 (52 *and* 53 *Vict. c.* 50), *sec.* 99.—Sec. 99 of the Local Government (Scotland) Act, 1889, enacts,—"Nothing in this Act shall interfere with the

* Decided Nov. 8, 1895.

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formation of police burghs under the provisions of the General Police and Improvement (Scotland) Act, 1862, and on the formation of any police burgh the Commissioners of Police thereof shall become the Local Authority therein under the Public Health Acts subject to adjustment by the Sheriff in regard to the property and debts and liabilities affected by such change. . . ."

In 1876 the Parochial Board of Wemyss, as the Local Authority under the Public Health Act, 1867, introduced a water supply for the whole parish from a source outside the parish, the only works within the parish being the distributing mains. On the passing of the Local Government (Scotland) Act, 1889, the Kirkcaldy District Committee of the County Council of Fife came in place of the Parochial Board as Local Authority, and the water-works were vested in them. The requisite expenditure was levied upon the whole property in the parish.

In 1891 a district of the parish was created a police burgh, and subsequently formed into a special water supply district. In 1892 the remaining part of the parish was formed into a special water supply district. The existing system of water-works for the supply of the whole parish was continued.

In a question between the District Committee of the County Council and the Police Commissioners of the burgh, *held* (1) that the water supply and water-works fell to be managed by the subcommittee of the District Committee appointed under sec. 81 of the Local Government Act, 1889, and the Police Commissioners (or so many of the Police Commissioners as the Sheriff should fix as a committee) jointly; and (2) that the Police Commissioners were alone entitled to impose and levy the necessary assessments within the burgh.

1ST DIVISION. THIS was a special case presented by the Kirkcaldy District Committee of the County Council of Fife, as first parties, and the Police Commissioners of the burgh of Buckhaven, Methil, and Innerleven as second parties, to determine certain questions which had arisen between them as to the management and maintenance of the water-works and water supply of the parish of Wemyss of which the burgh formed a part. The undernoted sections of the Local Government (Scotland) Act, 1889, were, *inter alia*, referred to by the parties,* and the following facts were set forth in the special case:—

* The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), enacts,—Sec. 81. "With respect to special drainage districts or special water supply districts the following provisions shall have effect—(1) Where a special drainage district or special water supply district has been formed in any parish under the Public Health Acts, the district committee may, subject to regulations to be from time to time made with the consent of the County Council, appoint a subcommittee for the management and maintenance of the drainage or water supply works, and such subcommittee shall in part consist of persons, whether members of the district committee or not, who are resident within the special drainage district, or special water supply district. (2) Where a special drainage district or special water supply district is partly within a county and partly within a burgh or police burgh, the subcommittee appointed under the immediately preceding subsection, and such number of the town council or Police Commissioners (as the case may be) of such burgh or police burgh as, failing agreement, the Secretary for Scotland may determine, having regard to all the circumstances of the case, shall be charged with the management and maintenance of the drainage or water supply works within such special district, and the determination of the Secretary for Scotland may provide for the regulation of the proceedings, and for the allocation and payment of the expenses incurred under this subsection. (3) Where a special drainage district or

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In 1868 the town or village of Buckhaven, and in 1870 the village of East Wemyss, both within the parish of Wemyss and county of Fife, were respectively formed into special water supply districts under the Public Health (Scotland) Act, 1867, section 89 (5). At that time the areas of these water districts were wholly landward.

In 1876 the Parochial Board of Wemyss applied for and obtained a provisional order confirmed by Parliament authorising them to introduce a supply of water for the whole parish. The works were vested in and constructed and administered by the Parochial Board of Wemyss as the Local Authority under the Public Health (Scotland) Act, 1867. The water supply so introduced was obtained from a source beyond the parish, the only works within the parish and the special districts above mentioned being distributing mains, excepting a small distributing tank situated within the parish, but beyond the special districts.

The debts due by the special districts of Buckhaven and East Wemyss were taken over and paid by the Parochial Board as the Local Authority of Wemyss, and the special districts were thereafter treated, like the other parts of the parish, as if they had not been formed into special districts. The assessments, however, for the water supply were levied under the Public Health Act, section 94, subsection 1 (which applies to special districts only), and not under subsection 2. To provide funds for the construction of the water-works sums of money were borrowed from time to time by the Parochial Board as Local Authority of the parish, in security of the repayment of which, and of interest thereon, the water assessments of the parish, including the special districts above mentioned, and also the general public health assessments of the parish, were pledged. Such was the position of matters when the Local Government (Scotland) Act, 1889, came into operation, and the parish of Wemyss became part of the Kirkcaldy district of the county of Fife.

In June 1890, the Kirkcaldy District Committee being under the erroneous apprehension that the whole parish of Wemyss had been formed into a special water supply district, a subcommittee was appointed to manage and maintain the water supply works under section 81 (1) of the Local Government Act. The subcommittee consisted of six members of the district committee, and four residenters within the parish of Wemyss.

By an order of the Boundary Commissioners, of date 24th November 1890, a detached portion of the parish of Markinch, known as Innerleven, and which had been formed into a special water supply district in the year 1885, was added to the parish of Wemyss.

On 4th March 1891 the district of Buckhaven, Methil, and Inner-

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special water supply district is wholly within a police burgh formed after the passing of this Act, the Police Commissioners of such police burgh shall become the Local Authority under the Public Health Acts for such special district, and the assessments in respect of the drainage and water supply shall be levied in the same manner as they were before such district was formed into a police burgh."

Sec. 99. "Nothing in this Act shall interfere with the formation of police burghs under the provisions of the General Police and Improvement (Scotland) Act, 1862; and on the formation of any police burgh the Commissioners of Police thereof shall become the Local Authority therein under the Public Health Acts, subject to adjustment by the Sheriff in regard to the property and debts and liabilities affected by such change. . . ."

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leven, all in the parish of Wemyss, was formed into a police burgh, under the provisions of the General Police Act of 1862.

In July 1892 the District Committee extended the special water supply district of East Wemyss (formed as before mentioned in 1870) so as to include the whole parish of Wemyss except those parts of the parish which were embraced in the limits of the police burgh of Buckhaven, &c.

In August 1892 the Police Commissioners of Buckhaven, &c. extended the special water supply district of Buckhaven (formed as before mentioned in 1868), so as to include the whole burgh of Buckhaven, &c.

In September 1892, in pursuance of section 92 of the Public Health Act of 1867,* a joint committee of the District Committee and the Police Commissioners was appointed for the management of the works, and "to enable the combined authorities of the parish of Wemyss and of the police burgh of Buckhaven, Methil, and Innerleven to bring in an additional supply of water, and to execute and maintain the works."

Thereafter the District Committee and the Police Commissioners approved of a scheme for the new water supply, called the Byres Scheme, and empowered the joint committee to apply for a provisional order for the Byres Scheme, and thereafter to execute the provisional order, and to manage and maintain the works to be so constructed along with the existing works of the combined special water supply district of Wemyss.

The provisional order was obtained, and received the royal assent in 1894. Before, however, the works were executed, questions arose between the Kirkcaldy District Committee and the Police Commissioners as to which was the Local Authority for the administration of the water supply works originally introduced by the parochial board for the whole parish, and of those to be constructed in virtue of the provisional order, and this special case was presented.

The questions of law submitted for the opinion and judgment of the Court were:—"(1) Which of the parties to the case is the Local Authority charged with and entitled to the administration of (*a*) the existing, and (*b*) the contemplated water supply and water-works (1) within the landward part of the parish of Wemyss; (2) within the police burgh of Buckhaven, Methil, and Innerleven; and (3) within the part outwith both the said police burgh and the said parish? (2) Do the assessments necessary in connection with (*a*) the existing, and (*b*) the contemplated water-works fall to be imposed and levied by the County Council over the whole parish; or are the second parties entitled or bound to impose and levy the same within the burghal portion of the said parish?"

The first parties maintained that, looking to the facts that the water supply introduced into the parish of Wemyss by the parochial board, as local authority of the parish, was introduced for the benefit of the whole parish; that the whole of the works, except certain distributing mains, were outside the limits of the police burgh, and partly also outwith the parish of Wemyss; that the cost of the works

* The Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101), sec. 92, enacts,—"Two or more local authorities may combine together for the purpose of executing and maintaining any works by this Act authorised in regard to water supply that may be for the benefit of their respective districts."

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for the supply of the whole parish, including the burgh, formed a debt upon the parish, including the burgh, and the assessments of the whole parish, including the burgh, were pledged in security for repayment of the money borrowed to construct the works; and that the special water supply districts of East Wemyss and Buckhaven were all formed before the police burgh came into existence, only the extensions and combinations of the same having taken place after the creation of the burgh,—the District Committee was entitled to exercise all the administrative and financial business of the water-works through a subcommittee appointed in terms of section 81 of the Local Government (Scotland) Act, 1889; and the County Council was entitled and bound to levy the assessments necessary within the burghal as well as the landward portions of the parish.[1] As the new supply of water about to be introduced was merely an addition to the existing supply, the whole of the works in connection therewith being outside the burgh, and most of them outside the parish, the administration of, and the assessments necessary in connection with, such new or additional supply, must be dealt with upon the footing above indicated with regard to the existing water supply.

The second parties maintained that Buckhaven, Methil, and Innerleven, being a police burgh formed in 1891 under the General Police Act, 1862, of which the second parties are the Local Authority under the Public Health Acts and the Local Government (Scotland) Act, 1889, sec. 81 (3) and sec. 99; and the said police burgh forming a special water supply district, the second parties were entitled to combine with the first parties, the Local Authority of the parish of Wemyss, in maintaining the existing, and executing and maintaining the contemplated water-works, and to exercise in conjunction with them the administrative and financial business of the said water-works, and that the second parties were entitled and bound to impose and levy the water-works assessments so far as within the said police burgh.

At advising,—

LORD PRESIDENT.—The police burgh of Buckhaven, Methil, and Innerleven was formed in 1891. The 99th section of the Local Government (Scotland) Act, 1889, determines the effects of this event upon the administration of the Public Health Acts. The Police Commissioners became the Local Authority within the new burgh in succession to, and in place of, the District Committee. The Police Commissioners succeeded the District Committee in all their rights as Local Authority within the burgh, including their property, and became the sole assessing authority.

The application of this law to the present question does not present any difficulty, either in theory or in practice. There was an existing system of water-works supplying both the burgh and the residue of the parish out of which the burgh was carved. The system being one and indivisible, there is a joint interest in the two local authorities, and there must be a joint management and maintenance. As the water-works form "a property affected by the change" from the one Local Authority to the other, the Sheriff is appointed by section 99 to adjust the terms of the new arrangement. The matter is complicated, but only very slightly, by the circum-

[1] County Council of Dumbartonshire v. Police Commissioners of Clydebank, Nov. 16, 1894, 22 R. 64.

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stance that the residue of the parish is a special water supply district; and, accordingly, while the District Committee is the Local Authority, its powers of management and maintenance of these works are exercised through a subcommittee appointed under section 81 (1) of the Local Government (Scotland) Act, 1889. (I may mention, but merely incidentally, and for the avoiding of all doubtfulness, that the statutory recognition of this special water supply district in the Provisional Order Act of 1894 sufficiently establishes the legality of the resuscitation and extension of the long obsolete district of East Wemyss.) It would be within the province of the Sheriff to fix, with due regard to the numerical strength of the subcommittee of the district committee, the number of police commissioners, if the whole are too many to sit as a committee along with the subcommittee of the district committee, so as to duly represent town and country respectively.

While the management and maintenance of the works will therefore be in the hands of this joint body, it is clear that it has no assessing power in itself. The joint body will, however, have in the course of its management to frame its budget, and make up its mind what money is required each year. This deficit must be divided between the two assessable areas (the special water supply district of Wemyss and the burgh of Buckhaven, Methil, and Innerleven), and the proportion can be fixed by the Sheriff. The sums thus falling on the two local authorities will be raised by assessment laid on, in the burgh by the Police Commissioners as Local Authority, and outside the burgh by the County Council, each authority exercising its own appropriate assessing powers.

What I have said has related to the existing water supply. It all, however, applies equally to the contemplated works. The Provisional Order Act of 1894 expressly authorises the new works as the joint enterprise of the two bodies; and, once those works are completed, the management and maintenance will be in like manner joint. As the old and the new works are to form one system, the new will necessarily come under the management of the same joint body, which by that time will be fully equipped.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find and declare (1) that the whole of the existing and also of the contemplated water supply and water-works fall to be managed and maintained by the subcommittee of the District Committee under section 81, subsection 1, of the Local Government Act, 1889, and the Police Commissioners (or so many of said Police Commissioners as the Sheriff shall fix as a committee) jointly; (2) that the second parties are alone entitled and bound to impose and levy within the police burgh the assessments necessary to raise the due proportion effeiring to the burgh of the moneys necessary to be raised by assessment for the existing and contemplated water-works, and decern."

RONALD & RITCHIE, S.S.C.—DOUGLAS & MILLER, W.S.—Agents.

JAMES HOWDEN (David Simson's Judicial Factor), Petitioner (Reclaimer).—*D. Dundas—Howden.*
JAMES SIMSON AND OTHERS, Respondents.—*Guy.*

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Howden v. Simson.

Trust—Power to make advances out of capital—Discretionary power of trustees—Judicial Factor—Special Powers.—A testator conveyed to certain persons named and to such other persons as should be assumed in terms of law to act in the trust, as trustees for executing the trust, his heritable and moveable estates. He directed his trustees, *inter alia*, to retain and invest £4000 for behoof of his son D in liferent allenarly and of his issue in fee, and on the death of D without issue to pay the sum to the testator's other sons, subject to the condition that "in case at any time my trustees may in the exercise of their judgment and discretion think it prudent and advisable to pay over" to D "the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted full power, authority, and liberty to do so, . . . it being my intention to give to my trustees the same full powers and discretion in giving the said principal sum" to D, "which I myself now possess."

A judicial factor who had been appointed in room of the trustees, who had resigned, presented a petition, bearing to be at D's request, for power to invest a portion of the £4000 in the purchase of an annuity in favour of D and his wife, and the survivor of them.

The Lord Ordinary (Low) refused the petition, on the ground that the trust-deed did not authorise any payment for behoof of D's wife.

The judicial factor having reclaimed, and lodged a minute stating that in his opinion the proposed application of the portion of the trust-estate was prudent and advisable, the Court, holding that the proposed investment, being at D's request, was virtually a payment to D himself, *granted* the prayer of the petition.

Observations by Lord M'Laren as to the limits of the power of a judicial factor who has come in place of trustees vested with discretionary powers.

(SEE *Simson*, Jan. 27, 1883, 10 R. 540.)

1ST DIVISION. Lord Low.

By trust-disposition and settlement executed on 15th and 18th September 1863 by David Simson senior, tenant of Oxnam Row, Roxburghshire, and Mrs Elizabeth Simson, his wife, David Simson conveyed his estates to certain persons named, and to such other person or persons as he should thereafter name, or as should be assumed in terms of law to act in the trust thereby created, and to the acceptors or acceptor, survivors and last survivor of the persons thereby named, or to be named or assumed as aforesaid, as trustees for executing the trust thereby created; whom all failing, then to the nearest heir-male of the last accepting and surviving trustee who should be major at the time and the assignees of his said trustees.

By the sixth purpose of the deed it was provided "that my trustees shall at the first term of Whitsunday or Martinmas after my death set apart the sum of £4000, and retain and invest the same in their own names as trustees foresaid . . . for behoof of David Simson junior, my son, in liferent, for his liferent use allenarly, and of his lawful issue in fee . . . Declaring that the interest or annual produce of the said sum of £4000 is intended by me, and shall be held to be a purely alimentary provision, to the said David Simson junior, and shall not be assignable by him in any way, nor for any purpose, nor be subject to the diligence of his creditors: . . . And it is hereby further provided and declared that upon the death of the said David Simson junior without issue then alive, then and in that case I appoint the said sum of £4000 to be divided and paid to

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my other sons, George Simson, James Simson, and John Simson, equally among them, share and share alike, and their respective heirs and assignees: But it is hereby specially provided and declared, that the foregoing provisions in favour of my said son, David Simson junior, in liferent, and of his issue, whom failing, in favour of the said George Simson, James Simson, and John Simson, and their foresaids, in fee, are made by me subject to this condition and provision that, in case at any time my trustees may, in the exercise of their own judgment and discretion, think it prudent and advisable to pay over to the said David Simson junior the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted full power, authority, and liberty to do so; and they shall be completely exonered thereof by the discharge of the said David Simson junior alone, and shall not thereafter be subject to any claim thereto, or to the part so paid at the instance of his issue, or of my said sons, George, James, and John, or any one of them, or on the part of their respective foresaids, it being my intention to give to my trustees the same full powers and discretion in giving the said principal sum to the said David Simson junior, or withholding the same from him, which I myself now possess; and the said David Simson junior shall have no right or power to claim or demand payment of said principal sum, or any part thereof, from my trustees in case they may not deem it proper to give the same to him of their own free will and motive, they being hereby declared to be the sole and uncontrolled judges in the matter."

The testator died on 12th April 1865. In July 1865 the whole purposes of the trust were fulfilled, with the exception of the sixth purpose. The trustees having all resigned, the Court on 21st May 1875 appointed a judicial factor upon the trust-estate.

On 21st November 1894 the judicial factor presented a petition to the Court, in which he stated "that the income of the estate falling to the liferenter, the said David Simson, is insufficient to meet his wants, and the petitioner has accordingly, at his request, agreed to ask your Lordships for authority . . . to invest a . . . sum of £1000 out of the trust-estate in the purchase of an annuity in favour of the said David Simson and his wife, and the survivor of them. It is believed that the sum of £1000 will purchase an annuity of about £60." He accordingly craved the Court to authorise him to make this investment by purchasing from the Edinburgh Life Assurance Company an annuity on the lives of David Simson and his wife, and the survivor of them.

Answers were lodged by James and John Simson, surviving brothers of David Simson junior, and by the nine children of George Simson, a deceased brother of David Simson junior. They submitted that the petition was wholly unnecessary, and that to grant its prayer would be contrary to the expressed intention of the testator.

On 18th October the Lord Ordinary (Low) refused the prayer of the petition.*

* "OPINION.— . . . The trust-deed authorises the trustees to pay over to David Simson the whole or any part of the sum of £4000 as his own absolute property. Now, in the former petition[1] the Court authorised the trustees to invest a sum of money in the purchase of an annuity for David Simson, on the ground that that was practically giving £1000 of the

[1] Simson, 10 R. 540.

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The petitioner reclaimed, and on the suggestion of the Court lodged a minute, in which he stated "that Mr David Simson junior has expressed to him a desire to make some provision for his wife, and has undertaken in the event of his obtaining from the trust-estate a capital sum of £1000 to invest the same in the purchase of an annuity in favour of himself and his wife and the survivor of them. The judicial factor is of opinion that in the whole circumstances of the case such an application of the said money would be prudent and advisable. He accordingly considers that the investment by him of the said sum of £1000 in an annuity as craved in the prayer of the petition would be a prudent and advisable act of the administration. Further, looking to the undertaking by Mr Simson above mentioned, in which the judicial factor reposes confidence, he is of opinion that it would be safe, prudent, and advisable, if the Court should authorise such a course, to hand over a sum of £1000 out of the trust funds to Mr Simson absolutely."

LORD KINNEAR.—I am of opinion that the application ought to be granted. The testator directed that £4000 should be held in trust by his trustees for behoof of his son David Simson, for his liferent use allenarly, and for his issue in fee; and then he went on to provide that the interest or annual produce of that sum should be held to be a purely alimentary provision for the said David Simson, and should not be assignable by him in any way or for any purpose, or be subject to the diligence of his creditors. If that provision had stood alone there could have been no possibility of the Court or the judicial factor allowing the alimentary liferenter to have, directly or indirectly, any portion of the fee of the estate. But the testator goes on to say,—"It is hereby specially provided and declared that the foregoing provisions . . . are made by me, subject to this condition and provision, that in case at any time my trustees may, in the exercise of their own judgment and discretion, think it prudent and advisable to pay over to the said David Simson junior the whole or any part of the principal of the said sum of £4000 as his own absolute property, they

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capital to David Simson himself, as he desired that the £1000 should be invested in that way. The factor approved of that being done, all the beneficiaries consented, and the Court said this:—That to say that this is not within the terms of the power is really a play upon words, because to expend £1000 in the purchase of an annuity, at the desire of David Simson, is practically the same thing as paying £1000 directly to himself for his own absolute use and behoof. But then upon the same course of reasoning to expend £1000, or any part of that sum, in purchasing an annuity, not for David Simson, but for his wife, is not in any sense giving the money to him. It is applying the capital of the money for behoof of a person other than David Simson, for which I can find no warrant whatever in the trust-deed.

"Now that is the only thing which is asked in this part of the prayer of the petition. It is asked that the authority of the Court should be given to the factor to invest £1000 in the purchase of an annuity for David Simson and his wife. If the application had been one for the advance of £1000 to David Simson, upon the ground that he desired that money to make provision for his wife, that would have been a totally different matter, and would have been a totally different application, raising another and different set of considerations than those we are considering here, and as to which I, of course, indicate no opinion. But I am clear that to apply a part of this capital sum in the purchase of an annuity, not for David Simson but for his wife, would be to go beyond the powers given in the trust-deed. . . ."

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shall have, and they are hereby granted full power, authority, and liberty to do so." He further goes on to express his intention of giving his trustees the same discretion in the matter as he himself possesses, and therefore there was a power given to the trustees to discharge the limitations which the truster had put upon the original gift for the protection of his son, and if they found it safe and prudent to do so, to make over to the son any part or the whole of the capital as they in their discretion might think fit.

Now, it appears to me that all of these provisions are made for the benefit of the son. It is for his benefit that the provisions are in the first place restricted so as to exclude the diligence of his creditors; and, in the second place, that the trustees are authorised to withdraw that restriction, and put him in full possession of his own property if they think fit. I do not think that the trustees, or the judicial factor in their place, would be entitled to exercise their power to give any portion of the sum in question to David Simson, unless in the exercise of their judgment and discretion they thought that it was no longer necessary that he should be protected, either with regard to the whole or a part of the sum as the case might be, by the exclusion of the diligence of his creditors, and therefore I think that the first step which the trustees, in the discharge of the duty laid upon them by the truster, are bound to take, in considering whether they are to give or to withhold any part of the money which David Simson may require, is to consider whether in his interest it is prudent and advisable to grant that request.

Now, if the judicial factor had said nothing more than that he "proposed to sink a thousand pounds in an annuity for David Simson and his wife," I should have thought that that was not a sufficient statement to warrant the power to do so being given. The mere fact that he so proposed would not in itself establish, at all events to my satisfaction, that he had, in the exercise of his judgment and discretion, come to the conclusion that it was prudent and advisable to make over such a sum of money as the absolute property of the legatee, because he no longer required the protection which the testator had provided against the diligence of creditors. But he does not confine himself to such a statement at all; he tells us explicitly that he does consider that the investment on the annuity would be a prudent and advisable act of administration, and further, that he is of opinion that it would be safe and prudent and advisable to hand over a sum of £1000 out of the trust-funds to Mr Simson absolutely.

Now, if we have the judicial factor's report to that effect, I do not think we should have any hesitation in allowing him to do what he thinks it advisable to do.

The only ground on which the Lord Ordinary refused the application appears to be that the petitioner desires the money to make provision for his wife, and his Lordship says that "to apply a portion of this capital sum in the purchase of an annuity, not for David Simson but for his wife, would be to go beyond the powers given in the trust-deed." That would have been perfectly sound if the powers in the trust-deed had been confined to the administration of the income of this property during David Simson's life, but the power is to give the whole or part to Simson as his absolute property, and if he is entitled to obtain a thousand pounds for himself, it is surely within that power that he should be entitled to say,—

"I want a thousand pounds, because I wish to purchase an annuity for my wife with it." No. 29.

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The purpose to which the money is to be applied is only material in so far as it is an element which the judicial factor very properly took into consideration in determining whether it was a prudent and advisable thing to put the money under this gentleman's control. The logical result of that view would be this, that we should authorise the judicial factor to pay over the £1000 to Mr Simson, and allow him to do with it what he pleases. But I think it is very much more convenient to adopt the course which the judicial factor himself proposes, and that we should authorise him to apply the money for which he is asked. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and that we should grant the prayer of the petition.

LORD ADAM concurred.

LORD M'LAREN.—I agree with all that has been said by Lord Kinnear, and will only add a sentence on two points. The exercise of the powers here granted by the testator is a somewhat delicate branch of our jurisdiction, and has often been the subject of discussion. In a case that came before us not very long ago, *Robbie's Judicial Factor* v. *Macrae*,[1] we had occasion to consider the limits of the power of a judicial factor who came in the place of trustees vested with discretionary powers, and your Lordships held that a judicial factor could not exercise an unqualified power of selection of the objects of the trust; but it appeared on a review of the cases, including that of *Simson*,[2] that where a truster had clearly pointed out the objects of a trust, and had given his trustees discretion only as to the mode in which the benefit should be enjoyed, that was a power which could be exercised by a factor, and it would be extremely unfortunate if such powers could not be exercised after the death of the original trustees.

But then I agree with the observation made in the respondents' argument that, where the trust is one involving a large exercise of discretion in disposing of a capital fund, the Court has a certain controlling power. The factor has not merely to come to the Court that we may see that the proposed application of the money is within his power, but he must also set forth his reasons for the proposed exercise of the power that we may see that there is a fair exercise of the discretion which has devolved upon him in succession to the trustees.

The only other point which I desire to note is as to the purpose for which this money is to be applied. Of course the most ordinary case of the exercise of such a power would be where there had been some loss of interest to the beneficiary, and it was necessary that a portion of the capital should be so invested that he might spend the remainder of his days in the same degree of comfort that he had hitherto enjoyed. But the power is not limited to questions of this sort. It is a power to give the beneficiary liferenting the fund the absolute control of a portion of the capital, provided the trustees shall think it a reasonable application of the money. It appears to me to be quite proper for the factor to inquire of the beneficiary what he means to do with the money, for the very purpose of the trust is

[1] 20 R. 358. [2] 10 R. 540.

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to protect him against the improvident expenditure of his capital. Now, in this case, where it is explained that he proposes to sink the money in an annuity, I cannot doubt that, upon this explanation being made, the judicial factor has a case before him entitled to very favourable consideration, and as he comes to us stating that he approves of the proposed advance, I am of opinion with Lord Kinnear that the power should be granted.

The LORD PRESIDENT concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, granted the prayer of the petition, and found the petitioner entitled to the expenses of the petition out of the capital of the trust-estate.

SHIELL & SMITH, S.S.C.—SIBBALD & MACKENZIE, W.S.—Agents.

No. 30.

Nov. 19, 1895. Campbell v. Morris.

HUGH CAMPBELL, Objector (Appellant).—*Cullen.*
ANDREW MORRIS, Claimant (Respondent).—*Blackburn.*

Election Law—Service Franchise—Representation of the People Act, 1884 (48 *and* 49 *Vict. c.* 3), *sec.* 3.—A coachman had the exclusive use and control of a room over the stable furnished as a bedroom, in which he kept his clothes and dressed, but he took his meals in the mansion-house occupied by his master, and slept there as caretaker.

He claimed to be enrolled as a voter in respect that he inhabited the room over the stable as a dwelling-house by virtue of service in the sense of section 3 of the Representation of the People Act, 1884.

Held that he was not entitled to the franchise, in respect that the dwelling-house which he inhabited was not the room over the stables but the mansion-house, which was inhabited by the person under whom he served.

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney.

AT a Registration Court for the county of Perth (Eastern Division), held on 3d October 1895, Andrew Morris, coachman, Ayton, claimed to be enrolled on the Register of Voters for the county (Eastern Division) as tenant and occupant of a house at Ayton. Hugh Campbell, solicitor, Perth, objected to the claim being admitted. The Sheriff (Jameson) admitted the claim, and on Campbell's request stated a case for the opinion of the Court of Appeal as follows:—

"The facts of the case are as follows:—Andrew Morris is coachman to Mr William Livingstone Watson of Ayton, in the parish of Abernethy, and resides there the whole year round. As such coachman he has in respect of his services the sole and exclusive use of a house over the stable which is furnished with beds, and in which he dresses and undresses, and which he also sits in during the day when he has leisure. Mr Watson is for a great part of the year absent in London, and as there are no other men-servants in the mansion-house at Ayton, the claimant has been requested to sleep in the said mansion-house, and has a bedroom there, where he has slept for the last four years, never having slept in the house in respect of which the claim is made. He keeps his box in his bedroom in the mansion-house, but keeps most of his clothes in the house over the stable. He has the custody of the keys of the said house over the stable, and full control of it. . . . . The claimant takes all his meals with the other servants in the mansion-house. He is not married."

The question of law for the decision of the Court of Appeal was

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"Whether in the circumstances above set forth the claimant is entitled to be put on the said Roll of Voters in respect of section 3 of the Act 48 and 49 Vict. cap. 3, intituled 'The Representation of the People Act, 1884'?" *

Argued for the appellant;—The "dwelling-house" referred to in section 3 must be taken to be the house in which the claimant slept and took his meals, and not the room which he occupied in his leisure time. As the former was also inhabited by his master, he could not be admitted to the franchise.[1]

Argued for the respondent;—The house which he really inhabited was the room over the stables, where he spent his time when he was not required to sleep at the mansion-house for its protection during his master's absence. Moreover, he might inhabit two houses.[2]

LORD KINNEAR.—I think that this is a somewhat narrow case, but I am unable to agree with the learned Sheriff. The clause which we are called upon to interpret is the 3d section of the Representation of the People Act, 1884.—[His Lordship here quoted the section.]

Now, the claimant is a coachman in the service of Mr Watson, and the case sets out that he sleeps in the mansion-house and takes his meals there. It also sets out that Mr Watson is absent for a great part of the year in London, and that as there are no other men-servants in the mansion-house, the claimant has been required to sleep there in the capacity of watchman. It is further stated that there is a house over the stables furnished with beds, although these are not used, and that he has the exclusive use of it for dressing and undressing, and keeps his clothes there, although he also keeps a box, presumably for his clothes, in his bedroom in the mansion-house.

Now, it appears to me in construing the word "dwelling-house" in its reasonable sense, that the house the claimant inhabits is the mansion-house and not the house over the stables. He is in the same position as many other people who inhabit a dwelling-house and carry on their business in a shop or office elsewhere. It appears to me that the claimant's dwelling-house is the house in which he sleeps and takes his meals day by day.

Mr Blackburn says that he is required to live in the mansion-house as part of his services. In that view he inhabits a dwelling-house by virtue of his service, but the dwelling-house is occupied by the master under whom he serves. I am of opinion that the Sheriff's judgment ought to be recalled.

LORD TRAYNER concurred.

LORD KINCAIRNEY.—I think this is a very narrow case, but I am not prepared to differ from your Lordships.

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* The Representation of the People Act, 1884 (48 and 49 Vict. c. 3), sec. 3, enacted,—"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant occupier of such dwelling-house as a tenant."

[1] Adair v. Murray, Nov. 9, 1874, 2 R. 11; Rogers on Elections, vol. i. p. 93.

[2] Sim v. Galt, Nov. 22, 1892, 20 R. 84.

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Nov. 19, 1895. Campbell v. Morris.

THE COURT sustained the appeal, and remitted to the Sheriff to expunge the name of Andrew Morris from the register of voters.

DAVID DOUGAL, W.S.—RUSSELL & DUNLOP, W.S.—Agents.

No. 31.

Nov. 19, 1895. Stirling v. Fletcher.

HUGH AUSTIN STIRLING, Objector (Appellant).—*C. J. Guthrie—Lyon Mackenzie.*

WILLIAM FLETCHER, Claimant (Respondent).—*Younger.*

Election Law—Lodger Franchise—Claim and declaration—Presumption—Wilful refusal of claimant to answer citation as witness—The Registration Amendment (Scotland) Act, 1885 (48 *Vict. c.* 16), *sec.* 14.—The Registration Amendment (Scotland) Act, 1885, by section 14, enacted,—"In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *prima facie* evidence of his qualification."

A person, claiming the lodger franchise in respect of a bedroom occupied by him in his father's house, produced at the Registration Court a notice of claim accompanied by the statutory declaration. The claim was objected to upon the allegation that the claimant had no contract with his father. The objector proposed to prove this by the evidence of the claimant himself, whom he had duly cited to attend. The claimant having failed to attend the diet, the Sheriff continued the case to an adjourned diet, to which the claimant was again cited. The claimant again failed to attend, and the objector led no evidence against the claim. The Sheriff sustained the claim.

In a special case obtained by the objector, the Sheriff stated that he considered himself bound by the case of *Dalgleish* v. *Dodds*, 22 R. 198, to admit the claim, otherwise he would have held the claimant as confessed, and rejected it.

The Court *held* that the case of *Dalgleish* v. *Dodds* did not apply, and (*diss.* Lord Kincairney) that the Sheriff should have given effect to his view of the evidence and refused the claim.

Observations upon *Dalgleish* v. *Dodds*, Dec. 12, 1894, 22 R. 198, and *Weir* v. *Blackwood*, Oct. 19, 1869, 8 Macph. 3.

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney.

AT a Registration Court for the Eastern Division of the county of Renfrew held on 5th October 1895, William Fletcher, druggist, claimed to be enrolled on the register of voters as a lodger, in respect of a bedroom occupied by him in his father's house at 45 Albert Road, Crosshill. The declaration annexed to the claim was in the statutory terms, and was duly certified.

The claim having been objected to and admitted, the Sheriff (Cheyne), at the request of the objector, stated a special case for the opinion of the Appeal Court. The case stated as follows:—"Hugh Austin Stirling, writer, residing at 188 Albert Road, Pollokshields East, a voter on the Roll, objected to the claim on the grounds that the claimant was not the sole tenant of the bedroom mentioned in his claim, that he had no contract with his father, and that the bedroom was not of sufficient value. He stated that he proposed to substantiate the objection by the evidence of the claimant himself, whom he had duly cited to attend the Court.

"The claimant did not appear in obedience to the citation, and Mr Robert Bird, writer, Glasgow, who attended as his mandatory, stated that he was unaware of the reason of his non-appearance.

"Thereupon the objector moved that the claim should be rejected,

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in respect of the claimant's non-appearance after citation. On the other hand, Mr Bird moved that the claim should be admitted, in respect the objector had led no evidence to rebut the statutory presumption.

"I continued the case to an adjourned Court to be held on 10th October 1895, stating that I would consider what course I ought to adopt if the claimant was cited to such adjourned Court and again failed to attend.

"At the adjourned Court held on 10th October 1895 at Paisley, the objector produced letters of second diligence and execution of citation against the claimant to attend thereat, under certification of being held as confessed, but the claimant did not attend personally, and no satisfactory excuse for his absence was offered by his agent. The objector tendered no further evidence.

"I admitted the claim, stating that I did so reluctantly, and merely because, on full consideration, I thought the case of *Dalgleish* v. *Dodds*, Dec. 12, 1894, 22 R. 198, obliged me to take that course; and that, but for the decision in that case, I would, in accordance with previous practice, have held the claimant as confessed, and rejected his claim, because of the disrespect which he had shewn to the Court in disobeying the two citations given to him.

"The question of law for the decision of the Court of Appeal is:—Does the wilful failure of a lodger claimant to obey a citation given him to appear at the Court in order to be examined as a witness in support of an objection taken to his claim entitle the Sheriff presiding at the Court to hold him as confessed, and to reject his claim?"

"If this question is answered in the affirmative, the name of the said William Fletcher will fall to be expunged from the register of voters."

Argued for the appellant;—The case of *Dalgleish*[1] was inapplicable. In it the statutory declaration stood uncontradicted because the evidence relied on to rebut the statutory presumption was held to be incompetent. It had been held[2] that the failure of a claimant to appear and produce his title on a second citation justified the Sheriff in rejecting his claim, and in that case it was assumed that certification would have been competent. The obvious inference to be drawn from the claimant's failure to answer the citation was that his claim was unfounded, and the Sheriff ought to have taken this into account.

Argued for the respondent;—The letters of second diligence under certification were incompetent. The statute which regulated the citation of witnesses in the Registration Court, viz., the Burgh Voters (Scotland) Act, 1856 (19 and 20 Vict. cap. 58)—extended to counties by the Representation of the People Act, 1884 (48 Vict. cap. 3), section 8 (6)—empowered the Sheriff, by section 24, to grant warrant to cite witnesses, and by section 38 to impose a penalty for wilful failure to obey the citation. He had no power to substitute refusal of the franchise for the penalty provided by the Act. The question in *Weir* v. *Blackwood*[2] arose under the County Voters (Scotland) Act, 1861 (24 and 25 Vict. cap. 83), which contained no provision like section 14 of the Registration Amendment (Scotland) Act, 1885. Failure to answer a single citation was not sufficient,[3] and there was

[1] Dalgleish v. Dodds, Dec. 12, 1894, 22 R. 198.
[2] Weir v. Blackwood, Oct. 19, 1869, 8 Macph. 3.
[3] M'Gowan v. Mather, Nov. 15, 1879, 7 R. 46.

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no reason why failure to answer a second citation should be. It was clear from *Dalgleish's*[1] case that if the claimant did not appear, and the objector led no evidence, the statutory presumption stood undisplaced. Moreover, the question could not be answered in any way which could lead to an operative decree. This Court had no power to decide anything except the answer to the question stated in the case.[2]

LORD TRAYNER.—The question of law put to us in this case is not stated in such a form as to enable us to give any definite answer to it one way or the other. It is impossible to lay down any abstract rule to the effect that if a claimant wilfully abstains from appearing before the Sheriff when his claim is under consideration, the Sheriff must always in consideration of that fact alone reject the claim. On the other hand there may be circumstances in which the Sheriff would be justified in rejecting a claim in respect of the wilful absence of the claimant.

But there is matter enough in the statement of this case to enable us, I think, to decide the real question which has been raised. The facts are shortly these. The claimant, having lodged his claim, appeared upon the Court day, not personally, but by an agent who held his mandate. The objector to his claim stated that he proposed to substantiate his objection by the evidence of the claimant himself, whom he had duly cited to attend. The Sheriff evidently thought that the claimant was bound to appear personally in answer to the citation, and continued the case to an adjourned diet in order that he might do so, intimating that if the claimant did not appear at the adjourned diet he would consider what course he ought to adopt in respect of his failure. The claimant was thus warned that he was required to attend to give evidence on the subject of his claim. He was cited to the adjourned diet by a citation which bore that if he failed to attend he would be held as confessed. At the adjourned diet the claimant again failed to appear, but was represented by an agent, who did not give any satisfactory reason for the claimant's absence, but argued that he was not bound to attend.

The Sheriff says he was prepared in that state of the facts to reject the claim, but admitted it because he thought he was bound to do so by the decision of the Court in the case of *Dalgleish*.[1] I think the Sheriff was mistaken in his view of that case. What we decided there was that the evidence tendered by the objector was incompetent, and did not displace the *prima facie* presumption arising from the statutory declaration. In that case the objector no doubt had cited the claimant as a witness, but in his absence preferred to go on and finish his case without insisting on the attendance of the claimant. That was just the case of a man with an important witness not present going on, and taking the risk of proving his case. I do not doubt, however, that if an objector says he requires the personal presence of the claimant in order to establish an objection to the claim, the claimant is bound to appear, and if he fails to do so wilfully it is right that he should be held as confessed. Such a judgment would not, in my opinion, proceed to any extent upon the ground that the claimant had

[1] 22 R. 198.
[2] Maitland v. M'Credie, Dec. 19, 1868, 7 Macph. 288.

been guilty of contempt of Court in not obeying his citation, but upon the implied confession that he could not support his claim by his evidence—in short, that the statement on which the claim was based was not true.

I am therefore of opinion that the Sheriff's decision in the case should be reversed.

LORD KINCAIRNEY.—I concur in what Lord Trayner has said about the case of *Dalgleish*.[1] I think it does not apply, and need not have prevented the Sheriff from deciding this case according to his own judgment. But beyond that, I regret that I am unable to concur, and am of opinion that the judgment of the Sheriff should be allowed to stand. The case is of considerable importance, for our judgment will refuse the franchise to forty claimants, and we are told besides that our judgment is desired for guidance in the future. Being of such importance I regret that the question has not been presented in a more satisfactory form. It is not proposed to remit the case for amendment, and if we merely deal with the question which the Sheriff has put,—and I doubt whether we have a right to do more,—I do not see how the judgment can be touched, for it will stand whether we answer the question in the affirmative or in the negative. The Sheriff puts the question whether he was entitled,—that is to say, whether he had the power,—to refuse the claim. If we answer in the negative, that is in accordance with the judgment; but if we answer that he had the power to refuse the claim that would apparently be a totally ineffectual judgment, seeing that the Sheriff has not in fact exercised his power. That no doubt is a technical difficulty. But in a question affecting so many interests I doubt whether we should disregard it. Again, we are accustomed in this Court to consider facts found by the Sheriff, and not the effect of evidence. But here no facts are found except that the claimant has made the statutory declaration, and that he has failed to appear in obedience to citation.

But supposing these difficulties in point of form to be surmounted, then I am of opinion that the Sheriff's judgment is right on the merits. The claimant's application was supported by the usual declaration, and it is enacted by the 14th section of the Act of 1885, 48 Vict. c. 16, that "in the case of a person claiming to vote as a lodger the declaration annexed to his notice of claim shall for the purposes of revision be *prima facie* evidence of his qualification." The claimant had therefore some evidence—*prima facie* evidence only no doubt, open to be rebutted—but such as, unless rebutted by counter evidence, gave him an unquestionable right to be enrolled.

I am of opinion that that is the sole evidence in the case, which indeed is obvious, because the objector led no evidence at all. I think that the statutory evidence for the claimant should therefore receive effect.

But it is said that because the claimant was twice cited by the objector and failed to appear his claim should be refused. The Sheriff suggests that the claim should be rejected by way of punishment for his contempt of Court. I see no reason why he should be denied the franchise because he was disrespectful to the Court. But then it is said that it is to be inferred as matter of fact from his non-appearance that his claim was bad.

[1] 22 R. 198.

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The Sheriff has not drawn that inference in fact, and I do not think that it can be legitimately drawn. The claim is objected to on the ground that the claimant has no contract with his father such as his claim alleges, and also that the alleged lodging was not of the requisite value. I cannot see that it can be assumed that there was no contract, or that the premises were not of the requisite value, merely because the claimant failed to appear. The objections were not such as were incapable of being supported by other evidence. The absence of contract might have been proved by the claimant's father, and the value of the lodging by any skilled evidence, and the objector might have secured the evidence of the claimant himself had he used the means which the law puts in his power. He did not take the trouble to do that, and is it to be said that, while he makes no effort to use the rights which the law supplies, the statutory presumption is to be defeated by a counter presumption of which the statute makes no mention? I cannot assent to that.

But then the letters of second diligence contained a certification that if the claimant did not appear he would be held as confessed. I doubt the propriety of inserting that certification in the letters, but I think it makes no difference. It is merely a warning that if the claimant did not appear the Sheriff would do something which I think he had no right to do, and which in point of fact he did not do, but which Lord Trayner proposes that the Court should do now. The mere announcement of the intention of the Judge to pronounce a particular judgment will not validate it unless the judgment is right in itself.

As to the authorities quoted, I would only say that I think that the case of *Dalgleish*[1] does not apply, for the reasons explained by Lord Trayner, and I am clear that the other cases do not apply for the simple reason that they were all prior to the Act of 1885. With regard to the case of *Weir* v. *Blackwood*,[2] I would only say that I do not question that judgment. The case was as to the right of a person to remain on the roll as a proprietor. It was objected that he had no title, and as he produced none, it was quite legitimate to hold, in accordance with a familiar maxim, that as none appeared none existed, and that was a ground sufficient for judgment.

I am of opinion that the judgment of the Sheriff should be approved and the claim sustained.

Lord Kinnear.—I agree with Lord Trayner. I know of no general rule which requires that a claim to vote as a lodger must be rejected because the claimant has not obeyed a citation. But the facts to which Lord Trayner has called attention appear to me to justify the conclusion to which his Lordship has come, and to which the Sheriff desired to come, that in this case the claimant should be held as confessed.

I think it material to observe that the objection is based on an averment of fact, of which the testimony of the claimant would be the best evidence, namely, that there was no contract between him and his father. No doubt the father also might have been called to speak to that fact. But the objector was quite entitled to say that he would prove his case out of the claimant's own mouth, and that he desired no further evidence. The ques-

[1] 22 R. 198. [2] 8 Macph. 3.

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tion for the Sheriff seems to me to have been, what inference in fact should be drawn from the claimant's conduct in the circumstances set forth in the case. That is not a question for us, but it involves a question of law, namely, whether the claimant's failure to obey the citation was a fact to be taken into account. I think it ought to have been taken into account; and therefore I cannot assent to the view that there was no evidence before the Sheriff which was admissible to rebut the *prima facie* evidence of the declaration. There was no oral testimony, but there were very material facts properly before the Court tending to shew that the declaration could not be true; and, whether they are conclusive evidence or not, such facts are evidence. It is just as legitimate for the objector to found on the claimant's disobedience to the citation as it would have been to found upon his conduct if he had been put into the box and had refused to answer a single question.

Now, if in these circumstances the Sheriff had inferred, as matter of fact, that the claimant could not dispute the allegations of the objector, I should have thought that a perfectly reasonable decision, and at all events a decision which this Court ought not to disturb. But unfortunately the Sheriff gives a reason for holding the claimant confessed which cannot possibly be sustained. The claimant's disrespect towards the Court is no reason whatever for rejecting his claim. Contempt of Court may be punished, if it is grave enough to merit punishment, but it cannot possibly affect the judgment of the Court on the merits. And that creates the only difficulty I have felt in disposing of this appeal.

It is not the function of this Court to find facts on evidence, and the question is whether we have a sufficient finding in fact by the Sheriff. But I agree with Lord Trayner that there is enough in the case to shew that the Sheriff would have rejected the claim as not proved if he had not thought himself bound to decide otherwise by the decision in the case of *Dalgleish*.[1] He says he would have held the claimant confessed, and that means that he would have held his persistent refusal to come forward and give evidence as equivalent to an admission that he could not deny the facts that had been adduced against his claim. I think that would have been a perfectly right decision; and, if so, it seems to me that the only question we have to consider is whether the reason given by the Sheriff for deciding otherwise is valid or not. Now, I agree with your Lordships that the case of *Dalgleish*[1] has no bearing whatever on the question. It appears that in that case a claimant did not appear in answer to his citation as a witness. But the Sheriff was not moved to reject the claim on that ground alone, and did not do so. The objector proceeded to lead evidence against the claim, and the question stated for this Court was whether the evidence so adduced was competent, and the case decides nothing more than that it was not competent, and ought not to have been received. The point seems to be that it appears incidentally that the claimant's failure to obey a citation was not treated as conclusive against him. Now, that may have been perfectly right, for the conclusions to be drawn from the claimant's conduct must depend on the circumstances of the case. But whether it was right or wrong was not the question before this Court. The circumstances of the

[1] 22 R. 198.

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and according to the pursuer, what he is told by the bankrupt is, that the room contained effects belonging entirely to the pursuer. Was the judicial factor bound to accept that, and to desist from verifying the statement of the bankrupt? It appears to me that that is entirely out of the question. The bankrupt is not a person whose word is to be final as to what are the contents of particular rooms, and, accordingly, I think it clear that this judicial factor was entitled to prosecute his mission and examine the house for the purpose of preserving the estate. I think therefore that he was entitled, if the door was locked, to make his way in by forcing the lock.

If that be the case, the claim for damages falls to the ground, for the pursuer has no case such as this, that, assuming the judicial factor to be lawfully in the room, he proceeded to do something unlawful, namely, to damage and injure her property. Her case falls to the ground completely, if her proposition in law is bad, namely, that the judicial factor had not the right to force his way into the room. It seems to me also that that being the legal act complained of, it is not an act giving a claim of damages to the bankrupt's wife, for *non constat* upon this record that the wife suffers any damage at all. If the opening of the place was an invasion of the legal rights of anybody, it was the farmer whose door was forced open that has a right to complain. I think this action is clearly irrelevant, and that on the shewing of the pursuer no legal wrong has been done.

Lord Adam.—I am of the same opinion. This is the case of a judicial factor appointed on a bankrupt estate, and, as we all know, that is not a common appointment, and is only made in cases of emergency where it is necessary to preserve the bankrupt's estate until the appointment of a trustee. I am of opinion that it was the duty of the judicial factor so appointed to take possession of and inventory the whole of the bankrupt's estate, and that, when he was in this house, and legally in this house, it was his duty to see and inventory and take possession of the whole contents of the house. It was no reason for his not doing so that someone came forward and said, "These particular articles in the bankrupt's house do not belong to him." It might be so, but he had nothing to do with that. The articles were in the bankrupt's house, and presumably in his possession at the moment. I think the factor would not have been doing his duty if he had not taken possession of the whole articles which presumably were in the bankrupt's possession at the time. If in the performance of his duty he came to a locked door in the house, was he to take the bankrupt's word, or the bankrupt's wife's word, that that room contained property belonging exclusively to her? I think he would not have been doing his duty to the estate if he had remained satisfied with that declaration. It was his duty to see and to inventory what was in that room, and accordingly it was in the discharge of his duty that he had the door opened. What is fatal to the pursuer's case is that the room, if it was in possession of anyone, was in possession of the husband. If anyone was injured, it was not the bankrupt's wife but the bankrupt. I suppose the husband and the judicial factor in his place could have opened the room if they liked. Where then is the legal wrong to the wife? I cannot see it. It was not

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the wife's door that was broken open, it was a door in the possession of the husband, the bankrupt. I therefore agree with your Lordship that we must assoilzie the defenders from the conclusions of the action. I do not think that the cases cited to us by Mr Smith as to the duties of sheriff-officers and messengers-at-arms have anything to do with the case.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defender.

GEO. MESTON LEYS, Solicitor—ALEX. MORISON, S.S.C.—Agents.

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Nov. 20, 1895.*
Girvin, Roper, & Co. v. Monteith.

GIRVIN, ROPER, & COMPANY, Pursuers (Reclaimers).—*Jameson—Burnet.*
ANDREW TAIT MONTEITH, Defender (Respondent).—*R. V. Campbell—W. Thomson.*

Foreign—Principal and Agent—Mercantile Agency—Liability of undisclosed foreign principal on contract made by agent.—A foreign principal sent an order to an agent in Scotland in the following terms:—"Buy cargo Californian wheat well forward immediately remittance ready telegraph."

The agent, without further communication with the principal, went to London and purchased a cargo of wheat from a grain merchant there, under a contract which contained a stipulation that for the purposes of legal proceedings "this contract shall be deemed to have been made in England to be performed there . . . and the Courts of England shall have exclusive jurisdiction over the disputes which may arise under this contract. Such disputes shall be settled according to the law of England. . . ."

The merchant knew that the agent was acting for a foreign principal, but did not know the principal's name. The agent having failed to pay the price the wheat was resold by the merchant, who then brought an action in Scotland for the loss sustained on the resale against the principal, whose name he had ascertained, and against whom he had founded jurisdiction by arrestments. The defender pleaded that he was not liable to be sued on the contract, in respect that he had not given the agent authority to make him a party to the contract. *Held* (1) that the question whether the foreign principal was liable to be sued on the contract was a dispute arising under the contract, and fell to be determined according to the law of England; (2) that according to that law a foreign principal was not bound by the contract of his agent unless he had given the agent authority to make him a party to the contract; and (3) that the order contained nothing which amounted to such an authority—and defender *assoilzied.*

Opinions reserved as to whether on the question of the liability of a foreign principal the laws of England and Scotland are identical.

Bennett v. *Inveresk Paper Company*, 18 R. 975, *commented on.*

1ST DIVISION.
Ld Stormonth-Darling.

ON 2d June 1894 Girvin, Roper, & Company, grain-merchants, London, raised an action against Andrew Tait Monteith, who was resident in British Columbia, but against whom jurisdiction had been founded by arrestment.

The action was for payment of £2122, 11s. 2d. in name of damages for breach of a contract alleged to have been made by Younger & Monteith on the defender's behalf.

The material facts in the case as ascertained by proof were as follows:—

On 18th December 1893 the defender sent instructions by telegraph

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to Younger & Monteith, who were grain-merchants, George Street, Edinburgh, in the following terms:—"Buy cargo Californian wheat well forward immediately remittance ready telegraph." The defender did not give Younger & Monteith any instructions in connection with this order, except those contained in the telegram.

Mr Younger, the sole partner of Younger & Monteith, on 19th December 1893 went to the office in London of Messrs Dowker & Company, corn-brokers, and instructed them to buy the required cargo of wheat. Messrs Dowker then purchased from the pursuers a cargo at the price of £11,803.

The substance of the telegram was communicated to the pursuers, and they knew that Younger & Monteith were acting for a foreign principal, but the name of the principal was neither asked for nor given. The name of Younger & Monteith was inserted in the contract as apparent principals.

The contract was in the following terms, *inter alia*:—"London, Decr. 19th, 1893.—Bought of Messrs Girvin, Roper, & Co., London, for a/c of Messrs Younger & Monteith, Edinburgh, through Messrs A. Dowker & Co., London, on the printed conditions and rules endorsed on this contract. A cargo of.....Californian wheat . . . Buyer and seller agree that, for the purpose of proceedings either legal or by arbitration, this contract shall be deemed to have been made in England to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding, and the Courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England, whatever the domicile of the parties to this contract may be or become. . . ."

The cargo was deliverable at any safe port in the United Kingdom, with an option to the purchaser to send the ship to certain ports on the Continent. The price was to be paid by cash in London in exchange for shipping documents, or at seller's option by buyer's acceptance of shipper's or seller's "drafts domiciled in London," with documents attached.

The pursuers took a bill from Younger & Monteith for the price, and the shipping documents were made out in their favour. On the arrival of the cargo Younger & Monteith failed to take up the documents and to meet their acceptance.

The pursuers then resold the cargo at a loss of £2122, 11s. 2d.

On 31st March they wrote to Younger & Monteith that they had called upon the defender to pay the loss, but that he repudiated liability. "If he is successful in this repudiation we shall, of course, look to you."

The pursuers, on 5th April, rendered to Younger & Monteith a debit note for the loss, and intimated that, in the event of the same not being paid, they would "take all necessary steps for the recovery of the same."

They afterwards raised the present action against the defender.

The pursuers pleaded;—(2) The defender having broken the contract entered into by his agents on his behalf, is liable in the damages occasioned by the breach. (5) The question as to the liability of the defender to the pursuers not being a question arising

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on the interpretation of the said contract of sale, the provisions of the said contract regarding the law of England are inapplicable.

The defender pleaded;—(4) The defender having given no authority to Messrs Younger & Monteith to pledge his credit, and the contract having been entered into with them as principals, according to the custom in the foreign trade and the law of England, the defender is not liable to be sued thereon by the pursuers.

Evidence was led as to the English law on the subject of foreign principals, the import of which sufficiently appears from the opinions of the Lord Ordinary and Lord M'Laren.

On 3d April 1895 the Lord Ordinary (Stormonth-Darling) sustained the fourth plea in law for the defender, and assoilzied him.*

"OPINION.—(After narrating facts)—There is no dispute as to the breach of contract, nor as to the measure of damages; but the defence is that the defender gave no express authority to Younger & Monteith to pledge his credit to the pursuers; that, without such authority (he being a foreign principal) his credit was not, and could not be pledged; and therefore that by the law of England (which the defender says must rule) the pursuers have no recourse or action against him.

"The first question thus comes to be, whether the law of England is to rule. If in this, as in so many branches of the law merchant, the laws of England and Scotland were identical, the question would be one of merely academic interest. But I am by no means satisfied that they are. After a careful examination of the *dicta* in *Millar* v. *Mitchell*, 22 D. 833, and of the judgment of the First Division in *Bennett* v. *Inveresk Paper Company*, 18 R. 975, it rather seems to me that the law of Scotland admits to a very modified extent the presumption which exists in England, that the credit of a foreign principal is not pledged in a contract made by an agent at home. The latter case in particular (as I read it) practically comes to this, that the presumption (if it exists at all) is displaced by evidence of the mere fact of agency. It therefore becomes a question of practical importance to determine which law is to be applied.

"Now, the written contract of 19th December 1893 provides that for the purpose of proceedings, either legal or by arbitration, the contract shall be deemed to have been made in England and to be performed there, that the Courts of England shall have exclusive jurisdiction over all disputes which may arise under it, and that such disputes shall be settled according to the law of England, whatever the domicile of the parties to the contract may be or become. Is this, then, a dispute arising under the contract? If it is, the pursuers themselves have stipulated that it shall be settled according to the law of England. I cannot doubt that it is. The pursuers' right of action depends on the contract; they have no other. It is said that the question is not one as to the interpretation of the contract, but one depending on the collateral contract of agency between the defender and Younger & Monteith. No doubt the contract of agency must be examined, but only for the purpose of determining whether the defender is liable on the contract of sale, and the results derived from an examination of the one contract must be applied to the other before any conclusion can be reached. I am unable to hold that the question who is liable on a contract can ever be anything but a dispute arising under that contract. But the pursuer urges another argument against the applicability of English law. He says:—'Be it that this is a dispute arising under the contract, it is a question depending for its solution upon a presumption, and presumptions, being truly a part of the law of evidence, are to be determined by the *lex fori*.' Now, nobody doubts that when the Courts of one country are called upon to adjudicate upon a contract made in another, they must be guided by their own rules of procedure and of proof. The well-known

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The pursuers reclaimed, and argued;—The question which had arisen was not a dispute "under" the contract of sale.[1] It had no concern with the interpretation or effect of that contract, or the rights and incidents arising from it. The question was whether the defender was a party to the contract. That was anterior to and outside the contract itself, and not "under" it. It arose rather under the contract of agency between the defender and Younger & Monteith, and it fell, therefore, to be determined by the law of Scotland, the agents being domiciled in Scotland. If the law of Scotland were applicable, then as soon as agency was proved the principal was liable whether he were a home principal or a foreign principal. The Lord Ordinary was right in the view he took of the effect of the Scots decisions on that point.[2] Even if it were held that the action had to be determined by the law of England, the telegram from the defender to his agents satisfied the requirements of that law. It was intended that the telegram should be shewn to wheat sellers, and the words "remittance ready," meant that the full price was ready

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case of *Don* v. *Lippman*, in 1837 (2 Sh. & Macl. 682), settled that these rules include local laws relating to prescription. But that is on the ground that whatever relates to the remedy, as distinguished from the substance of the obligation itself, is to be governed by the *lex fori*; and Lord Brougham was at pains to shew (pp. 728-9) that the parties could not at the time of making the contract have had the remedy in view, because in that case they would have been contemplating, not the performance of the contract, but the breach of it. Even as regards prescription the rule would seem to be different where the set period, as in the case of the septennial limitation of cautionary obligations, is of the essence of the contract (*Alexander* v. *Badenach*, 1843, 6 D. 322). Now, it seems to me that the question whether a foreign principal, known to exist though undisclosed as to identity, has rendered himself liable under a contract, is a question which relates not to the remedy but to the nature of the obligation, and, moreover, is one which the parties must have had in view as among those which they agreed should be determined according to the *lex loci contractus*. In resorting to that law this Court is not called upon to violate any of its own curial rules, any more than the House of Lords did in *Hamlyn* v. *Talisker Distillery Co.* (L. R. 1894, App. Ca. 202), when effect was given to an English clause of reference to arbiters unnamed. All it has to do is to inquire, according to its own rules, and by evidence satisfactory to itself, whether a presumption existing in the law by which the parties contracted has or has not been overcome. I therefore hold that the law of England must be applied.

"I was favoured with some interesting evidence on that law, which, of course, I am bound to treat as a question of fact. The result seems to me to be this, that a presumption exists in that law against the credit of a foreign principal being pledged in any contract made by his agent in this country, and that the presumption can only be overcome by evidence of authority to do so. I refrain from saying express authority, though that phrase has the high authority of Lord Blackburn, because Mr Boyd, the pursuers' skilled witness, demurred to it; and certainly he adduced, in the course of his very able review of the cases, strong reasons for holding that the authority may be implied either from the terms of employment as agent, or from a course of dealing. But I think it is plain that the authority, if not express, must be implied from something much more direct than the

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[1] Maspons y Hermano v. Mildred, 1882, L. R., 9 Q. B. D. 530; Piercy v. Young, 1879, L. R., 14 Ch. Div. 200.

[2] Millar v. Mitchell, Feb. 17, 1860, 22 D. 833, 32 Scot. Jur. 346; Bennett v. Inveresk Paper Co., June 19, 1891, 18 R. 975.

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to be forwarded by the foreign principal, the true buyer. The principal hoped by using these words to induce a sale, and that was tantamount to an authority to the agent to pledge his—the principal's—credit.

Argued for the defender;—The contract on which the pursuers laid their action was the contract of sale. The defender disputed his liability on that contract, and that was clearly a dispute arising "under" it. The question, therefore, by the agreement of parties, fell to be determined by the law of England. By that law there was a presumption against the liability of a foreign undisclosed principal. To overcome that it was necessary to prove a distinct authority to the agent to pledge the principal's credit.[1] It was impossible to spell out of the telegram any such authority. The Scots law was really to the same effect, but assuming that the presumption was not so strong, there was no warrant for the inference drawn by the Lord Ordinary in the cases cited by his Lordship that proof of agency was sufficient to rebut the presumption.

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mere fact of agency. I am not concerned to inquire what the origin of the presumption was. Some lawyers have referred it to the improbability of the English merchant giving credit to the foreigner. Others have viewed it rather from the foreigner's standpoint. Perhaps it partakes of both elements; but whatever may have been the original motive, the rule has come to tell quite as much in favour of the foreigner as of the merchant at home.

"Has the presumption, then, been overcome in this case? On that point I am simply exercising the functions of a jury, subject to what I think would be the direction of an English Judge, viz., that it cannot be overcome merely by the fact of agency. There was here no general appointment and no course of dealing. There was simply the telegram instructing the particular purchase. In the case of *Hutton* v. *Bulloch*, L. R., 9 Q. B. 576, Lord Esher (then Mr Justice Brett) says,—'It is now settled that it is not in ordinary course for the foreign merchant to authorise the English merchant to bind him to the English contract.' Can I imply from the words in the telegram, 'remittance ready,' that the defender, contrary to 'ordinary course,' authorised Younger & Monteith to pledge his credit to the pursuers? I think not. I regard these words as merely an assurance to the agent that the price (or the difference in case of loss on a resale) would be forthcoming. Such an assurance might make the agent more ready to undertake the liabilities of a principal (as in point of fact he did), but it did not, I think, express or imply any willingness on the part of the foreign principal to establish privity of contract with the English seller.

"That, I think, is sufficient for the decision of the case in favour of the defender. If Younger & Monteith had had authority to pledge the defender's credit, I do not think it would have been necessary to shew that they did in fact pledge it by express words. Neither do I think that the pursuers would have lost their right to sue the defender by sending the debit note of 5th April to Younger & Monteith after they knew the defender's identity. No doubt there is a duty of election in such circumstances, but according to the evidence of the defender's skilled witnesses it is not made irrevocably by such a proceeding.

"One point only remains to be dealt with. It was argued for the pursuers that the English presumption against the liability of a foreign principal applies only where the agent is subject to the jurisdiction of the English Courts. There is no decision to that effect, and I doubt whether an agent in Scotland can be regarded as a foreigner in the same sense as a

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[1] Hutton v. Bulloch, 1874, 9 Q. B. 572, Brett, J., at p. 576; Elbinger Actien Gesellschaft v. Claye, 1873, 8 Q. B. 313.

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LORD M'LAREN.—This case raises an interesting question in relation to the liability of an undisclosed foreign principal upon contracts entered into on his behalf by an agent in this country. (His Lordship then narrated the facts.)

Now, even if there were more doubt as to the proper *locus* of this contract than I can entertain, I should hold that the parties had settled the question for themselves by agreeing that the contract should be treated for all purposes as a contract made in England and to be performed there. This is in legal effect as if the parties had set forth a summary of the known rules of the law of principal and agent as administered by the Courts of England, with this addition,—"We agree that these rules shall be incorporated with our contract, and shall regulate the rights and liabilities arising under it." I do not know that the law has set any limit to the right of parties to interpret their contracts by setting up systems of rules which are made part of the particular contract, and it is no objection to such a system or scheme of interpretation that the law of England is made the canon of interpretation rather than a private code; because wherever the contract has to be enforced, the law of England applicable to the question in dispute can always be ascertained. If this were taken to be to certain effects a contract to be performed in Scotland, I should still be of opinion that the rights arising out of it are governed by the law of England, because the parties have so agreed. But independently of agreement I have no doubt that it is an English contract. London is known to be a principal centre of the corn trade, and when the defender telegraphed to his agent and

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principal in Vancouver. The language of English Judges when dealing with this subject has often been wide enough to cover the case of an agent residing in the United Kingdom. Neither do I see why a foreign principal should be thought more likely to give authority for the pledging of his credit because his agent resides in a different part of the United Kingdom from that in which the third party resides. But in this case, I think, the agent made himself subject to the jurisdiction of the English Courts by the terms of the contract. When I put some questions to Mr Boyd about the practice of the English Courts with regard to service out of the jurisdiction, I had not observed the clause in the contract providing that any party to the contract residing either in Scotland or Ireland was, for the purpose of legal proceedings, to be held as residing at the offices of the London or Liverpool Corn Trade Association, and that service of proceedings there was to be deemed good service. I cannot doubt that this imported a consent by Younger & Monteith to waive any objection to the jurisdiction of the English Courts, and, of course, any judgment obtained against them in England could have been carried into effect under the Judgments Extension Act.

"I would only add that the question here is much more than a technicality. The defender is undoubtedly liable to Younger & Monteith, but he has claims against them which, so far as I see, he could not plead against the pursuers, because the law of England seems to be that a plaintiff suing an undisclosed principal is not liable to have the state of accounts between the principal and the agent pleaded against him unless he has, by his conduct, induced the principal to alter his position prejudicially by payments made subsequent to the contract. Here the payments were all antecedent to the contract, and were in no way affected by any action on the part of the pursuers."

former partner instructing him to buy a cargo of wheat he did not mean that the purchase was to be made in Edinburgh, but rather wherever an advantageous bargain could be made, and subject to all the usual conditions. Mr Younger, as I conceive, was entitled to make the purchase in the London market, and for a price payable there. In this view also the law of England is applicable to the rights arising under the contract.

I now come to the particular question as to which the parties are in dispute. It is this—The sellers, Messrs Girvin, Roper, & Company, having discovered that Younger had a principal behind him, are suing Monteith, and they claim to be entitled to do so under the rule which in general gives to the party enforcing a contract made with an undisclosed principal an election to sue either the principal or the agent who represented him in making the contract. In defence it is pleaded that a foreign principal is not liable to be sued on the contract, unless he has given authority to his agent to make him a party to the contract. I am not now quoting from the defender's pleas; I am not sure that I should agree with any of the defender's propositions in the precise terms in which they are stated. But I am putting in my own words the substance of what was maintained in the argument addressed to us.

If this proposition be true, then the action must fail; because at the time the contract of sale was made between the pursuers and Mr Younger, Mr Younger's only authority to act for the defender was the telegram I have quoted. Now, as I read this order, it neither empowers the addressee to make his principal a party to the contract of purchase and sale, nor inhibits him from so doing, but simply instructs the agent to make a contract in the usual form. The question then is, what is the true doctrine of the law of England regarding the liability of a foreign principal. The authorities have been very distinctly brought before us in the statements of the English counsel who gave evidence on this subject. I am glad to be able to say that there is less difference of view in the opinions of these learned gentlemen than we often find in cases of expert evidence, and this is only what I should expect from members of the bar when giving their opinions on a case. But, of course, it is necessary that we should consider the authorities; and without entering on a discussion, which I conceive to be unnecessary for the purposes of the present case, I accept the statement of Lord Esher, quoted by the Lord Ordinary, as entirely satisfactory and sufficient, with reference to the question I am considering. "It is now settled that it is not in ordinary course for the foreign merchant to authorise the English merchant to bind him to the English contract"—*Hutton* v. *Bulloch*.[1] From this it follows that an order to purchase a cargo, expressed in the general terms which I have read, would not amount to an authority to make the foreign principal a party to the English contract, and therefore there is no relation of contract between the pursuers and the defender. This is my opinion on the merits of the case.

While my opinion on all essential points is in entire agreement with the judgment of the Lord Ordinary under review, I should desire to reserve my opinion on the question first considered by his Lordship, viz., whether on

[1] L. R., 9 Q. B. 576.

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the question of the liability of the foreign principal the laws of England and Scotland are identical. The Lord Ordinary observes, under reference to the cases of *Millar* v. *Mitchell*,[1] and *Bennett* v. *Inveresk Paper Company*,[2] that the law of Scotland "admits to a very modified extent the presumption which exists in England that the credit of a foreign principal is not pledged in a contract made by an agent at home." Now, there can be no doubt that the known principles of the law of Scotland in relation to mercantile agency are largely founded on the decisions of the English Courts of law; and it was certainly not my intention, nor, so far as I know, the intention of any of my colleagues who took part in the decision of the case of *Bennett*,[2] to introduce a new distinction between the laws of England and Scotland in relation to principal and agent. In the judgment the question of the principal's title to sue is treated as a question of general mercantile law or usage. It was not a case of singular employment like the present; there was a standing agreement in writing between the principal in Australia and his agent in London, under which the powers of the agent were carefully limited, and his accountability to his principal defined; and we were of opinion that in such a case the principal was in the position of a party to the contracts made for him by his agent, although his name was not immediately disclosed. It may be inferred from my opinion in *Bennett's*[2] case that I am not prepared to subscribe to an expression attributed to Lord Blackburn to the effect that there is a presumption of law against the foreign principal being bound. But, on a reconsideration of the English authorities, I see no reason to believe that the case of *Bennett*[2] would have been decided differently in England supposing the law of England were applicable, except that the question as to the extent of the agent's authority would most probably have been determined by a Judge and jury instead of by the Court. If there be any divergence of view in this class of cases I think that at most it is no more than such as occasionally occurs where co-ordinate Courts of the same country have to apply known principles of law to different states of fact.

The Lord Ordinary has assoilzied the defender from the conclusions of the action, and if your Lordships agree with me the reclaiming note will be refused.

The Lord President, Lord Adam, and Lord Kinnear concurred.

The Court adhered.

Boyd, Jameson, & Kelly, W.S.—W. & J. Burness, W.S.—Agents.

No. 34. Nov. 20, 1895. Waverley Hydropathic Co., Limited, v. Barrowman.

The Waverley Hydropathic Company, Limited, First Parties.—*Cullen.*
David Barrowman and Daniel Lamond, Second Parties.—*M'Clure.*
John Ferguson, Third Party.—*Cook.*

Company—Preference Shares—Ultra vires—Allottees of illegal preference shares, not ordinary shareholders, but creditors of company.—A limited company which, by the terms of its memorandum and original articles of association, was precluded from creating preference shares, by special resolution resolved that the remaining unissued shares of the nominal capital

[1] 22 D. 833. [2] 18 R. 975.

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should be preference shares subject to these conditions: that they should bear a fixed rate of dividend; that any failure of the annual profits to meet the dividend should be made good from the profits of subsequent years; that after ten years the company had right to redeem these shares at par; that preference shareholders were not entitled to vote or take part in any meeting, or in the management of the company, or to share in the rights of ordinary shareholders. Preference shares were applied for and allotted.

In a special case presented by an allottee of preference shares and the company, the company contended that, although the preference given to these shares was invalid, the allottee was to be regarded as a holder of ordinary shares.

Held that, as the allottee of preference shares had not applied for or agreed to take ordinary shares, he was not to be regarded as an ordinary shareholder, but as a creditor of the company, and that he was entitled to repayment of the price of the shares, with interest at 4 per cent, less any dividend which he had received.

2D DIVISION.

THE WAVERLEY HYDROPATHIC COMPANY, LIMITED, were incorporated, under the Companies Acts, 1862 and 1867, upon 28th May 1869, for the purpose of erecting a hydropathic establishment at Melrose. The memorandum of association provided,—"(Fourth) the liability of the members is limited; (fifth) the capital of the company is twelve thousand pounds sterling, divided into four hundred and eighty shares of twenty-five pounds each." The articles provided for the increase of the company's capital, but did not confer upon the company power to issue preference shares. By various resolutions duly confirmed, the nominal capital of the company in 1872 stood at £36,000, divided into 1440 shares of £25 each. Of these shares 880 were issued and fully paid up, making a paid-up capital of £22,000.

At a general meeting on 9th April 1874, by special resolution, certain amendments upon the articles of association were confirmed. They contained provisions regarding new capital, and provided, *inter alia*,—"(6) New capital shall be subject to all the provisions herein contained, and when paid up shall participate in all the privileges pertaining to the pre-existing capital, or the new capital may be raised by preference stock, bearing a fixed rate of dividend, as the company may then determine." The part of this article authorising the issue of preference stock was inconsistent with the memorandum and the original articles of association.

The following special resolution was passed at a general meeting of the company held on 15th April 1876, and confirmed at a subsequent general meeting held on 1st May 1876:—"That the remaining unissued 560 shares of the nominal capital of the company shall be preference shares; and that the directors may, from time to time, with the consent of a general meeting, issue such portions thereof as such meeting may authorise, subject always to the following conditions, viz.,—(1) That such preference shares shall be payable in full within one month after allotment. (2) That such preference shares shall bear a yearly rate of dividend, to be fixed by the general meeting at which such preference shares shall be authorised to be issued; and that such dividends shall be payable yearly out of the first annual profits of the company, to be expressly set apart for that purpose, before paying a dividend to the ordinary shareholders. (3) That in case the profits of any year shall not be sufficient for the payment of said preferential dividend, such profits shall be divided, so far as they will extend, among the holders of such preference shares, *pari passu*, and the deficiency shall be made good out of the profits

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of succeeding years. (4) That, for behoof of the company, the directors shall have a prior right to purchase at par, from the registered owner thereof, any of such preference shares, for which instrument of transfer may be presented for registration; or, at any time after ten years from the date of issue, the company shall have power to purchase or redeem at par any of such preference shares from the holder thereof, who shall be bound to transfer said preference shares to the company on being required to do so. (5) That, in the event of a winding-up of the company before said preference shares shall be redeemed by the company, the holders thereof shall rank *pari passu* and be entitled to be repaid at par said preference shares, out of the free assets of the company, with all deficiencies of dividends, should the profits in any year not be sufficient to pay the fixed rate of dividend at which such shares shall have been issued, and that in preference and priority to the holders of the ordinary shares of the company. But interest shall in no event be chargeable upon such deficiencies of dividend. (6) That such preference shares shall not entitle the holder thereof to any vote, or to be present at any meeting of the company, or to take any part in the management of the affairs of the company, or to participate in any of the rights or privileges pertaining to the ordinary shareholders under the articles of association."

In terms of this resolution 419 of the remaining unissued 560 shares were from time to time issued by the directors with the consent of general meetings of the company as preference shares, producing a capital of £10,475. The form of application for these shares was in the following terms:—"I hereby make application for an allotment to me of preference shares of £25 each of the Waverley Hydropathic Company, Limited, at the fixed rate of dividend of 5 per cent per annum under the conditions mentioned," &c. The form of allotment was, "I beg to inform you that the directors have allotted to you preference shares of £25 each," &c. There were at the date of the special case after mentioned twenty-one persons holding in all 195 preference shares who did not hold any ordinary shares of the company. Since 31st July 1878 no dividend was paid upon the ordinary shares of the company. Dividends were from time to time paid upon the preference shares down to 1888.

In view of the fact that the original articles of association did not provide for the issue of preference shares, a question was raised in connection with a proposed scheme of reconstruction of the capital account of the company whether the issue of said shares was *ultra vires* of the company.

This special case was accordingly presented by (1) the Waverley Hydropathic Company, Limited; (2) David Barrowman, an original allottee of eight preference shares, and Daniel Lamond, a *bona fide* onerous transferee of twelve preference shares; and (3) John Ferguson, an ordinary shareholder of the company.

The second parties maintained that the shares were valid, as preferential shares, and that the holders had a preferential right to the profits and assets of the company. They maintained further that if it were found that the shares were invalid as preferential shares, then they were not ordinary shareholders but creditors of the said company to the amount paid by them for preference shares, with interest at the rate of 5 per cent from the date of such payment, less the amount of sums received by them in name of dividends upon supposed preference shares, or with such interest, if any, in addition to

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the said sums paid as dividends as might be reasonable; or otherwise, and in case it were found that the second parties were at present ordinary shareholders of the company, the second parties maintained that they were entitled to rescind the agreement in virtue of which they became such shareholders, and to claim repayment of the amount paid for the shares, with interest. The third party, on the other hand, maintained that it was *ultra vires* of the company to confer upon the holders of the said shares any preferential right, that these shares were not preference but ordinary shares, and that in any event the holders thereof by applying for and obtaining them became members of the company, with the rights and liabilities of ordinary shareholders, and were not now entitled, in respect of their delay and acquiescence, to rescind their agreement to become shareholders. The first party maintained that the second parties were not creditors of the company, but shareholders, preferential or ordinary, as the Court might determine. They also maintained that the second parties were not now entitled to rescind their agreement to become shareholders. Such rescission, if demanded and given effect to in the case of all the preference shareholders, would involve the company in insolvency.

The following were the questions of law:—"(1) Are the said preference shares valid to the effect of entitling the second parties, as the holders thereof, to a preference over the profits and assets of the company? (2) If the first question is answered in the negative, are the second parties ordinary shareholders of the company in respect of the said shares? or (3) Are they creditors of the company to the amount paid for said shares, with interest thereon at the rate of 5 per cent per annum from the date of such payment, less the amount of sums received by them in name of dividends or composition for dividends upon said shares?"

Argued for the first parties;—The second parties were not creditors of the company. They were shareholders, either preferential or ordinary as might be determined. They were not entitled to rescind their agreement to become shareholders. Such a course would be disastrous to the company, and render it insolvent. Apart from this liability, the company was solvent.

Argued for the second parties;—They were not ordinary shareholders, but creditors of the company to the amount paid by them for preference shares, with interest at five per cent from the date of payment, less the amount received as dividends. The resolution to issue preference stock was *ultra vires* of the company, and everything following on that illegal action was null. The result of the illegality was not to alter the character of the stock from preference to ordinary stock, but to render the issue nugatory.[1] Besides, the terms of the issue were such as to negative ordinary shareholdership. But if the shares were not valid, the money paid for them must be returned.[2] If the second parties were held to be ordinary shareholders they were entitled now to rescind the contract and claim repayment on the ground of misrepresentation and essential error.

Argued for the third party;—The shares issued were the remaining unissued shares of the ordinary capital, with what purported to be

[1] Ashbury Railway Carriage and Iron Company v. Riche, June 1875, 7 Eng. and Ir. Ap. 653; Buckley on the Companies Acts, p. 181.

[2] *In re* Guardian Permanent Benefit Building Society, Dec. 1882, L. R., 23 Ch. Div. 440, *per* Jessel, M. R., p. 460.

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preferential conditions added. The allottees by accepting these became members of the company.[1] They acted as members so far as was competent to them, and drew dividends. It was no doubt now admitted that no valid preference was given to the allottees. But there was no mistake as to the facts, only a mistake as to the law. In such circumstances the parties were held to have agreed so far as they had legally contracted, the illegal conditions being refused effect.[2] The second parties were therefore shareholders and not creditors. It was too late now to rescind. Matters were no longer entire. The business had been conducted for nineteen years on the footing that the second parties were members of the company. Rescission now would result in insolvency.[3] Third parties had bought shares on the faith of the second parties being shareholders.

It was ultimately admitted that the issue of preference shares was *ultra vires*.

At advising,—

LORD JUSTICE-CLERK.—The second parties in this case bought some years ago from the Hydropathic Company certain shares on the footing that they were preference shares, and subject to various conditions. These conditions are peculiar. The fourth of these conditions is that the company has a right, in the event of a transfer, to purchase the shares at par, and at any time after ten years they have right to redeem any of such shares at par. That is a privilege given to the company which is quite inconsistent with the idea that these shares are ordinary shares. Then again under the sixth condition the holders of these shares are not to be entitled to vote or be present at the meetings of the company, or to take part in the management of the company's affairs, or to participate in any of the rights or privileges of the ordinary shareholders. Now this is a restriction of the rights of the purchasers of the preference shares which puts them outside of the ordinary category of shareholders altogether. There is a further provision applicable to these preference shares, and to no others, viz., that they are to receive a certain fixed rate of dividend, and if the profits are not sufficient in any year to pay the dividend, the deficiency is to be made good out of the profits of subsequent years. This again places these shares in a position as unlike that of ordinary shares as possible.

It has now turned out that the issue of preference shares was unauthorised by the articles of the company, and it is not now contended that these shares are preference shares.

In these circumstances the only question which arises is whether the contention of the ordinary shareholders is sound, viz., that as the persons who took these so-called preference shares cannot take them on the conditions in the special resolution, they must now be held to be ordinary shareholders liable to the obligations and entitled to the privileges of ordinary share-

[1] Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 23.

[2] Ooregum Gold Mining Company of India v. Roper, March 14, 1892, L. R., App. Cas. 125; *In re* Railway Time Tables Publishing Company, *ex parte* Sandys, 1889, L. R., 42 Ch. Div. 98; Liquidator of Milford Haven Fishing Co., Limited, v. Jones, March 20, 1895, 22 R. 577; United Ports Insurance Co. (Perret's case), Jan. 30, 1873, L. R., 15 Eq. 250.

[3] Lawrence's case, 1867, L. R., 2 Ch. Ap. 412; Kincaid's case, 1867, L. R., 2 Ch. Ap. 426.

holders. I cannot see how this contention can be held to be sound. I do not see any ground for holding that persons who definitely bargained to become preference shareholders can now be held to be ordinary shareholders, when it is found out that the company exceeded its powers in creating preference shares. I therefore am of opinion that the second question must be answered in the negative.

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The only question remaining is that involved in the third question of law, what is the position of the persons who took the shares believing them to be preference shares? It appears to me that the third question must be answered in the affirmative. These persons handed over their money to the company on conditions which the company could not make, and received certain privileges which the company could not give. The only course left is that the company must restore all the money they received from the persons with interest, *minus* the amount of the dividends paid on the so-called preference shares.

LORD YOUNG.—The shares to which this case refers were applied for and allotted under a resolution of the company, passed on 15th April 1876. The question lying at the root of all the others is, whether this resolution was legal—whether it was within the power of the company. The parties are agreed that it was not, that it was invalid, and that the allotment of shares under the resolution was not good.

But the substantial question between the parties is not whether the allotment was good, but what was the position of parties after the allocation was made. If the first question is answered in the negative, are the holders of the shares ordinary shareholders, or in other words, is the allotment in terms of the resolution to be so altered as to make it an allotment of ordinary shares, contrary to the terms of the resolution? I have no hesitation in answering that question in the negative. It was *ultra vires* of the company to issue these shares, and that being so the issue must be held to be of no effect at all. It is impossible to change the contract between the parties into an issue of shares of a totally different character from that specified in the contract.

The next question is, what is the position of a person who took these shares, believing them to be preference shares, which the company was authorised to issue? I am of opinion that he is entitled to the remedy of restoration, the ordinary remedy under similar circumstances. There may be cases where an illegal term in a contract may be struck out, leaving the contract to stand without it. But this is not a case of that class. The company desire to change the bargain into something totally different from what it originally was. In such circumstances the proper remedy is restoration, the allottee getting back his money with ordinary interest, I do not say at such a high rate as five per cent, but that can be arranged.

LORD TRAYNER.—I am of the same opinion. With the consent of all parties, the first question is to be answered in the negative. It appears to me that this answer, taken in conjunction with the facts before us, leads to a similar answer being given to the second question. If the second parties are not preference shareholders they are not shareholders at all. They applied for and received shares which the directors had no power to

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give, and when that has been shewn, it follows that there is no contract between the parties. These shareholders never asked for ordinary shares and never got them, for the possession of ordinary shares would have entitled them to receive more than 5 per cent, if the company had earned sufficient to distribute a larger dividend, and would have empowered them to attend the meetings of the company, and to take part in the management of the company's affairs, privileges from which they were excluded. Looking at the clauses of the resolution, the two classes of shares are as separate and distinct as two things could possibly be. The preference shares being once held invalid, there is no reason for holding that their owners are ordinary shareholders in the company.

What, then, is the position of the original allottees of these shares? I think their position is that of creditors of the company, and that they are entitled to receive back the money which they paid to the company with interest, less any dividend which they have received. As to the rate of interest, if it cannot be made a matter of agreement between the parties, I should think that 5 per cent was too much, and should be inclined to award something less. As to the position of transferees, I express no opinion, as we have not before us the information necessary for forming one.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Answer the first and second questions therein stated in the negative, and in answer to the third question therein stated, find that the first of the second parties is a creditor to the amount paid for said shares, with interest thereon at the rate of 4 per centum per annum from the date of such payment, less the amount of sums received by him in name of dividends or composition for dividends upon said shares; and further, find that the facts stated in the case are not sufficient to enable the Court to answer the question so far as affecting the second of the second parties."

ANDREW TOSH, S.S.C.—RUSSELL & DUNLOP, W.S.—JAMES SKINNER, S.S.C.—Agents.

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Wallace's Executors v. Wallace.

FORBES WALLACE AND ANOTHER (Wallace's Executors), First Parties. —*Johnston—Neish.*
ANNIE AMELIA WALLACE, Second Party.—*Johnston—Neish.*
JAMES NEWTON WALLACE, Third Party.—*Macfarlane.*

Succession—Testament—Words importing gift of heritage—Heritage carried by residuary clause.—A testator left the estate of N to his nephew, and after various legacies he provided as follows:—"I leave as my residuary legatee my niece Annie Amelia Wallace, who will pay my funeral expenses and any debts I may justly owe."

The nephew died six months before the testator, who was aware of his death, but made no alteration on his will.

Held that the estate of N was carried by the residuary clause.

2D DIVISION.

GEORGE JOHNSTON WALLACE, of Newton Hall, Fifeshire, died at Newton Hall on 24th June 1895, leaving a holograph last will and testament dated 18th March 1884, which, after bequeathing certain specific legacies, proceeded as follows:—"I give, devise, and bequeath to my nephew Adolphus Wallace, tea-planter, India, the estate of

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Newton Hall, . . . and with the said estate, the mansion-house, also the furniture and household furnishings, silver, silver-plate, &c., subject, however, to the following conditions, viz.:—That the mansion-house with its furniture, &c., and furnishings shall remain and be held by Annie Amelia Wallace for her use and benefit, and for the use and benefit of her sister Margaret Wallace, and for the use and benefit of her sister Priscilla Isabella Wallace, so long as they remain unmarried. —Annie Amelia Wallace to have the control and management of household matters so long as she remains unmarried. . . . I give, devise, and bequeath to my niece Annie Amelia Wallace (as a token for her devoted attention to my every want since I returned from India) my estate known as Kuttehla Grant, in Goruckpore, N. W. P., India."

Then, after a number of other specific bequests, the will concluded: —"I leave as my residuary legatee my niece Annie Amelia Wallace, who will pay my funeral expenses and any debts I may justly owe." Adolphus Wallace, Annie Amelia Wallace, and another were appointed executors.

Adolphus Wallace, who was the eldest surviving son of the testator's brother John Wallace, now deceased, had he survived the testator, would have been his heir-at-law, but he died unmarried on 1st November 1894. In consequence of his predeceasing the testator the bequest of the estate of Newton Hall and other subjects in his favour lapsed. The testator was aware that his nephew Adolphus Wallace was dead.

Annie Amelia Wallace claimed that, subject to the liferent use created in favour of herself and her sisters, the residuary bequest in her favour carried the property of Newton Hall and personal effects enumerated in connection with it.

James Newton Wallace, the heir-at-law of the testator, maintained that the special bequest of Newton Hall and other subjects having lapsed, the estate was not carried by the residuary bequest, but became intestate succession, and that the heritable subjects, subject to the liferents, fell to him as heir-at-law of the testator.

A special case, which set forth the facts above narrated, was presented by (1) the executors, (2) Annie Amelia Wallace, and (3) James Newton Wallace, for the opinion of the Court on the following question of law:—"1. (*a*) Is the heritable estate of Newton Hall, comprised in the lapsed bequest to Adolphus Wallace, carried, subject to the liferents, by the bequest of residue in favour of the second party? or (*b*) Is the third party, subject to the liferents, entitled as heir-at-law to the heritable estate comprised in said bequest to Adolphus Wallace?"

Argued for the third party;—The bequest to Adolphus Wallace had lapsed; the terms of the residue clause were not sufficient to carry heritage, and accordingly the estate of Newton Hall became intestate succession. Before the date of the Titles to Land Consolidation (Scotland) Act, 1868, no doubt intestacy would have been assumed. Section 20 of that Act, which dispensed with the word "dispone" in *mortis causa* deeds, left the present question open to argument. The terms of the provision in favour of the second party excluded the idea of heritable estate. "Residuary legatee" referred *prima facie* to moveable estate.[1] She was left legatee in that class of property which was usually carried by such a bequest. At the time of making it the

[1] Urquhart v. Dewar, June 13, 1879, 6 R. 1026; Erskine Inst. iii. 9.

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testator had disposed of all except moveables. Only executors were appointed, and not trustees. The funeral charges, for which the second party was made liable, were usually laid on the moveable estate. They were included in what was the ordinary counterpart of a right to moveable estate. The terms of the bequest did not express or imply the intention of the testator to dispose of the heritage.[1] To hold that a residuary clause imported a disposition of land would be going further than the Court had gone before.

Argued for the second party;—The language of the residuary clause was sufficient to carry Newton Hall. The provisions of section 20 of the Lands Clauses Consolidation Act, 1868, ruled here. It was clear from various considerations that the residuary clause was used with reference to heritage. The will dealt with the whole estate both heritable and moveable. The second party was favoured by the testator, while the third party was not benefited. The testator knew of the death of Adolphus Wallace, and had time to alter his will if he had thought it necessary. He had not done so. Lastly, there was always a presumption against intestacy. In all the cases cited the wills considered had dealt with moveable estate and had not referred to heritage. Similar words in less strong circumstances had been held to carry heritage.[2]

LORD JUSTICE-CLERK.—The late George Johnston Wallace, eleven years before his death, executed a last will and testament by which he disposed of all his heritable estate, and after giving certain legacies, appointed a niece, the second party, to be his residuary legatee. The questions in this special case relate to a property called Newton Hall, in the mansion-house of which he had resided before his death. This property he bequeathed with all the stock upon it, and the furniture in the mansion-house, to a nephew, subject to the use of the house and its contents by the second party and her sisters as long as each of them remained unmarried.

The nephew died six months before the testator, and the testator made no alteration upon his will. The questions are whether the property, the gift of which to the nephew lapsed by his death, goes to the second party as residuary legatee, or falls into intestacy and goes, as regards heritable property, to the heir-at-law of the deceased, and as regards the moveables, to the next of kin?

It is plain that the testator intended by his will to dispose of his whole estate, including in it all his heritable estate. It bears upon the face of it that he had a special regard for the second party, the deed narrating expressly the great kindness and attention he had received from her, and his desire to benefit her accordingly. There is nothing to indicate that in appointing her his residuary legatee he desired to keep back from her anything which he had not specially appropriated to some other relation. The nephew having died several months before the testator's death, there is no good reason for supposing that the testator did not desire that the property which by that event fell into the residue of his estate, because no longer destined to any particular person, should not be disposed of as the rest of the estate

[1] Campbell v. Campbell, Nov. 30, 1887, 15 R. 103; Grant v. Morren, Feb. 22, 1893, 20 R. 404.

[2] Forsyth v. Turnbull, Dec. 16, 1887, 15 R. 172; M'Leod's Trustees v. M'Leod, Feb. 28, 1875, 2 R. 481.

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was intended to be by his appointment of the second party to be his residuary legatee. And as that appointment was made in such general terms, and the testator made no alteration on it, and as it admits of being construed to refer to heritable as well as moveable estate under the existing law, there seems to be no good ground for holding that he died intestate as regards this property. On the contrary, I think that it must be held that under her appointment as residuary legatee the second party takes this property, which at the time of the testator's death stood in the position of not being specially disposed of by the will.

If this view be sound, then it must also follow that the moveables connected with the property of Newton Hall are in the same position. I think that the first alternative of the first question should be answered in the affirmative.

LORD TRAYNER.—I think the language of the residuary clause in the will before us is habile to convey heritage to the residuary legatee named, and that it does convey heritage to her, if the whole tenor and contents of the will are sufficient to instruct that the testator intended thereby to deal with heritage as well as moveables. I think he did so intend. The will was a universal settlement; it disposed of the testator's whole estate. He had destined the property of Newton Hall to his nephew, who was his heir-at-law, but that nephew predeceased the testator, as the testator knew. In these circumstances had the testator intended to convey Newton Hall to the third party, he would probably have done so by a codicil. He must have known that the third party could not take the property under the will as it stood, in which the third party is not even named. But the probability is that nothing was added to the will, and no new provision made concerning the property in question, because the testator regarded the lapsed legacy as falling back into residue which had already been conferred on the second party. The special favour with which the testator regarded his niece (the second party) strengthens this view. The testator, having made no new provision with regard to the property of Newton Hall, must have intended it to go either to his residuary legatee or to be treated as intestate succession. The latter view is opposed to all the probabilities of the case, and is indeed negatived, I think, by the fact that the testator had originally disposed of his whole estate by the will before us, and intended his property to descend according to his directions, and not according to the disposition of the law.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the first branch of the first question in the affirmative and the second branch in the negative.

HENDERSON & CLARK, W.S., Agents.

No. 36.

Nov. 21, 1895. Kennedy's Trustees v. Sharpe.

WILLIAM GOSS AND OTHERS (Kennedy's Trustees), First Parties.—*Constable.*
WILLIAM GOSS AND WILLIAM BROWN (Kennedy's Executors), Second Parties.—*Sandeman.*
MRS CATHERINE SHARPE AND HUSBAND, Third Parties.—*Constable.*
JOHN HOGARTH KENNEDY AND OTHERS, Fourth Parties.—*Sandeman.*

Insurance—Insurance by widower for benefit of children—Married Women's Policies of Assurance (Scotland) Act, 1880 (43 *and* 44 *Vict. cap.* 26), sec. 2.—The Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2, enacts that "a policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his children," shall be deemed a trust for their benefit.

Held that a widower was a "married man" in the sense of the Act.

2D DIVISION.

MR JOHN KENNEDY, Baintbari, Bengal, insured his life with the Scottish Imperial Insurance Company for the sum of £1000. The policy, which was dated 10th October 1889, bore to be for the benefit of any child or children of the assured who might survive him. Mr Kennedy at this time was a widower with three children.

On 14th January 1893 Mr Kennedy married again, and on 14th April 1893 died survived by his widow and by the children of his former marriage. There were no children of the second marriage. He left a will dated 13th April 1893 in which he directed the sum insured to be sent out to India for investment, and the profits paid to his wife and children in equal parts.

The testator appointed Mr William Goss, of Ballabari, and Dr William Brown, of Rungamati, and his wife as joint trustees.

William Goss and William Brown obtained probate as executors of the testator in India.

Mrs Kennedy subsequently married James J. Sharpe.

The trustees having obtained the sum in the policy, a question arose as to the disposal of the fund.

In a special case John H. Kennedy and others, the testator's children, the fourth parties, claimed to have right to the whole fund under the Married Women's Policies of Assurance (Scotland) Act.*

The testator's widow, Mrs Sharpe, and her husband, the third parties, maintained that the Act did not apply, as the testator was a widower, and not a married man, at the date of the policy.

The following were the questions of law:—"(1) Did the policy of assurance in question constitute an effectual trust under the Married

* The Married Women's Policies of Assurance (Scotland) Act, 1880 (43 and 44 Vict. cap. 26), sec. 2, enacts,—"A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation or reducible on any ground of excess or insolvency. . . ."

Women's Policies of Assurance (Scotland) Act, 1880, of the sum thereby secured for behoof of the fourth parties solely? or (2) Did the proceeds of the policy form part of the estate of the assured at the date of his death?"

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LORD YOUNG.—The question is whether this policy constituted an effectual trust under the Act of 1880. I am of opinion that it falls within the Act, and thus the proceeds must go to the children of the deceased by the first marriage.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the first question in the affirmative, and the second in the negative.

MACPHERSON & MACKAY, S.S.C.—JAMES AYTON, S.S.C.—Agents.

FRANCES ANN HESTER CRUIKSHANK, Pursuer (Respondent).—*Jameson—M'Clure.*

THE NORTHERN ACCIDENT INSURANCE COMPANY, LIMITED, Defenders (Reclaimers).—*Balfour—Crole.*

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Cruikshank v. Northern Accident Insurance Co., Limited.

Insurance—Accident Insurance—Condition—Warranty—Answers to questions by company—Agent and Principal—Personal Bar.—The widow of a person who had been killed by accident raised an action against an accident insurance company upon a policy taken out by the deceased. The defenders pleaded that the policy was void, in respect that it was subject to the condition that the declaration by the insured, upon which it was granted, was true; that in answer to the question in the proposal, "Are there any circumstances which render you peculiarly liable to accident?" the deceased had stated, "Slight lameness from birth," and had signed a declaration in the following terms:—"I hereby declare and warrant that the above statements are true"; and that the answer and declaration in material respects were false.

It appeared from a proof that the deceased, while staying in a hotel in England, met an agent of the defenders' company with whom he was not acquainted, and was induced by him to make a proposal for an insurance; that the agent wrote the answers to the questions in the proposal as the deceased dictated them; that deceased was and had been from childhood extremely lame, and could not have walked across a room without shewing the extent of his lameness. Several witnesses deponed that the deceased had told them that he walked across the room at the hotel before the agent, but the agent deponed that he never saw him rise from his seat. It was proved that some years after the deceased had fallen into a fireplace in his bedroom and had received injuries from which he died next day.

The Court *held* (*aff.* judgment of Lord Low) (1) that the deceased's statement as to his walking across the room was true; (2) that as the defenders' agent must have seen the extent of his lameness, the defenders were not entitled to take advantage of any misdescription of the lameness in the proposal, as the knowledge of their agent was their knowledge; and (3) that no breach of warranty had been proved.

Observations on the construction to be applied to a declaration in a proposal for insurance against accident—"I have not had paralysis or a fit of any kind."

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2D DIVISION. Lord Low.

ON 20th February 1883 George Macaulay Cruikshank, patent agent and consulting engineer, Glasgow, effected an insurance with the Northern Accident Insurance Company, Limited, whereby the company promised on the death of the insured by accident to pay to his representatives the sum of £1000.

On 24th January 1894 Cruikshank, who was lame, fell into a fireplace in his house, and was so burned that he died on the following day.

Mrs Frances Ann Hester Cruikshank, his widow and executrix, called on the company to pay the contents of the policy, and upon their refusal raised this action against them for payment of £1000.

The defenders stated:—"The said policy proceeded on a written proposal signed by the deceased on 16th February 1883. The fifth question in said proposal is as follows, viz.:—'Are there any circumstances which render you peculiarly liable to accident?' The answer given to the said question by the deceased was, 'Slight lameness from birth.' There is also a declaration in said proposal in the following terms, viz.:—'I hereby declare and warrant that the above statements are true; that I have not had paralysis, or a fit of any kind, or been ruptured; that I have no physical infirmity . . . and I agree that this declaration shall be the basis of the contract between me and the Northern Accident Insurance Company, Limited.' The said proposal is produced, and founded on. By the said policy it is, *inter alia*, provided as follows, viz.:—'Provided always that this policy is granted upon the express condition that the aforesaid declaration is true in all respects, and that if either this policy, or any renewal thereof, has been obtained through any material misrepresentation or concealment by or on behalf of the insured, then this policy shall become absolutely void, and all premiums paid in respect thereof be forfeited to the company.' The said answer and declaration are in material respects false and untrue. The said George Macaulay Cruikshank had a malformation in both feet, and had suffered from paralysis almost all his life. At the time the said declaration was made his right leg was totally paralysed, and his left leg was also paralysed to a very great extent. . . . If the defenders had been made aware of the true physical condition of the deceased they would not have entered into the said contract. The defenders aver that the deceased well knew that he was not a fit subject for accident insurance."

The pursuer pleaded;—(2) The defenders having been fully aware of Mr Cruikshank's condition when they accepted his proposal and issued the policy, the defences should be repelled.

The defenders pleaded;—(2) The said policy is void, having been granted on the express condition that the said declaration was true in all respects, and the said declaration having been untrue, as condescended on.

A proof was allowed, in which the defenders led. The import of the evidence sufficiently appears from the opinions of the Judges.

On 27th August 1895 the Lord Ordinary (Low) granted decree in terms of the conclusions of the summons.*

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* "OPINION.—It is not disputed that the description given by Mr Cruikshank of his lameness in the proposal upon which the policy in question was issued was not in fact true. He described his lameness as slight, while, as a matter of fact, he was extremely lame. If, therefore, the

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The defenders reclaimed, and argued;—The statement in the proposal for insurance and the warranty in the declaration were untrue in fact, and the policy was void. The contract was in writing, and the statements were of the nature of warranty, and not merely declarations of belief. The insured was a business man and knew the nature of the forms he was signing. If he did not read them *sibi imputet*. He must be taken to have known that the agent could only contract for his employers in one way, and was not empowered to waive any condition. It was therefore irrelevant to prove any antecedent communings between the insured and the agent, which led the agent to accept the insured in the face of peculiar risk. If he did waive the usual conditions he acted *ultra vires*. The knowledge of the agent would not be imputed to the defenders if the result of it was that the policy was a fraud upon them.[1] But the weight of the evidence was to the effect that the agent did not see the condition of the insured. The statement that the lameness was slight was untrue. The insured was very lame. The best evidence of this was that his infirmity was the cause of his death. The degree of lameness was

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policy was issued upon the faith of the statement made in the proposal, and of nothing else, the policy would be void.

"The pursuer, however, avers that Mr Black, the defenders' general agency superintendent, through whom the insurance was effected, saw Mr Cruikshank, and was fully aware of his condition.

"It appears that in 1883 Mr Cruikshank and Mr Black met by chance in a hotel in Manchester and got into conversation. Mr Black asked Mr Cruikshank if he was insured against accidents, and upon the latter replying in the negative, proposed that he should take an insurance with the defenders' company.

"In regard to what followed, the evidence is conflicting.

"Mr Black says that he only saw Mr Cruikshank sitting at table, that he did not see him walk, nor did he see his lower limbs, and that he accepted the proposal upon the faith of Mr Cruikshank's statement that he was only slightly lame.

"Upon the other hand, the evidence for the pursuer is as follows:—When Mr Cruikshank returned from Manchester he told his wife that he had taken out an insurance against accidents. He then told her in detail how it had come about. He said that he had met the insurance company's agent by chance in the hotel at Manchester, and that the agent proposed that he should take out an insurance against accidents. He then said to the agent that he must first see the subject with which he had to deal, and he accordingly rose and walked across the room. The agent said that his lameness did not matter, because people in his condition took more care than those who had no physical infirmity, and that the risk to the company was therefore not greater. The matter was then concluded, the premium was paid, and a covering-note given.

"Shortly afterwards Mr Cruikshank saw Mr M'Creadie, his law-agent and intimate friend, and mentioned that he had taken out an insurance against accidents. Mr M'Creadie then asked if the company knew of his condition, and Mr Cruikshank told him the same story which he had previously told to his wife.

"Subsequently Mr Cruikshank was in the private room of Mr Napier, station-master at Uddingston, waiting for a train, when the conversation turned upon insurance against accident. There had been a railway accident

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[1] Bawden v. London, Edinburgh, and Glasgow Assurance Company [1892], 2 Q. B. 534; Weems v. Standard Assurance Company, March 5, 1884, 11 R. 658, Aug. 1, 1884, 11 R. (H. L.), 48.

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material to the risk, and the answer should have been such as to put the defenders on their inquiry whether to accept the risk. The Lord Ordinary thought the insured was very lame. (2) The pursuer was forced to contend for the use of the word "paralysis" in a very limited sense. This contention was unfair, for the term embraced many kinds, such as "creeping paralysis," and "infantile paralysis" which might form a source of physical disability. The result of the evidence was that the condition of the insured resulted from infantile paralysis.

Argued for the pursuer;—The Lord Ordinary's view of the evidence and his reasoning were sound. The issue of the policy was an acceptance of the statements of the insured with a perfect knowledge of the state of the case.

At advising,—

LORD JUSTICE-CLERK.—This is a peculiar case in some respects. The late Mr Cruikshank is proved to have suffered an accident shortly after his birth, the result of which was that he was lame for the rest of his life.

While he was staying in a hotel in Manchester he met Mr Black, who

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in the neighbourhood, and Mr Napier was the agent for an accident insurance company, and that led to the matter of insurance against accident being spoken of. Mr Cruikshank told Mr Napier that he had been insured for a number of years, and then he gave him the same narrative of what had happened as he had previously given to his wife and Mr M'Creadie. He also got up and walked round the table to illustrate what had passed in the hotel at Manchester.

"Now, no suggestion can be made against the credibility of these three witnesses—Mrs Cruikshank, Mr M'Creadie, and Mr Napier—and it is certain that Mr Cruikshank narrated to them the story which they told in the witness-box.

"The question is whether the story was true? Now, even if Mr Cruikshank had been a person who was likely to invent a story of the sort, which he was not, it is impossible to suggest any motive which he could have had for doing so. It is to my mind incredible that he should have told a made-up story to his wife immediately after his return from Manchester, and repeated it subsequently to his law-agent and to Mr Napier.

"What, then, is to be said of the evidence of Mr Black? Mr Black did not give his evidence with very great confidence. Although he at first said positively that he had not seen Mr Cruikshank except sitting behind a table, when pressed in cross-examination as to whether he had not seen Cruikshank walk, he very much took refuge in want of recollection. And Mr Black's hesitancy appeared to me to be even more marked in his manner than in the words which he used.

"I have, therefore, no doubt that the story told by Mr Cruikshank was true; and if so, I am of opinion that the defenders are not entitled to take advantage of the misdescription in the proposal of Mr Cruikshank's physical condition. The knowledge of their agent was their knowledge.

"A more difficult question arises upon the general declaration at the end of the proposal. It is, so far as material, in the following terms:—'I hereby declare and warrant that the above statements are true; that I have not had paralysis or a fit of any kind, or been ruptured; that I have no physical infirmity.'

"Mr Cruikshank's signature is appended to the declaration, and it is argued for the defenders that the declaration was not true in respect (1) that he had a physical infirmity, and (2) that he must have had infantile paralysis.

"The only physical infirmity which Mr Cruikshank had was his lameness, and if that was disclosed in the answers to the questions in the earlier

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was in the employment of the defenders at the time as an inspector of agents, and Mr Black was in the habit of getting insurances when he could, and such applications were accepted by the defenders. In course of conversation he impressed the advantages of accident insurance upon Mr Cruikshank, who admitted its importance, and expressed himself as willing to take a policy. Then and there Mr Black settled the business on behalf of the company, as far as it was possible to conclude it at the time. In exchange for a covering-note Mr Black received a premium, and the matter was concluded subject to the approval of the board.

Now there are two things which are said to support the refusal of the company to pay the sum in the policy. It is said that a false assertion occurs in the statement which Mr Cruikshank signed describing his condition, and the falsity is said to be contained in the words "slight lameness." It is to be noted that these words occur in answer to this question,—"Are there any circumstances which render you peculiarly liable to accidents?" This answer is accordingly to be read in full as follows:—"I

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part of the proposal, I think that that was sufficient. The declaration must, I think, be read in the light of the previous answers, and anything which is disclosed in the answers does not require to be excepted from the declaration.

"But then it was said that the lameness was caused by infantile paralysis, and that as the declaration was a warranty, it was not material to inquire whether Mr Cruikshank was or was not aware that he had had paralysis.

"It appears that when in a subsequent year Mr Cruikshank was insuring his life, he told the doctor of the insurance company that his lameness had been the result of a fall which he had when an infant. He told his wife the same thing. Now if the lameness resulted from a fall, the probability is that the spine received some injury, and that partial paralysis of the legs ensued.

"Why the lameness is entered in the proposal in question as being from birth it is impossible to say. The answers in the proposal are filled in in Mr Black's handwriting, and the words 'from birth' appear to have been filled in after the original answer 'slight lameness' had been written. It may be that Mr Cruikshank gave Mr Black the same account of the origin of his lameness as he gave to others (at least I see no reason why he should not have done so) and that the words 'from birth' were added as a short way of describing a lameness which commenced at a time which Mr Cruikshank could not remember. But however that may be, the statement as it stands must be taken as Mr Cruikshank's statement, and the policy dealt with upon that footing.

"Now in the first place I do not think that it is proved that Mr Cruikshank ever had infantile paralysis. No doubt the evidence renders it highly probable that the lameness was caused by partial paralysis brought on by a fall in infancy. But I do not think that upon the medical evidence the defenders' case can be put higher than one of probability.

"Further, although the declaration is a warranty, it is to be remembered that it is intended to be made by members of the general public desiring to insure against accidents. Therefore in a case of lameness following upon a fall in childhood, where the scientific cause of the lameness is paralysis induced by an injury to the spine, I do not think that the policy would be void because the proposer did not know, and therefore did not state, that his lameness was caused by paralysis, if he stated truly and accurately the extent and nature and origin of his lameness. Now here, according to the view which I take of the evidence, the defenders knew, through Mr Black, how lame Mr Cruikshank was, and what was the nature of his lameness. They knew that the right leg was shorter than the left, and was almost

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have suffered from slight lameness from birth, which renders me peculiarly liable to accidents." Accordingly, so far as the statement goes, there is nothing to suggest that it was false. The only suggestion of falsehood is in connection with the use of the word "slight." Now, that is a word which may be used by different persons according to the variety of the views which they are in the habit of taking of things. It was proved that Mr Cruikshank was a man of considerable activity, and with the help of his crutch and stick could get along at a very good rate—2½ to 3 miles an hour. His lameness did not prevent him being a very active man of business. If a man can only move with the greatest slowness his liability to accidents is totally different from the state of a man who is capable of active and quick movement. It is a question of interpretation. One man could truthfully use the word "slight" where another would use the word "great." Taking the word by itself, I see in it no ground for holding that it was a false statement. It is important that the Lord Ordinary is of opinion that Mr Black, who wrote this answer from Mr Cruikshank's dictation, saw Mr Cruikshank walk, and saw the extent of his lameness. There is trustworthy evidence to the effect that this was matter of conversation between them, and Mr Black expressed the opinion that a man with such an infirmity was a safer subject of insurance, because he was accustomed to take greater care of himself. Mr Cruikshank shortly afterwards stated to more than one person what had taken place, and Mr Black's evidence to the contrary is not in my opinion satisfactory.

Therefore, so far as this question is concerned, I think there is no ground for disturbing the interlocutor of the Lord Ordinary.

The next question is, whether the defenders are not liable because of the declaration made by the insured, and which is said to be a warranty of what it contains. It is entitled "declaration," but thereby the insured did declare and warrant that the above statements were true, and that he had not had paralysis or a fit of any kind. I think that amounts to a declara-

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powerless. They had knowledge therefore which suggested that Mr Cruikshank might have had infantile paralysis. But then it is said that Mr Cruikshank made an untrue statement as to the origin of his lameness. As regards that, the burden of proof is upon the defenders, and upon the evidence I am unable to say for certain that the statement was untrue. Mr Cruikshank told his wife and the doctor of the Life Insurance Company that he had had a fall when an infant, to which his lameness was attributed, and he must be taken to have told Mr Black that he had been lame from birth. It is not said that Mr Cruikshank made a wilfully false statement, and no one now can tell for certain whether the latter statement was in fact true or false. The origin of the lameness was not a matter within the personal knowledge of Mr Cruikshank. He had been lame ever since he remembered, and the defenders knew that that was the case. No one suggests that if it had been stated that the lameness was due to a fall in infancy, instead of from birth, that would have made any difference in the risk. The important matters were the nature and extent of the lameness, and that Mr Cruikshank had been lame ever since he remembered. The defenders were aware of all that, and therefore they knew all that was necessary to enable them to consider whether they should refuse the proposal, or charge a higher premium, or demand a medical examination.

"Upon the whole matter I am of opinion that the pursuer is entitled to decree."

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tion that the insured had not suffered from paralysis arising from some organic cause, and does not suggest to the ordinary mind paralysis which may ensue from an accident to a limb. There is no evidence that the insured thought that he suffered from any form of paralysis, and if this is to be regarded as a warranty, I think it can only be so regarded with reference to that kind of paralysis which is the result of disease and not the result of accident.

I am of opinion that there is nothing either in the statement or the declaration entitling the defenders to say that they were deceived by the statements of Cruikshank, or that he warranted them as against the condition of lameness in which he was.

LORD YOUNG.—The late Mr Cruikshank obtained the policy in 1883, and kept it up until the accident which caused his death in 1894.

The defence to this action on the policy is that the conditions expressed in the policy were not complied with.

All the facts of the case and the views of both sides were very fully and with most commendable fairness put before us by Mr Crole in his opening speech, and I do not think that he suggested that this case raised a question of good or bad faith. The good faith of the deceased is not in dispute. But it is said that, assuming this good faith, the conditions of the policy were not complied with. If that is true the defence must prevail, the good faith of the deceased notwithstanding.

Now, the conditions referred to are contained in a "declaration" made by Mr Cruikshank (and the title is not unimportant), whereby he did "declare and warrant that the above statements are true; that I have not had paralysis or a fit of any kind, or been ruptured; that I have no physical infirmity."

The statement which is represented as being untrue is the statement in the form of proposal for the policy, and consists of an answer to this question,—"Are there any circumstances which render you peculiarly liable to accidents?" The answer is,—"Slight lameness from birth." Of course these words must be prefaced by the monosyllable "yes," for if there were no circumstances rendering him peculiarly liable to accidents there would be none to specify, and the answer would be "no."

It appears from the evidence that Mr Cruikshank had been lame from his earliest infancy. It seems that he had been let fall while an infant, and so injured as to be lame for life. Thus, perhaps, strictly speaking, his lameness was not from birth, but I do not think that anything turns upon a distinction between injury received before birth or immediately after. But this lameness is characterised by the word "slight," and I think we must look at the evidence to say what effect ought to be given to this adjective applied to the lameness stated as rendering the insured peculiarly liable to accidents. I am inclined to accept the view of the Lord Ordinary on the evidence, and to conclude that the lameness was such as to be manifest to anyone who saw Mr Cruikshank upon his feet. When Mr Black proposed that he should take out a policy I agree with the Lord Ordinary in thinking it proved that Mr Cruikshank rose and walked across the room. Mr Black, who wrote the replies in the

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form of a proposal, having seen this lameness, described it as slight, and reading this word so written, I cannot regard it as an untrue answer on which a defence to this action can be founded. I think that this lameness was expressly described as making Mr Cruikshank peculiarly liable to accidents, and that the degree of this lameness being so written by the agent of the defenders cannot be founded on by the defenders as untrue. Taking this as a written contract, the terms of which must be complied with, I think that so far the plea stated in defence to this action, that the conditions of the contract were not complied with, must fail.

With regard to the declaration that the insured had not had paralysis or a fit of any kind, I think that we must take the language of the declaration in the sense in which it was probably and reasonably understood. I think that when a man applies for insurance, and states that he is afflicted with lifelong lameness which renders him peculiarly liable to accidents, and also states that he has not had paralysis or a fit of any kind, he is not to be understood as declaring that paralysis in any form was not the source of the lameness which was disclosed. I think the fair view is that "paralysis" is to be taken in connection with the words "fit of any kind." Paralysis is commonly understood as a fit or shock. I do not think it is commonly used so as to suggest such paralysis as is the result of a fall causing lameness. I think the Lord Ordinary is of opinion that it was not proved that Mr Cruikshank ever had paralysis, and I agree with him. There are certain attacks of illness which produce forms of paralysis. I suppose that a fainting fit is while it lasts a species of paralysis. It is a paralysis of the nerves of motion. But I do not think that the word "paralysis" is used in this declaration as designative of the less serious seizures to which the term might with more or less accuracy be applied. I think it is used as applicable to that graver form of attack which is associated with lesion of the brain. I agree with the Lord Ordinary that it is not proved that Mr Cruikshank had paralysis in any sense in which the word is used in this declaration. But the declaration proceeds,—"I have no physical infirmity," and the question is, what bearing this declaration has on the liability of the defenders when taken in connection with the lameness of the insured? I do not think it is to be taken literally, for I suppose there is not any human being, or indeed any animal, free from physical infirmity. An ear which hears less distinctly than the other, an eye which sees less clearly than its fellow, a weak voice, might each be described as physical infirmity. The effort would be endless to attempt to express the varieties of physical infirmity to which all living beings are liable.

But in what sense, then, did the defenders understand this declaration on the part of a man who had declared that he had slight lameness from birth? I think the two statements must be taken together. I think the insured must be taken to have meant that he had no physical infirmity except the lameness which I think was fairly disclosed. I am therefore of opinion that the declaration cannot be read as importing a warranty that the insured was absolutely free from all physical infirmity.

I can understand that the defenders might at any time during the currency of the policy have desired to know what was the kind and extent of the lameness of the insured, but they were quite satisfied to take it as it

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stood, the insured remained in good health, and I am not surprised that the defenders did not desire to have any further information as to his condition.

On the whole matter I conclude, along with the Lord Ordinary, that the defence of breach of warranty existing in misstatements in the proposal of insurance, and in the declaration, is not proved.

LORD TRAYNER.—I entirely concur, and can add nothing usefully to what has been said. I therefore agree that the Lord Ordinary's interlocutor should be affirmed.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

MARTIN & M'GLASHAN, S.S.C.—J. & R. A. ROBERTSON, S.S.C.—Agents.

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Ivory v. Macrae.

WILLIAM IVORY (Sheriff of Inverness-shire), Objector.—*Ure—Blair.*
DONALD MACRAE, Respondent.—*Lorimer—Trotter.*

Election Law—Returning officer's charges—Presiding officers and clerks—"Travelling expenses"—Hotel expenses—Returning Officers (Scotland) Act, 1891 (54 *and* 55 *Vict. c.* 49), *sec.* 3, *Schedule, Part I.*—The schedule to the Returning Officers (Scotland) Act, 1891, bears,—"The following are the maximum charges to be made by the returning officer, but the charges are in no case to exceed the sums actually paid or payable. Part I.—Counties and districts . . . For each presiding officer £3, 3s. If the presiding officer is obliged to leave home in order to perform his duties in connection with the election a further fee of £1, 1s. shall be allowed him for each night he is absent . . . For travelling expenses of presiding officers and clerks per mile £0, 1s. 0d. No travelling expenses to be allowed beyond the limits of the sheriffdom."

Held (*diss.* Lord Adam) that the expression "travelling expenses" in the schedule included hotel and other personal expenses necessarily incurred by a presiding officer.

Election Law—Returning officer's charges—Deputy returning officer—Ballot Act, 1872 (35 *and* 36 *Vict. c.* 33), *sec.* 8.—*Held* that a deputy returning officer, remunerated as such, was not entitled to any fee for acting as a presiding officer at a parliamentary election.

ELECTION PETITION.
Lord Adam.
Ld. M'Laren.
Ld. Kyllachy.
Ld Stormonth-Darling.

ON 13th June 1895 an election was held for the county of Inverness-shire. The Sheriff (Ivory) thereafter, in terms of the Returning Officers (Scotland) Act, 1886 (49 and 50 Vict. c. 58), sec. 3, transmitted to the election-agents of the candidates an account of his expenses in connection with the election.

On the application of the agent for Mr Donald Macrae, one of the candidates, the Auditor of the Court of Session taxed the account.

On 29th July the Auditor issued a report, in which he taxed the account at £469, 9s. 7d.†

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* Decided Nov. 15, 1895.

† "The sums taxed off the foregoing account consist, with the exception of a few items of inconsiderable amount, of charges by presiding officers and their clerks for hotel bills and other personal expenses.

"The charges of returning officers are regulated by the Returning Officers (Scotland) Act, 1891, the particular allowances under the various heads of charge being specified in the schedule appended to the Act. The allowance to each presiding officer is £3, 3s., with £1, 1s. additional for

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On 7th August the returning officer lodged with the Judges for the Trial of Election Petitions a note of objections as follows:—"The report of the Auditor is objected to in so far as he has disallowed or taxed off (1) the sum of £90, 17s. 5d., representing, with the exception of one or two items of very small amount, charges by presiding officers and their clerks for hotel bills and other personal expenses; and (2) the sum of £3, 3s., the amount of the fee charged by Mr Duncan Shaw, Writer to the Signet, Inverness, for acting as presiding officer at Inverness on the polling day."

Mr Duncan Shaw was deputy returning officer, and was remunerated as such.

Argued for the objector;—(1) The hotel and personal expenses were *ex hypothesi* necessary expenses, and must be covered by some allowance contained in the schedule of the Act of 1891.* They were not covered by the £3, 3s. and £1, 1s. allowed respectively to presiding officers and clerks, for these allowances were expressly described as "fees." They were as little covered by the sums allowed to the officers and clerks of £1, 1s. and 10s. respectively per night, for these sums were intended to be a remuneration for services, being described in each case as "a further fee." They must then come under the expression "travelling expenses." That expression, in its ordinary sense, included not only the expenses of locomotion but also personal outlays incidental to travelling, such as hotel bills. The addition of the expression "per mile, one shilling," did not limit the meaning of the expression to expenses of bare locomotion, for one shilling per mile was not enough for posting, and was far too much for railway fares. The amount was roughly calculated on an average to meet the cost of travelling generally. (2) The deputy returning officer was under the Ballot Act, 1872,† entitled to act as a presiding officer, his right to a fee not being excluded by the "necessary modifications" referred to. In any view, as the returning officer himself was present on the polling day, the deputy was superseded. He was therefore acting as a presiding officer, not *qua* deputy returning officer, but in virtue of an appointment like any other person, and was equally entitled to a fee.

Argued for the respondent;—(1) In its ordinary sense "travelling expenses" certainly did not include hotel bills and personal expenses.

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each night absent; and to each clerk £1, 1s., and 10s. for each night absent, with travelling expenses in both cases within the limits of the sheriffdom. There is no mention in the Act of any further allowance to presiding officers or clerks, and I do not consider that I am entitled to pass any charges which are not distinctly specified in the schedule. I have accordingly restricted the allowances to the above rates, with the addition of actual outlays for travelling expenses, so far as in my opinion reasonable and proper."

* Quoted in rubric.

† The Ballot Act, 1872 (35 and 36 Vict. c. 33), sec. 8, enacted,—A deputy returning officer, duly appointed in terms of the Act, "may exercise any powers and do any things which the returning officer is authorised or required to exercise or do in relation to such election."

The First Schedule—Part I.—Rules for Parliamentary Elections, Rule 47, bears,—"The returning officer may, if he think fit, preside at any polling station, and the provisions of this Act relating to a presiding officer shall apply to such returning officer, with the necessary modifications as to things to be done by the returning officer to the presiding officer, or the presiding officer to the returning officer."

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In the undernoted tables of fees * "personal expenses" and "allowance for maintenance" were mentioned as something in addition to "travelling expenses." It was impossible to suppose that "travelling expenses," calculated at so much a mile, could include hotel bills and personal expenses. These outlays were intended to be met out of the sums allowed to presiding officers and clerks for each night in which they were necessarily absent in connection with their duties. (2) The deputy returning-officer was entitled, but not obliged, to act as a presiding officer, but he was not entitled to anything besides his remuneration as deputy returning officer whatever work he might have done.

At advising,—

LORD M'LAREN.—The question which we have to dispose of is raised in an appeal from the taxation of the account of election expenses for the county of Inverness.

The Auditor, in that part of the account which consists of sums paid by the returning officer for the expenses of his deputies and clerks, has disallowed the expenses of subsistence of the polling officers and their clerks while absent from Inverness on their official duties, and has allowed only the cost of locomotion—railway, steamboat, and carriage fares. This, I presume, proceeds upon the view which was maintained at the bar, that the Act of Parliament, in empowering the returning officer to charge the travelling expenses of his assistants in the accounts meant only to give travelling expenses in the most restricted sense which can be put on these words. The returning officer, in appealing against this decision, maintains that travelling expenses include all the expenses necessarily incurred by these gentlemen during their absence from home on their official duties, it being common ground that there is a maximum sum imposed by the Act which is to be calculated at the rate of one shilling per mile.

In dealing with a question of this kind, the consideration which first presents itself to my mind is, that a returning officer incurring expense in the public service is, in accordance with the usual practice in every branch of the public service, entitled to be reimbursed out of moneys voted by Parliament. That is his general right, and his general right is fully recognised in the Act of Parliament under consideration, as it has been in previous Acts of Parliament. No doubt it may be inferred from the circumstance that a limit is fixed to the expenditure, that there was some apprehension that returning officers might be disposed to pass expenses upon too liberal a scale unless some check were applied. It is possible that in certain cases the necessary expense might exceed the assigned limit, and that the returning officer might be out of pocket. But I hardly think it would be a sound condition of a construction of this Act to begin by assuming that the Legislature intended as an ordinary, or, at least, not very exceptional result of the working of this Act, that necessary expenses incurred by a public servant in the discharge of his official duties should be left as a personal burden upon himself.

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* Table of Fees for Conveyancing and General Business, 1876, Table IX. (34) (*b*) and (*c*), and Table of Fees for Law-Agents under A. S. 15th July 1876, I. 6 (1) (*b*) and (*c*).

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I have then to consider which of the constructions contended for is mostly in accordance with the principle which I have stated, and with the probable intention of the Legislature. It is a perfectly possible construction of the words "travelling expenses" that these words should include the expenses of subsistence in a hotel or lodgings as well as railway and steamboat fares in cases where the persons concerned were necessarily absent from their homes for more than one day. I will go further, and say that this is not only a possible construction but is in my judgment the true meaning of "travelling expenses," according to the ordinary use of such language. Of course that is only a matter of impression, and my impression may not be the same as that of some of my colleagues, but I have always understood travelling expenses, when used without qualification, to include the whole cost and inconvenience to which a person is put by being absent from home. But probably if the statute had either imposed no limit, or if the limit had been expressed in a different way, this would not have been disputed, because the argument in support of the other construction is that the limit is in the form of so much per mile on the distance travelled. It is quite true that this is a limit more appropriate to travelling proper than to the calculation of hotel expenses, because it goes without saying that no man calculates the cost of his living by the mile. At the same time it must be observed that the schedule does not mean or say that the account is to be rendered for an amount of so much per mile, but only that the amount of one shilling per mile is to be taken, and that the account is only to be allowed in so far as it is within that limit. If the limit had been fixed at so much per day, a precisely similar argument might have been raised. It would then have been said that the words "travelling expenses" meant only hotel expenses, and did not cover railway or steamboat fares, because people do not pay their railway fares at so much a day. To have had a double limit would have been rather a conflicting business, and I do not see very well how any satisfactory results would be got out of a double limit.

It was most probably considered that if only one limit was to be taken, the limit of so much per mile would be a good practical mode of fixing the maximum, because on the average a person's total expenditure on a journey is roughly proportionate to the distance travelled. Especially would this be the case in Highland counties, where it is only on account of the long distances to be travelled to certain of the polling-stations that it is necessary for the polling officer and clerks to be absent from home for more than a day. For these reasons I am of opinion that the Act of Parliament should receive a liberal construction in favour of reimbursement to the returning officer of all his necessary expenses within the limit, and accordingly that the objections to the Auditor's report under this head should be sustained.

With regard to the other objection, which only involves three guineas, it is urged that the deputy returning officer for Inverness was not also entitled to remuneration as a polling officer. I am of opinion, in common with all your Lordships, that this objection is well founded, and that whoever was appointed as a deputy returning officer, and remunerated as such, is not also entitled to additional remuneration for acting as a polling officer, which he was not obliged to do.

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LORD KYLLACHY.—I come to the same conclusion, and in doing so I start with this, that somewhere in the Act—somewhere in the schedule—provision must be found for the expenses in question. They are *ex hypothesi* necessary expenses, and it must, I think, be assumed that they are met or covered by some payment or allowance contained in the schedule. Now, that being so, the first point is, whether they can be held as covered by the fees of £3, 3s. and £1, 1s. respectively, which are allowed for the day of the poll, or by the additional fees of £1, 1s. and 10s. respectively which are allowed for every night for which the presiding officer or clerk is absent from home.

Now, it appears to me that that suggestion is excluded, for two reasons. In the first place, these payments or allowances are expressly described as "fees,"—that is to say, as remuneration for services rendered or time occupied. In the next place, at least in the case of clerks, the total fees allowed would often, if not generally, be inadequate to meet the clerks' personal outlays, much less to meet those outlays and leave any reasonable remuneration. I refer particularly to cases, by no means uncommon in Scotland, where the polling official requires, in order to perform his duty, to spend four or even five days away from home, living necessarily in hotels, and paying for everything on a corresponding scale. Now, I at least am not able to believe that anything of that kind was intended by the Legislature. On the contrary, I feel bound to assume that polling officials were intended to have at least some remuneration—remuneration not only for their services on the polling day, but also for the time necessarily occupied in travelling to and from their stations. And therefore I am forced to the conclusion—at least I think so—that the expense in question—the personal outlay of these officials—is not covered by their fees, but must be found under some other head of the schedule.

But the only other head of the schedule under which any allowance is made to the presiding officer and clerk is that of "Travelling Expenses," and I agree with your Lordship that that is a category under which the expenses in question may quite well be brought. Personally I confess I have no particular difficulty in so holding. In the usual and popular sense, in the sense in which we should construe the expression in any private contract (a contract, *e.g.*, between employer and employed), travelling expenses do not include merely the bare expenses of locomotion. They also include those personal outlays which are incidental to travelling, and which we all know are a necessary part of the expenses of travelling. And I see no reason why we should be astute in construing this statute or this schedule to restrict the expression in the way now proposed.

It was urged, however, and this was really the main argument, that the maximum allowance for "travelling expenses" is fixed at so much per mile; and that is said to be a limit appropriate only to mere locomotion. Well, it may be that a traveller's personal outlays are not always proportional to the length of his journey. But the object of the Act was not to fix a charge but to impose a limit, and it may very well have been considered that in fixing a limit for the total cost of a journey, the length of the journey afforded a measure—rough perhaps, but as good as any other—of the maximum cost. As I have already said, the object is not to fix a charge but

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only to fix a limit, and in this connection it is not unimportant to observe that the limit fixed by the schedule (1s. per mile) is certainly not appropriate to any known mode of locomotion. It is not enough for posting, the minimum charge for which is, as we all know, 1s. 3d. per mile. And it is far too much for railway fares, which in this country never exceed 3d. per mile. On the whole, therefore, while I do not say that the question is free from doubt, I concur with the judgment which your Lordship proposes.

LORD STORMONTH-DARLING.—A returning officer in Scotland is entitled to recover from the candidates his "reasonable charges," not exceeding the sums mentioned in the schedule to the Returning Officers (Scotland) Act, 1891, "in respect of services and expenses of the several kinds mentioned in the said schedule, which have been properly rendered and incurred by him for the purposes of the election." What the Auditor on taxation has to do, therefore, as regards expenses (when there is a question of expenses incurred by the returning officer) is to inquire—(1) Whether the charges are reasonable; (2) whether they are within the maximum; (3) whether they are of the kinds mentioned in the schedule; and (4) whether they have been properly incurred for the purposes of the election.

No question arises in the present case as to the first, second, or fourth of these heads. The charges in themselves are not said to have been unreasonable; they are within the maximum; and they were incurred for the purposes of the election. The question is whether they are of any of the several kinds mentioned in the schedule. And here I desire to express my concurrence with the opinion of the Queen's Bench Division *in re Election for South-Eastern Division of Essex*, 1887, L. R., 19 Q. B. D. 252 (at p. 260), when they say, "We do not think that the Legislature intended to enact that no possible service or expense rendered or incurred by the Sheriff should be payable by the candidates merely because it does not come *verbatim et literatim* within the several descriptions in the schedule, provided it be a service or expense of one of the kinds mentioned." Be it observed that the learned Judges were there construing the English Returning Officers Act of 1875, the leading clause of which is in terms identical with the Scottish Act of 1891. Indeed, the whole of the Act of 1891 is modelled on the English Act, with certain slight modifications not material to the present question.

If, then, a Sheriff finds it necessary, in the exercise of his discretion, to despatch a presiding officer or a clerk to a polling-station at such a distance from his home that he must spend one or more nights at a hotel, does his hotel bill fall within the schedule? It is natural to expect that it should, for when a man is sent away from his home on business not his own, it is according to common experience that his expenses, not only of locomotion, but of living, are paid for him. The contrary, of course, may be arranged, or the fee paid may be so large as presumably to cover everything. But where the fee is no more than fair remuneration for time spent and services rendered, it is, I should say, invariable to allow all reasonable outlay which is incidental to the journey, and not merely the bare expense of locomotion.

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Now, the phrase in the schedule under which this kind of expense must be brought (if it is to come within the schedule at all) is "travelling expenses of presiding officers and clerks." That seems to me a wide enough phrase to cover hotel bills. If a man were dispatched by his employer (say) to Paris, and was promised his "travelling expenses," the private contract would, I think, be so construed. I admit that the phrase might have been made more specific, but if the English Judges were right in holding (as I think they were) that a particular head of expense need not come *verbatim et literatim* within the schedule, provided it be, in a reasonable sense, of the kind there mentioned, it is of no consequence that hotel bills, or personal expenses, or expenses of maintenance, are not specifically mentioned.

Nor do I think it enough to deprive the phrase "travelling expenses" of its generic meaning, that the maximum rate is fixed by reference to the distance travelled. It is easy, no doubt, to deride the notion of paying for food at so much a mile. But locomotion is the primary item in travelling expenses, and the distance a man travels may very well be taken as a rough but not inappropriate test of the total cost of his journey, both for conveyance and maintenance. This consideration receives weight from the fact that the mileage rate is obviously fixed without reference to any particular mode of locomotion. It is too little for posting; it is a great deal too much for any kind of public conveyance.

The alternative view is that Parliament intended, either that the returning officer should bear these charges himself, or that he should succeed in finding presiding officers and clerks willing to pay them out of their own pockets. I cannot readily believe that Parliament intended either of these things. It was suggested in argument that hotel bills might fairly be met by these officers out of the additional fee of one guinea, and ten shillings respectively allowed for each night they are absent from home. But this is in effect to say that a man is to get no more for two days' work than for one. The normal fee of £3, 3s. in the case of the presiding officer, and £1, 1s. in the case of the clerk, is allowed by the schedule as the appropriate remuneration for one day's work done at the man's own door. If he is taken away from home, and has to spend two days on public duty, he is not extravagantly paid by getting in all £4, 4s., or £1, 11s., as the case may be, without having to bear charges which would go far to swallow up what is described as a "further fee." The "further fee," like the original fee, is, I am persuaded, intended, not as reimbursement for outlay, but as remuneration for time spent and services rendered.

I therefore agree with Lord M'Laren and Lord Kyllachy that the Auditor was wrong in taxing off these charges, and that they ought to be allowed.

With regard to the fee charged for the deputy returning officer acting as a presiding officer, I think the Auditor was right, because the deputy returning officer is the *alter ego* of the returning officer, and is subject to the same disabilities. In saying this I do not wish to be held as implying that in this particular case (which was a bye-election) it was competent to appoint a deputy returning officer at all. That is a point which, although mooted

No. 38. in argument, does not arise for decision, and I desire to reserve my opinion upon it.

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LORD ADAM.—My opinion differs from that of your Lordships, and, as that is so, I desire to state shortly the reasons which have brought me to that result. It is agreed on all hands that, unless the expression "travelling expenses" in the schedule to the Act of Parliament includes hotel expenses, hotel expenses cannot come under any other category of expenses allowed by the statute. I agree with Lord M'Laren that if the expression "travelling expenses" had been unqualified by any other words, incidental expenses, such as expenses on the way, and hotel expenses at the end of the journey, might well have been included under such a general expression. But when I read that travelling expenses are to be calculated at so much per mile, I find it so extremely difficult to see how travelling expenses calculated at a rate per mile can refer to hotel bills that I cannot agree with your Lordships. Such a rate refers my mind directly to the road, and it appears to me to be impossible to come to any other conclusion than that travelling expenses, which are to be calculated at so much per mile, mean travelling expenses proper, namely, the expenses of locomotion only. I cannot suppose that it was intended that hotel bills should or should not be chargeable according to the greater or less expense incurred in actual locomotion. Lord Kyllachy referred to the case of remote counties, where travelling facilities were few, and the polling places distant from any rails.

Now, it will be observed that the fund assumed to be provided, or available for payment of these hotel expenses, &c., is the difference between the actual amount paid for locomotion and the maximum amount of 1s. a mile allowed by the Act; so that if the journey is made by rail, say at 3d. a mile, there would be a surplus over for payment of these expenses. If, however, the journey is made by road, there would be no surplus at all, for the maximum sum allowed for travelling, 1s. a mile, would presumably be exhausted in paying the actual expenses of locomotion—posting, &c. The result is that there would be nothing left to pay these expenses in the cases where presumably they would be most frequently and necessarily incurred. I think the matter is provided for by another clause of the schedule, by which a guinea and ten shillings are allowed in the case of presiding officers and their clerks respectively for each night necessarily absent in connection with their duties.

I think the Legislature intended that they should get three guineas and one guinea for their labours on the polling day, one guinea or ten shillings for each night necessarily absent, and their actual travelling expenses of locomotion, and nothing more. I am therefore of opinion that the decision of the Auditor should be upheld.

On the other question I concur with your Lordships.

THEIR LORDSHIPS pronounced the following interlocutor:—"Sustain the objection to the Auditor having taxed off the said account the sum of £90, 17s. 5d. sterling, representing charges of presiding officers and their clerks for hotel bills and other personal expenses, and allow said charges: Repel the objection to the Auditor having taxed off said account the sum of

£3, 3s. sterling, the amount of the fee charged by Mr Duncan Shaw, W.S., deputy returning officer, for acting as presiding officer at Inverness on the polling day: Disallow said last mentioned charge, and decern: Find the returning officer objector entitled to expenses," &c. No. 38. Nov. 21, 1895. Ivory v. Macrae.

J. & A. PEDDIE & IVORY, W.S.—JOHN PITKEATHLY, L.A.—Agents.

JOHN H. DOUGLAS & COMPANY, Pursuers (Reclaimers).—*Dickson—Aitken.*
MRS ELIZABETH MILNE, Defender (Respondent).—*Salvesen—W. Thomson.*

No. 39. Nov. 21, 1895.* Douglas & Co. v. Milne.

Sale—Warranty—Sale of goods for specific purpose—Implied condition of fitness for purpose not superseded by express warranty.—Where goods are sold for a specific purpose, the implied condition that the goods must be fit for that purpose is not superseded by an express warranty which is not inconsistent with it.

A wood-merchant accepted an order from a fish-curer for a quantity of staves. The contract bore that the staves were to be of certain dimensions, and "of good, sound, bright, dry, merchantable quality," but was silent as to the purpose for which they were required. The merchant, however, knew that they had been ordered for making herring pickle barrels. A quantity of staves of the description expressed in the contract, but made of wood too porous for retaining pickle, and therefore unfit for making the barrels, having been tendered to the fish-curer, *held* that he was entitled to reject them.

1st DIVISION. Lord Low.

ON 1st August 1893 James Milne, fish-curer in Aberdeen, sent an order in the following terms to Messrs John H. Douglas & Company, wood-merchants, London:—"Please ship to me soonest possible this season 40,000 superficial feet of 31 in. by $\frac{5}{8}$ in. white wood fir (spruce) staves, and 7000 superficial feet 36 in. by $\frac{3}{4}$ in. heading, at 52s. 6d. per 1000 superficial feet for the staves, and 57s. 6d. per 1000 superficial feet for the headings, c.i.f. Aberdeen. The staves and headings to be of good, sound, bright, dry, merchantable quality, and the measurement and my selection, if necessary, at Aberdeen to be made by Customs bill of entry measurer, the buyer and the sellers paying the measuring charge equally between them. Terms, nett cash on delivery."

The order was accepted by Messrs Douglas & Company, by a letter dated 10th August 1893, and a month later they sent to Aberdeen a cargo consisting partly of staves and headings of the dimensions ordered.

Milne refused to accept the goods, on the ground that they were not conform to contract.

Douglas & Company then raised an action against Milne for payment of the price of the goods. Milne having died while the action was pending, Mrs Elizabeth Milne, his widow and executrix, was sisted as defender in his place.

The defender stated that "the staves and headings were sold to the defender for the express purpose of being used in the manufacture of herring pickle barrels. At all events the pursuers were made aware of the purpose for which the goods were required by the defender, and it was a condition of the sale that the said goods should be rea-

* Decided Nov. 13, 1895.

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sonably fit for such purpose. This they were not." Such staves "require to be made of wood which will not allow the pickle to percolate through it. The pursuers knew this." Two barrels which the defender constructed to test the wood "were quite useless, as the water percolated through them."

The defender pleaded;—(1) The goods being disconform to contract and unsuitable for the purpose for which they were sold, and the defender having timeously rejected the same, he should be assoilzied, with expenses.

The Lord Ordinary (Low) allowed a proof, the result of which, for the purposes of this report, sufficiently appears from his Lordship's opinion.

On 31st May 1895 the Lord Ordinary sustained the first plea in law for the defender, and assoilzied her from the conclusions of the action.*

The pursuers reclaimed, and argued;—There was a written contract here. There was no mention in it of the particular purpose for which the wood was required, and it contained no warranty that the wood was fitted for making herring pickle barrels. The defender was not entitled to go outside the terms of the writing and import into the contract a condition that was not expressed.[1] An express warranty could not be extended by implication.[2] It might be admitted that the staves, &c., were intended for barrels, but there were many kinds of barrels, and for making some of these the wood supplied was well adapted. The goods therefore were "merchantable according to the denomination of the commodity."[3] The Lord Ordinary was wrong on the facts.

Argued for the respondent;—The Lord Ordinary was right on the facts. The pursuers knew perfectly well for what purpose the wood was required. The express warranty must be read with reference to

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* "OPINION.— . . . The defence is that the staves and headings were not good and merchantable, in respect that they were made of porous wood, and could not be made into barrels capable of retaining pickle.

"It is plain upon the face of the letters that the goods ordered were materials—staves and headings—for the construction of barrels. It is also proved that staves and headings of white fir wood, of the dimensions specified in the letters, are used for the purpose of making barrels for pickled fish, and for no other purpose. That is the known and ordinary purpose for which such staves and headings are used, and there is no doubt that the pursuers knew perfectly well that that was the purpose for which the defenders ordered them.

"In these circumstances, I am of opinion that the condition that the staves and headings should be good and merchantable meant that they should be good and merchantable for the purpose of making pickle barrels. Indeed, if that condition had not been expressed in the contract, I think that it would have been implied, because the goods were ordered by the purchaser without sample or previous inspection, and the construction of pickle barrels was the purpose for which such goods were ordinarily used.

"The question therefore seems to me to resolve into one of fact, namely, whether the staves and headings were good and merchantable for the purpose of pickle barrels?

"In my opinion, that question must be answered in the negative. . . ."

[1] Hutchison & Co. v. Henry and Corrie, Nov. 26, 1867, 6 Macph. 57, 40 Scot. Jur. 36; Christie v. Hunter, March 16, 1880, 7 R. 729, at p. 730.

[2] Dickson v. Zizinia, Jan. 18, 1851, 20 L. J. C. P. 73; Benjamin on Sales, 663, 607.

[3] Bell's Prin. sec. 98; Gardiner v. Gray, March 6, 1815, 4 Camp. 144.

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that purpose, and amounted therefore to a warranty that the wood was fit for making herring pickle barrels. In any view, that it was so fit was an implied condition of the contract, and there being nothing inconsistent between the implied condition and the express warranty, the latter did not supersede and exclude the former.[1]

At advising,—

LORD KINNEAR.—(After stating that he agreed with the Lord Ordinary in his view of the evidence)—The question therefore comes to be—the main question which was argued—whether the defence is well founded in law. Assuming the facts to be as I have stated, I do not understand it to be disputed that when goods are ordered for a particular and specific purpose it is an implied condition, according to the law of Scotland, that the goods furnished must be fit for that purpose. But then it was said that when the parties had expressly contracted as to the nature and quality of the goods to be sold, the law will not imply any additional condition which they have not expressed; and the case of *Dickson* v. *Zizinia*[2] was cited in support of that doctrine. That case appears to me to be inapplicable. The contract was for the purchase of a specific cargo of corn actually shipped at the time on board a certain vessel by the plaintiff; but by the law of England, as explained in the judgment, there is no implied warrant in the sale of a particular chattel. Therefore if there were any warranty it must be found not in the general implication of law but in the contract itself; and the question therefore was not whether a warranty was implied by law, but whether an express warranty that the corn was good and merchantable at the time of shipment could be extended by implication from other parts of the contract to mean that it was in good and merchantable condition for a foreign voyage. The Court held that that stipulation could not be extended beyond the language employed; but that was a decision on the construction of a particular contract, and it seems to me to have no bearing upon the question in dispute. The cases of *Cooper & Aves*[1] and *Bigge*[3] are more in point. The result of these decisions is that when goods are ordered for a particular purpose the implied condition that the goods to be furnished must be fit for that purpose will not be excluded by any express warranty or condition which is capable of standing along with it. In the contract now in question there is no stipulation in the slightest degree inconsistent with the condition that the staves to be supplied shall be fit for herring barrels; and therefore it appears to me that on the principles explained in the case of *Cooper & Aves*[1] and the other English case to which I have referred, it must be held that, inasmuch as the goods were ordered for the specified and particular purpose of making herring barrels, the law super-adds to the express condition that they are to be of good, sound, bright, dry, merchantable quality the other implied condition that they are to be fit for the specified purpose.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—J. DOUGLAS GARDINER & MILL, S.S.C.—Agents.

[1] Jones v. Just, 1868, L. R., 3 Q. B. 197; Cooper & Aves v. Clydesdale Shipping Co., March 19, 1863, 1 Macph. 677, 35 Scot. Jur. 383.
[2] 20 L. J. C. P. 73.
[3] 31 L. J. Exch. p. 301.

No. 40.

Nov. 22, 1895.
County Council of Renfrew v. Trustees for Orphan Homes of Scotland.

THE COUNTY COUNCIL OF RENFREW, First Parties.—*D. Dundas—R. E. M. Smith—R. S. Brown.*
ROBERT BINNIE AND OTHERS (Trustees for the Orphan Homes of Scotland for Destitute Children), Second Parties.—*Balfour—Clyde.*

Process—Special Case—Competency—Absence of Lis.—Held that a special case which was brought for the purpose of ascertaining the true construction of an Act of Parliament, but which disclosed no controversy between the parties, was incompetent.

1st DIVISION. THIS was a special case presented by the County Council of Renfrewshire, as parties of the first part, and Robert Binnie and others, trustees of the Orphan Homes of Scotland for Destitute Children, as parties of the second part.

The statements in the case were to the following effect:—The second parties were heritably vested as trustees in subjects in the parish of Kilmalcolm, known as "The Orphan Homes of Scotland for Destitute Children," and these subjects were entered in the Valuation-roll for the county of Renfrew as occupied by "trustees for managers and children." The trustees were accordingly assessed by the County Council for consolidated rates in respect both of ownership and occupancy for the year from 15th May 1894 to 15th May 1895. Mr Quarrier (the manager of the orphanage), as representing the second parties, appealed against this assessment.

The Rates Appeal Committee of the County Council held that the term "Ragged School" used in the Sunday and Ragged Schools (Exemption from Rating) Act, 1869* (32 and 33 Vict. cap. 40), applied to the orphanage, and accordingly they discharged the occupiers' rates on the orphanage, but refused the appeal as regarded the proprietors' rates.

Mr Quarrier appealed to the County Council, and maintained that the Act gave power to the County Council to exempt the trustees as owners as well as occupiers from payment of rates.

"The County Council could not accept the interpretation put upon the Act of 1869 by Mr Quarrier, and a motion was proposed that the appeal be refused, to which an amendment was proposed and carried that a 'special case be submitted to the Court of Session by the council and the appellant in order to ascertain the extent, if any, to which the council have power to relieve the property referred to of assessments, and that after the decision of the Court has been got, the appeal be dealt with by the council, and relief given to that extent.' Mr Quarrier stated that he acquiesced in this course."

The present special case was accordingly presented.

It is not necessary to quote the questions originally stated in the case, as the parties stated at the outset of the discussion that they proposed to substitute the following:—"(1) Are the subjects assessed a Sunday school and a ragged school, or a Sunday school, or a ragged school, within the meaning of the Act 32 and 33 Vict. cap. 40? (2) If so, have the first parties as a rating authority power in virtue of said Act to relieve

* Section 1 provides,—"From and after the 30th day of September 1869 every authority having power to impose or levy any rate upon the occupier of any building, or part of a building, used exclusively as a Sunday School or Ragged School, may exempt such building, or part of a building, from any rate for any purpose whatever which such authority has power to impose or levy. . . ."

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the said subjects or any part of them—(*a*) from the consolidated rates levied in respect of the ownership of the subjects; (*b*) from the consolidated rates levied in respect of the occupancy of the subjects?"

The case contained no statement of opposing contentions.

In support of the competency of the case if thus amended the parties argued;—A special case was competent wherever the parties were agreed upon the facts, and there was a question of law which might be raised by a declarator. The present case was equivalent to a declarator at the instance of the second parties, that (1) the subjects in question fell within the definition of ragged school in the Act of 1869; (2) that the County Council had power to exempt under the Act; and (3) that they were bound to consider Mr Quarrier's appeal. Such a declarator was competent.[1] The present case was practically an action to declare the meaning of the Sunday and Ragged Schools (Exemption from Rating) Act, 1869. Such a declarator was competent whenever there was a subject in dispute, and parties who had an interest to raise the question.[2] These conditions were satisfied here. If the County Council assessed Mr Quarrier, he might bring the assessment under review by a suspension of a charge for payment or a reduction, and he was therefore entitled to have his liability determined *ab ante* in the present proceedings.

LORD PRESIDENT.—The shape of the special case as it stands in type was such that it was announced at the outset that the parties proposed to substitute certain queries for those which are in the original case. We have before us this proposed amendment, and we have to consider whether it renders the case one which we can entertain. The first question is, "Are the subjects assessed a ragged school and a Sunday school, or a ragged school, or a Sunday school, within the meaning of the Act of 1869?" Now upon that query, the first question is, Who are the disputants? There are none; because, instead of dispute, there is practical agreement. The County Council have not on this question joined issue with Mr Quarrier, and they contend—and the special case defines their contention and its grounds for our consideration—nothing which is negative of the first query. On the contrary, I think the fair reading of their case is, that their desire is that that question should be affirmed. Now, it will not do for this Court, in questions of assessments, to give an answer to a query where there is no dispute, and no parties who take opposite views. Therefore I think that that question will not do. Then, as Lord Adam has pointed out, the second question is entirely dependent upon our answering the first in the affirmative. For it begins, "If so," &c. That seems to form a short and conclusive objection to our entertaining this second query. But I must go on to observe that I do not think the parties here have arrived at any stage at which there is such a *lis* or controversy that the Court is entitled to step in. If the County Council had disposed of Mr Quarrier's appeal in a way adverse to him, I can understand his challenging the legality of their decision in this form, or in a declarator. If it appeared, for instance, that the County Council had re-

[1] Edinburgh and Glasgow Railway Company v. Meek, Nov. 21, 1849, 12 D. 153, opinion of Lord Fullerton at p. 158, 22 Scot. Jur. 17.

[2] Leith Police Commissioners v. Campbell, Dec. 21, 1866, 5 Macph. 247, opinion of Lord Justice-Clerk at p. 251, 39 Scot. Jur. 100; Hogg v. Parochial Board of Auchtermuchty, June 22, 1880, 7 R. 986.

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fused to consider some question on which a right to exemption depended, it is not too bold to say that the remedy might have been found. But they have not done so; and for aught that appears, they might exempt Mr Quarrier.

LORD ADAM.—I agree with what has been said. No doubt a special case is a very valuable and quick and cheap mode of getting the opinion of the Court on matters appropriate for decision in that way. But it appears to me that in this case the form of a special case has been used where there is no dispute between the parties. About the first question there is no controversy. Mr Quarrier maintains that this orphanage is a ragged school, and it is set forth in the case that the County Council admit that it is a ragged school. There is accordingly no proper *lis* or case which can be brought before the Court in the shape of a special case. Then look at the other question. One would naturally suppose that the County Council would be the parties to maintain that they had the power of exemption. It is not likely that a board of any sort would be willing to deny that they had a right to exercise a certain discretion; yet here it is Mr Quarrier who wants to insist that his opponents have it, and his opponents, as I understand, are supposed to say that they have not got it. I do not think the question is a proper one for the judgment of the Court. Supposing we did decide these questions, our judgment might come to nothing if the County Council chose to say "We will exercise our discretion."

LORD KINNEAR.—I am of the same opinion. I do not say that it would not be possible to obtain a judgment upon some of the questions indicated by Mr Clyde in the course of his argument as being those questions upon which the judgment of the Court is desired, and I do not say that it would be impossible to obtain those judgments in the form of a special case. But I agree with your Lordships that this case cannot be entertained, because it discloses no controversy between the parties. Neither in its form nor in its substance does it appear to me to raise any question on which the parties are opposed. The proper mode of stating a special case is, to set out in the first place an articulate statement of the facts on which the parties are agreed, and then to set out, as clearly and articulately, the opposing pleas of the parties. Here we have no opposing contentions. We may gather that different views of the statute may be maintained, but we have no statement of opposing pleas by the parties to the case. I therefore agree with your Lordships that this case as it now stands cannot be entertained.

LORD M'LAREN was absent.

THE COURT refused the motion for leave to amend, and dismissed the case.

F. J. MARTIN, W.S.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

No. 41.

Nov. 22, 1895. Wordie's Trustees v. County Council of Lanarkshire.

JOHN WORDIE AND OTHERS (William Wordie's Trustees) AND OTHERS, Pursuers (Reclaimers).—*Johnston—A. S. D. Thomson.*
THE COUNTY COUNCIL OF LANARKSHIRE, Defenders (Respondents).—*C. J. Guthrie—Cullen.*

Public Health—Special water supply—Agreement between Local Authorities—Assessment—Ultra vires.—A Parochial Board, as the Local Authority

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for the parish under the Public Health Act, 1867, having formed a Special Water Supply District, entered into an agreement with the Police Commissioners of a neighbouring burgh, whereby, in consideration of obtaining a supply of water for the Special Water District, the Parochial Board agreed to assess the inhabitants of the Special Water District at the same rate as the inhabitants of the burgh were assessed, and to pay over the proceeds to the Commissioners. *Held* that the agreement prescribed a mode of assessment for the Special Water District which was not in accordance with the statutory powers of the Local Authority imposing the assessment, and that, in so far as it did so, it was invalid.

1ST DIVISION. Lord Kincairney.

IN May 1875 the Parochial Board of the parish of Cadder, as Local Authority for the parish under the Public Health Act, 1867, entered into an agreement with the Police Commissioners of the burgh of Kirkintilloch, as the Local Authority for the burgh, whereby the latter (the first parties) agreed to supply water to a Special Water Supply District in the parish of Cadder, and the Parochial Board of Cadder, as Local Authority (the second parties) agreed, so long as the agreement subsisted, to "assess and levy from the inhabitants of the said Special Water Supply District upon the rental of property within the said district as appearing from the Valuation-roll aforesaid an equal rate of assessment with the rate of assessment levied by the first parties (*i.e.*, the Commissioners), and their successors for the same year on the inhabitants within the burgh of Kirkintilloch, and the second parties shall pay over to the first parties the amount of each year's said levy on the 10th day of January in each year, less charges of collection and assessments irrecoverable."

In 1883 it was determined by an arbiter that under this agreement woodland and land used for agriculture within the special district fell to be assessed at one-fourth of the annual value, that being the statutory mode of assessment for like subjects within the burgh.

In 1887 the Parochial Board of Cadder entered into a similar agreement with the Police Commissioners for the drainage of a Special Drainage District of the parish, and for the assessment of the inhabitants of the drainage district at the same rate as the inhabitants of the burgh.

In 1889 the powers and duties of the Parochial Board of Cadder, as Local Authority under the Public Health Acts, were transferred by the Local Government Act, 1889, to the County Council of Lanark.

In levying assessments for the year 1894-95 upon the inhabitants of the above-mentioned Special Water Supply and Special Drainage District the County Council assessed the woodland and agricultural land within the special districts upon their gross valuation, under deduction of 10 per cent.

John Wordie and others, trustees of the deceased William Wordie of Millersneuk, as proprietors of that estate, which was included in the Special Water Supply District, objected to this mode of assessment, and brought the present action against the County Council to have it declared that the foresaid agreements and decree-arbitral were binding upon the defenders, and that so long as the agreements above mentioned subsisted, the defenders, in assessing for the purposes of water and drainage within the Special Water and Drainage Districts, were only entitled to assess woodland and agricultural land belonging to the pursuers upon the nearest aggregate sum of pounds sterling to one-fourth of their annual value as entered in the Valuation-roll.

The Police Commissioners of Kirkintilloch were not called as defenders.

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The defenders pleaded, *inter alia*;—(1) No title or interest to sue. (2) All parties not called. (4) On a sound construction of the agreements and decree-arbitral, they do not bear the meaning contended for by the pursuers, and the defenders should be assoilzied. (5) *Separatim*, on the assumption that the agreements and decree-arbitral have the meaning and effect attributed to them by the pursuers, they are in contravention of the Public Health Acts and the Local Government (Scotland) Act, 1889, and *ultra vires* of the predecessors of the defenders, who are not bound thereby, and should be assoilzied.

On 6th July 1895 the Lord Ordinary (Kincairney) sustained the first and second pleas in law for the defenders, and in respect thereof, dismissed the action.

The pursuers reclaimed, and argued;—The decree-arbitral was decisive on the meaning of the agreements, and the defenders, as the successors of the Parochial Board, were bound by the agreements as so construed. The pursuers, as interested parties, had a title to sue.

Argued for the defenders;—The pursuers not being parties to the agreements had no title to sue for their enforcement. Further, they were mistaken in their interpretation of the agreements, which merely bound the Local Authority to pay to the Commissioners of the burgh a contribution of a certain amount. Assuming that the pursuers rightly construed the agreements, they were *ultra vires* of the Local Authority, and therefore not binding on the defenders, as no Local Authority could levy assessments except in accordance with its statutory powers.

Lord President.—This action is clearly unmaintainable, but I think that the true objection to it is founded upon a broader ground than that stated by the Lord Ordinary.

The action in substance, and indeed in expression, is an application to the Court to have it declared that the County Council is bound to levy the assessments in a manner for which there is no statutory warrant. The pursuers are ratepayers, and are bound to pay only such assessments as the assessing body has a right to impose. Now they say that the predecessors of the County Council, the Parochial Board, agreed with the Police Commissioners of the burgh of Kirkintilloch, that the latter should let them have a supply of water for their Special Water Supply District; so far the proceeding was quite regular and proper, but they go on to say that the agreement prescribes as a consideration for the supply that the Parochial Board should not pay a contribution to the Police Commissioners, but should assess the inhabitants of the Special Water Supply District in the same manner as the people in the burgh are assessed by the Police Commissioners. No doubt it is competent for the Local Authority to enter into an arrangement by which they should get a supply of water and pay for it, and they may fix the amount to be paid by any standard of calculation which they choose to imagine, but their contribution, whatever it is, must be raised in a manner allowed by their own assessing powers. It would be competent for them to stipulate that they should pay either a lump sum or a proportion of the total liability, provided that the Local Authority raise the funds according to their statutory powers. But what never can be done is that the assessing body should acquire right to levy assessments otherwise than is allowed by statute, and therefore the agreement, so far as it pre-

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scribes a non-statutory mode of assessment, is entirely invalid. Accordingly, the County Council have no course open to them but to disregard the agreement, and to satisfy what they are bound to pay by levying assessments in the only lawful way. On that ground I think that the defenders are entitled to absolvitor, but I am not satisfied that the pursuers would have no title to sue on the agreement on the assumption that it was a lawful agreement. I think if the agreement had merely regulated the amount of contribution, and the assessments had been in excess of this, it would be by no means clear that the pursuers could not found upon it. But this is to imagine a different case from what we have here.

LORD ADAM.—I agree. I think your Lordship has put the case upon the right grounds.

LORD KINNEAR.—I entirely agree with all that your Lordship has said, and have nothing to add, except that, if the agreement could be construed as meaning that the Parochial Board should be bound to contribute towards the expense of the special water supply a sum not exceeding the amount which would be raised by an assessment on one-fourth of the value of lands, then I do not say that effect could not be given to it. But I quite agree with your Lordship that that is not the meaning of the agreement. It is not an undertaking to contribute a sum, but to levy an assessment.

LORD M'LAREN was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

MARCUS J. BROWN, S.S.C.—BRUCE & KERR, W.S.—Agents.

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Nov. 23, 1895.
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JAMES HOOD AND ANOTHER, Petitioners.—*Shaw—Ure—Dewar.*
JOHN EDWARD GORDON, Respondent.—*Dickson—C. N. Johnston—Wilson.*
THE LORD ADVOCATE.—*Ferguson, A.-D.*

Election Law—Petition against return of Member—Bribery—Treating—Illegal practices—Statement of particulars—Specification.—In an election petition *held* that in the "statement of particulars" provided by rule 1 of the Additional Parliamentary Election Petition Rules, 1869, (1) with reference to allegations of bribery and treating, it was necessary to set forth the places where the alleged acts were committed, and the form in which the bribery was effected; (2) with reference to allegations of illegal payments made by political associations or clubs, it was necessary to state the individuals through whom the alleged payments were made, and the particular items complained of.

Election Law—Jurisdiction—Diligence for recovery of documents—Citation of witnesses and havers—Parliamentary Elections Act, 1868 (31 *and* 32 *Vict. c.* 125), *secs.* 2, 26, *and* 58.—*Held* that the Judges in an election petition have no jurisdiction to grant a diligence for recovery of documents prior to the trial, but may grant warrant to cite witnesses and havers in common form.

Observations on *Moore* v. *Kennard*, 1883, L. R., 10 Q. B. D. 290.

(SEE previous report, *supra*, p. 4.)

ELECTION JUDGES.
Lord M'Laren.
Ld. Kyllachy.

On 19th October the petitioners lodged an amended petition, and on that date the Election Judges pronounced the following interlocutor:—"Appoint the trial of said petition to be proceeded with within the Court-House at Elgin, upon Tuesday the 19th day of No-

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vember 1895, at ten o'clock, and ordain the petitioners, not later than three weeks before the said date of the trial, to lodge with the Principal Clerk of the First Division of the Court of Session, and serve upon the respondent, at the office of his agent in Edinburgh, a written statement setting forth the particular acts of bribery, treating, undue influence, and corrupt and illegal practices as to which they purpose to lead evidence at the trial." *

In the statement of particulars prepared by the petitioners in terms of the above interlocutor, they set forth in articles I. and II. twenty-seven cases of bribery and twenty-four cases of treating. In regard to these charges, they set forth the names of the persons said to have been bribed or treated, their numbers on the roll of electors, and the persons by whom the alleged acts of bribery or treating were committed. As regarded the charges of bribery, the month only was specified, in some cases a latitude of from two to three months being taken. As regarded the charges of treating, in nine of the alleged cases the day of treating was specified, while in the remaining fifteen cases the month only was stated.

In regard to the alleged illegal and corrupt practices the petitioners set forth,—"(III.) . . . In or about the month of February 1894 the said John E. Gordon announced, and it became publicly known, that he intended to present himself for election, and in point of fact the candidature of the said John E. Gordon then began. In the months of February, March, April, and May 1894, he held meetings in forty or fifty different places throughout the constituency, engaged in a house-to-house canvass, and performed other election work, all with a view to his election and return. And subsequent thereto he also performed such work. In respect of all such expenses and work sums of money were paid and disbursed by him and others on his behalf, including the said John Wink † and the said John Foster, and the societies and others mentioned in subsection 2 hereof, in respect of the conduct and management of the election, which expenses are not included in said return. And your petitioners intend to prove that the said John E. Gordon and his said agent well knew that all such expenses ought to have been included in said return, yet they knowingly and illegally failed so to include it. And further, your petitioners intend to prove that sums of money not included in said

* The Additional Parliamentary Election Petition Rules of 1869 provided,—Rule 1. "Evidence need not be stated in the petition, but the Court, or either of the Election Judges, may, on the requisition of the respondent, order the petitioner, within such period previous to the day fixed for the trial of the petition as may in the circumstances be deemed right, to lodge with the principal clerk, and to serve on the respondent or his agent, in the manner prescribed with regard to election petitions, a written statement of such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial."

Rule 2. "No evidence shall be received at the trial except as to matters within the written statement ordered as aforesaid, and tending to support the same, or matters which have been already sufficiently set forth in the petition, without the leave of the Court or the Judge, and upon such conditions as to the postponement of the trial, payment of costs, and otherwise, as may be ordered."

† Mr Wink afterwards became Mr Gordon's election agent, and Mr Foster was the organising secretary of the associations referred to in numbers (6) and (7) of the list referred to on p. 173, *post*.

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return were paid to agents, and organisers, and canvassers, by the said John E. Gordon, or by others in respect of the conduct and management of said election, with the knowledge and concurrence of the said John Edward Gordon, and of his said election agent. And the said agents, and organisers, and canvassers disbursed said sums of money for the purpose of conducting and managing said election. The petitioners believe and aver that the sum so expended amounted to not less than £700.

"(Second) That the following societies, clubs, or associations were the agents of the respondent in said election, and were recognised by him as agents:— . . . 6. The Elgin and Nairn Conservative Association, whose offices are in Elgin, and whose secretary and treasurer is John Wink, solicitor, Elgin, and the district committees connected therewith. 7. The Elgin and Nairn Liberal Unionist Association, whose offices are in Elgin, and whose secretary and treasurer is Hugh Stewart, solicitor, Elgin, and the district committees connected therewith. . . .

"The said associations mentioned in the foregoing list, and numbered 6, 7 . . . hereof, had numerous meetings during the course of said candidature, namely, from January 1894 till the date of the election, with reference to and for the purpose of promoting said candidature.

"That the said nine societies, clubs, or associations, from January 1894 until subsequent to said election, incurred expenses and expended money in conducting and managing said election, supplied literature, appointed agents and canvassers, and performed other work with the knowledge of the respondent and the said John Wink, and in the promotion of his candidature—they acting as his agents in said matters."

To this statement the respondent lodged, upon 31st October, a note of objections, in which he objected that the statement of particulars did not (*a*) as regarded the alleged cases of bribery sufficiently specify the dates, places, nature, and amount of the said several alleged bribes; and (*b*) as regarded the alleged cases of treating did not sufficiently specify the dates, places, or the nature and character of the alleged treating. As regarded the third article of the statement he objected "that there is no relevant averment under the third head of the statement of particulars; and further, that there is no sufficient specification as to the place or places, the time or times, or the details of the alleged payments, disbursements, or liabilities, and no sufficient specification of the persons, societies, clubs, or associations concerned in the matters complained of, or by whom the said disbursements, payments, and liabilities were made or incurred."

Argued for the respondent;—As the charges of bribery and treating were of the nature of crimes, both the *locus* and the *modus* must be stated. In the case of bribery it was essential that the *modus* should be stated, in order that the respondent might have notice of the particular form of bribery alleged.[1] The latitude as to time was too great.[2] As regarded the statements in article III. the names of the individuals who made the payments, and not merely the names

[1] Eastern Division of Manchester Case, 1892, 4 O'Malley and Hardcastle, p. 120; Rogers on Elections, vol. ii. p. 200; Day's Election Cases, p. 153; Rogers on Elections, Appendix 4, Forms 38 and 39, pp. 655 and 656; Corrupt Practices Prevention Act, 1854 (17 and 18 Vict. c. 102), secs. 2 and 4.

[2] Eastern Division of Manchester Case, 1892, 4 O'Malley and Hardcastle, p. 120, *per* J. Cave, p. 121; Day's Election Cases, p. 154.

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of the associations, must be specified.[1] It was also necessary to state the nature of the expenditure complained of, what was paid in cash, the persons to whom and by whom the payment was made, and the place and date of each payment. The private transactions of political associations could not be inquired into, and so far as the statement contained averments relating to such associations it was irrelevant. On all the points contended for the practice in England was in favour of the respondents; and even assuming there was a difference between the English and Scots practice, which was not admitted, the English practice was to be preferred, in respect that there was more experience in England of the practice in the House of Commons' committees prior to the transference of election petitions to legal tribunals. The practice before the committees was to be followed where there were no special rules of Court.[2]

Argued for the petitioners;—The Scots practice was in accordance with the course followed by the petitioners.[3] The form of order in England[4] was different from that in the interlocutor of 19th October, and the particulars stated by the petitioner sufficiently complied with that interlocutor. As regarded article III., the petitioners were prepared to give the dates and places of the meetings which they alleged were paid for by the associations, but it was impossible for the petitioners to ascertain the names of the individuals who made the payments, and it was not reasonable to require them to do this.

LORD M'LAREN.—As regards the statements in articles I. and II. dealing with the charges of bribery and treating, I am of opinion that there is insufficient specification. The statement of particulars ought to specify the places where the alleged acts of bribery and treating were committed, and in the case of bribery, the form in which the bribery was effected. It does not appear that in any of the cases in Scotland cited to us this question was argued to the Court or judicially determined. In England the practice is in accordance with the ruling I have indicated. If the petitioners are not aware of these particulars, and are unable to specify them, that ought to appear in the statement.

The petitioners have indicated their intention to amend the statements in articles I. and II. to this effect, and I propose that we should allow such amendments to be made. As regards article III., dealing with illegal payments, or payments not included in the return of expenses, I think the respondent's objection ought to be sustained. There are no relevant averments in that article upon which the petitioners would, in my opinion, be entitled to an allowance of proof. It is not enough to say that political associations or clubs made payments in contravention of the statute. There must be specific averments as to the individuals through whom the alleged payments were made, and the particular items of which the petitioners complain.

LORD KYLLACHY concurred.

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[1] Hexham Case, referred to on p. 14 of Day's Election Cases; Rochester Case, referred to *ibidem*, pp. 98 and 104.

[2] Parliamentary Elections Act, 1868 (31 and 32 Vict. c. 124), sec. 26.

[3] Boyd and O'Kane v. Stewart (Wigtown Burghs Case), July 13, 1880, 7 R. 1170; Juridical Styles, vol. iii. p. 855.

[4] Rogers on Elections, vol. ii. p. 200.

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On 2d November the Court pronounced this interlocutor:—"Having considered the amended petition, together with the statement of particulars and the note of objections thereto for the respondents, and heard counsel for the parties thereon, sustain the respondent's objection to the third head of the said statement of particulars, reserving to the petitioners to put in a new statement under this head: Also allow the petitioners to amend the other articles of the statement of particulars, such amendments to be lodged by Wednesday next."

Along with their original statement of particulars the petitioners lodged a specification of writings for the recovery of which they craved a diligence. The respondent objected, on the ground that it was incompetent for the Election Judges to grant the diligence.*

Argued for the petitioners;—A diligence for the recovery of documents was granted in the *Wigtown* case,[1] and also in the unreported *Dumbartonshire* case. In the latter, though no objection was taken on the particular ground of competency, the diligence was undoubtedly opposed. Section 26 of the Parliamentary Elections Act, 1868, if considered in connection with section 2, was intended to provide a rule for dealing with contingencies to which the ordinary procedure of the Court was inapplicable or inadequate. The English cases were not applicable, because there was no procedure in England analogous to the Scottish diligence.

Argued for the respondents;—It had been settled in England that the diligence craved here was incompetent.[2] The power of the Court to exercise its ordinary jurisdiction in the case of election petitions, conferred by section 2 of the Act of 1868, was "subject to the provisions of this Act," that is, subject, *inter alia*, to the provisions of section 26, which expressly provided that the procedure before the Parliamentary committees should be followed in the absence of a rule

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* The Parliamentary Elections Act, 1868 (31 and 32 Vict. c. 125), enacted, section 2,—"The expression 'the Court' shall, for the purposes of this Act, in its application to England, mean the Court of Common Pleas at Westminster, and in its application to Ireland, the Court of Common Pleas at Dublin, and such Court shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority with reference to an election petition, and the proceedings therein, as it would have if such petition were an ordinary cause within their jurisdiction."

Section 58.—"The provisions of this Act shall apply to Scotland, subject to the following modifications:—

"(1) The expression 'the Court' shall mean either Division of the Inner-House of the Court of Session, and either of such Divisions shall have the same powers, jurisdiction, and authority with reference to an election petition in Scotland, and the proceedings thereon, which by this Act are conferred on the Court of Common Pleas at Westminster with respect to election petitions in England."

Section 26.—"Until rules of Court have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed so far as may be by the Court and Judge in the case of election petitions under this Act."

[1] Boyd and O'Kane v. Stewart, July 13, 1880, 7 R. 1170.

[2] Moore v. Kennard, 1883, L. R., 10 Q. B. D. 290; Wells v. Wren, 1880, L. R., 5 C. P. D. 546.

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of Court dealing with the question. It was never the practice of Parliamentary committees to grant a diligence for the recovery of documents before the trial, and there was no special rule. There was no precedent in Scotland. In the *Dumbartonshire* case, in which a diligence was granted, the question of competency was not considered, but only questions relating to the particular articles of the specification. The petitioners' application was therefore incompetent, and should be refused.

LORD M'LAREN.—The debate to which we have listened raises a question of some general importance in election law, and which has not yet been decided in Scotland either by the Election Judges or by one of the Divisions of the Court. It is true that in the report of the *Wigtown Burghs* case[1] it is stated that a diligence to recover documents was granted, but there is nothing in the report which suggests that this was the subject of discussion. No opinions are reported, and it is stated in Mr Blair's Election Manual (p. 278) that in point of fact the question of the competency of granting a diligence was not raised. Then my colleague, Lord Kyllachy, states that it is within his knowledge of the *Dumbartonshire* case, where such an application was also granted, that the question of competency or of consistency with the past election law and practice was not raised.

Therefore it appears to me that the point is open so far as regards previous decisions of this Court. Now, at the time when these orders were pronounced the question seems to have been not very much considered either in Scotland or in England, and we find that in the *Stafford Election Petition* in 1869,[2] an order for the recovery of documents, of vouchers, and orders for payment by the respondent, was granted by a Judge of very high authority—Mr Justice Blackburn.

The question, however, was raised in England in the two cases that have been cited, and a very authoritative judgment was given in the case of *Moore* v. *Kennard*,[3] after consideration of all that had been done before, and of the policy of the statute under which the jurisdiction is exercised. The judgment of the Court in that case does not appear to proceed upon anything technical or peculiar to the practice of the English Courts. It is not because an English Common Law Court does not usually grant an order for recovery against parties other than the parties to the case, but because in the opinion of the Judges who decided the case the practice of Parliamentary Committees was entirely adverse to such a proceeding, and because, under the statute which guides the Courts, the law and practice of Parliament is referred to as a guide in all matters that are not regulated by the statute itself, or by the rules and orders made in pursuance of it.

Now, even if I had more difficulty than I have on this subject, I should consider that this case was an authority to be deferred to, because it is a judgment of a co-ordinate Court on a question of practice on the same statute, a statute which is intended to be worked in precisely the same way throughout the United Kingdom with reference to the pre-existing practice, which was the practice of Parliamentary committees sitting to try election

[1] Boyd and O'Kane v. Stewart, 7 R. 1170.
[2] 20 L. T. 237.
[3] L. R., 10 Q. B. D. 290.

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petitions both for Scotland and for England. But I do not entertain any doubt as to the soundness of that decision.

On the contrary, my view entirely coincides with what was expressed by the English Judges. I think it is not contemplated in the statutes constituting this Court that there should be any preliminary proceedings involving proof, but that the whole of the matters of fact, including documentary as well as parole evidence, are to be investigated at the trial. It is not to be overlooked that the probability is that such an investigation would not lead to any useful results, but I do not proceed on that, but rather on a more general view, that it was not intended that any such powers should be exercised. If it were necessary that a certain document should be on the table of the Court for consideration, I have no doubt whatever that we have jurisdiction to make an order; for example, in the case of the orders that are granted for recovery of ballot papers and counterfoils, not only in questions of enumeration but also for the purposes of scrutiny. That, of course, is a proceeding directed for a quite different purpose from the present, and my opinion is that the diligence moved for should be refused.

LORD KYLLACHY.—I am of the same opinion. We are here exercising statutory jurisdiction, that is to say, jurisdiction subject to the provisions of the Act of 1868. Now, one of the provisions of that Act is the provision contained in section 26, "that until rules of Court have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice, and rules on which Committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed, so far as may be, by the Court and Judge in the case of election petitions under this Act."

Now, that being so, two things are admitted—first, that according to the practice and rules of Parliamentary committees, the recovery of documents antecedent to the trial of the case was not permitted; second, that that being the rule of Parliament, no rules of Court have yet been made conferring upon Election Judges such a power. Whether it would be a convenient power—whether it would be a power that could be properly exercised consistently with the scheme of the Act of 1868 and of the Corrupt Practices Act—I do not find it necessary to say; but no such rule has yet been made. That is enough. I therefore on principle entirely agree with the views expressed by the English Judges in the cases which have been quoted, and I also agree with your Lordship that even if we had doubts on the subject we should hesitate to differ.

THE COURT accordingly refused the motion.

On 6th November the petitioners, in terms of the interlocutor of 2d November, lodged an amended statement of particulars.

On 12th November the petitioners presented a note in which they craved warrant to cite witnesses and havers to attend the trial. A list was subjoined of the names of the witnesses and havers whom the petitioners proposed to cite.

Counsel for the respondent objected to warrant being granted for the citation of havers on the ground that no power to cite havers

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was given by the Election Petition Rules, 1868—(Rule 23 and Schedule D.)

LORD M'LAREN.—No specification has been granted here; on the contrary, after consideration, that was refused, and all that can be done under the warrant asked for is that a notice may be given to the witness of the documents that it is desired he should bring with him. Then it must be left to the witness to act as he thinks proper. If he thinks that the documents asked for are altogether outside the scope of the inquiry, and such as the Election Judges would not call upon him to produce, he may act accordingly, but if, on the other hand, documents which might throw light on the proceedings are called for and he does not bring them, there may be a question of the adjournment of the trial, and a question of expenses. We thought that it was not in accordance with the general law of elections to grant recoveries before trial; therefore it rather appears to me that in granting diligence against witnesses and havers, we imply nothing more than that the witnesses may be called upon to produce documents relative to the case, the relevancy to be determined, of course, by the Court.

LORD KYLLACHY.—A citation of havers merely gives the witness notice that he is called upon to produce documents at the trial. Whether he shall produce them at the trial will depend upon what we decide upon objection by him, or upon objection by the other side, or upon objection by ourselves. This is the usual form of diligence which is granted in the Outer-House where proofs are allowed. The diligence is granted against witnesses and havers, and it often happens that the haver states, "I thought this document had nothing to do with the case, and could not have imagined that the Court would call upon me to produce it," and the haver has been sent back for it, and that involved certain consequences. After all it merely means that he comes with a document prepared to produce it if called upon.

THE COURT accordingly granted warrant to cite witnesses and havers in usual form.

JAMES FALCONER, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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JAMES HOOD AND ANOTHER, Petitioners.—*Shaw—Ure—Dewar.*
JOHN EDWARD GORDON, Respondent.—*Dickson—C. N. Johnston—Wilson.*
THE LORD ADVOCATE.—*Ferguson, A.-D.*

Election Law—Election Petition—Expenses incurred in the conduct and management of the election—Return of expenses—Corrupt and Illegal Practices Prevention Act, 1883 (46 *and* 47 *Vict. c.* 51), *secs.* 8 *and* 28.—The Corrupt and Illegal Practices Prevention Act, 1883, sec. 8, enacts,—"Subject to such exception as may be allowed in pursuance of this Act, no sum shall be paid and no expense shall be incurred by a candidate at an election, or his election agent, whether before, during, or after an election, on account of, or in respect of, the conduct or management of such election in excess of" the scheduled allowance.

In February 1894 A was invited by a local Conservative Association to become the Unionist candidate for the county in the event of a Parliamentary election. A, in reply, stated, that in the event of an election he

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would consider the matter. Between that time and October he spent several weeks in the constituency, and addressed a large number of political meetings. He was absent from the county from the end of October till the end of May 1895, when he returned.

On 21st June the ministry were defeated and a dissolution became imminent. A then became the recognised Unionist candidate.

Held that the expenses incurred by A prior to 21st June 1895 were not expenses incurred "on account of, or in respect of, the conduct or management of" the election in the sense of sec. 8 of the Act.

Election Law—Election Petition—Polling Agent—Employment as subagent—Corrupt and Illegal Practices Prevention Act, 1883 (46 *and* 47 *Vict.* c. 51), *sec.* 17.—*Held* that the fee paid to a person as polling agent for a Parliamentary candidate was not to be regarded as to any extent a payment to him as a subagent merely because the polling agent voluntarily canvassed certain electors.

Election Law—Election Petition—Expenses—Political Associations.—In an election petition raising a question as to the sums to be included in the respondent's account of election expenses, it was proved that for two years prior to the election he had contributed £120 per annum to a local political association. The petitioner proposed to ask a witness to state the amount of the contributions by other persons. The Court *disallowed* the question.

Observations (*per* Lord M'Laren) on the expenditure of political associations.

Election Law—Election Agent—Payments.—Observation upon the duty of an election agent in regard to payments.

ELECTION JUDGES. Lord M'Laren. Ld. Kyllachy.

(SEQUEL of previous case.)

The trial of the petition began at Elgin on 19th November, and evidence was first led in regard to the charge of illegal practices under the Corrupt and Illegal Practices Prevention Act, 1883.* On this

* The Corrupt and Illegal Practices Prevention Act, 1883 (46 and 47 Vict. c. 51), enacts :—

"Sec. 8. (1) Subject to such exception as may be allowed in pursuance of this Act, no sum shall be paid and no expense shall be incurred by a candidate at an election, or his election agent, whether before, during, or after an election, on account of, or in respect of, the conduct or management of such election in excess of any maximum amount in that behalf specified in the first schedule to this Act." In the schedule a maximum scale of expenditure is stated proportionate to the magnitude of the constituency.

"(2) Any candidate or election agent who knowingly acts in contravention of this section shall be guilty of an illegal practice."

"Sec. 17. (1) No person shall, for the purpose of promoting or procuring the election of a candidate at any election, be engaged or employed for payment or promise of payment for any purpose or in any capacity whatever, except for any purposes or capacities mentioned in the first or second parts of the First Schedule to this Act, or except so far as payment is authorised by the first or second parts of the First Schedule to this Act." The persons who may be employed, as enumerated in the schedule, are, an election agent, who has the general supervision of the candidate's affairs, and for each district a subagent, polling agent, a clerk, and a messenger.

"Sec. 28. Except as permitted by or in pursuance of this Act, no payment and no advance or deposit shall be made by a candidate at an election or by any agent on behalf of the candidate, or by any other person at any time, whether before, during, or after such election, in respect of any expenses incurred on account of or in respect of the conduct or management of such election, otherwise than by or through the election agent of the candidate, whether acting in person or by a subagent; and all money provided by any person other than the candidate for any expenses incurred on account of or in respect of the conduct or management of the election, whether as

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branch of the case the petitioners in their amended statement of particulars amended articles I. and II. of the original statement of particulars in terms of the judgment of the Court giving effect to the respondent's objections to it.* As regarded article III., the petitioners amended it by setting forth in detail, so far as known to them, (1) the expenses of meetings addressed by Mr Gordon from February to October 1894; (2) certain expenses of advertising the said meetings, railway fares, and hiring by the respondent and by John Foster† during the said months, and personal expenses of the respondent, "the details of which are unknown to the petitioners, but which they aver amounted to not less than £250." "(Third), that the whole expenses of the meetings, canvass, and other election work above referred to, including the expenses specified in the first and second heads hereof, were incurred in respect of the conduct and management of the election, and with the knowledge and concurrence of the respondent," and were paid partly by the said John Wink and partly by the said John Foster. "That at the date of said payments the said John Wink and John Foster were agents of the respondent for the purposes of said election and candidature, and it was well known to the respondent that the expenses in question were being paid by them. That the respondent and the said John Wink well knew that said expenses ought to have been included in the return respecting election expenses lodged by the said John Wink, and that they were not so included, and that in this respect the said return, and the declarations as to expenses lodged by them respectively, are false."

They further stated (art. IV.),—"That the said John Foster was employed by or on behalf of the respondent, as an agent, in January or February 1894. That he continued to act as an agent until after the election. That throughout said period he was recognised by the respondent as such. That he introduced the respondent to voters, held meetings, canvassed, and did all manner of election work. That he was paid for such work a sum of not less than £300; and that he received in addition large sums of money, amounting to not less than £200, for the purpose of conducting and managing said candidature and election. That said respective sums were so received and disbursed by him in the conduct and management of said candidature and election. That this was well known to the respondent and his said election agent, yet they wilfully failed to include the money so paid to Foster, and the money disbursed by him, in the said election return."

Art. V. set forth that "the petitioners intended to prove that the said election is illegal, in respect that the respondent paid personal expenses incurred by him on account of, or in connection with, or incidental to said election, in excess of £100, and otherwise than through his election agent, in contravention of section 31 of the Corrupt and Illegal Practices Prevention Act, 1883."

In art. VI. they stated,—"(1) that the total number of voters in said combined counties is 5669. (2) That in said combined counties, the maximum amount which the respondent was legally entitled to

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gift, loan, advance, or deposit, shall be paid to the candidate or his election agent, and not otherwise."

"Sec. 31. (1) The candidate at an election may pay any personal expenses incurred by him on account of or in connection with or incidental to such election to an amount not exceeding one hundred pounds, but any further personal expenses so incurred by him shall be paid by his election agent."

* *Ante*, pp. 172 to 175. † See note, p. 172.

spend in the conduct and management of said election, exclusive of personal expenses and sums paid to the returning officer, was £890. (3) That the sums expended as specified in articles III. and IV. amount in all to £700 or thereby. These sums being added to the amount set forth in the said return (exclusive of personal expenses and sums paid to the returning officer)—£854, 12s. 11d.—largely exceed the said maximum amount. These sums have been paid by the respondent, or by others on his behalf, and with his knowledge and concurrence, in respect of the conduct and management of said election, exclusive of said personal expenses and sums paid to the returning officer."

They further averred (art. VIII.) that certain persons, including John M'Hardy, had been illegally employed and paid by the respondent or his election agent, or others on his behalf to act, and did act, as subagents, organisers, and canvassers, at the said election. (3) That the respondent or his election agent paid £17, 17s. to M'Hardy. "(4) That the said sums were paid to the said persons in respect of services other than those specified in the said return. The said persons were illegally employed to act as subagents and canvassers, and were falsely and deliberately designated in said election return as polling agents and clerks, for the purpose of evading the provisions of the Corrupt and Illegal Practices Prevention Act, 1883."

The following was the import of the evidence:—On 9th February 1894 Mr Gordon addressed for the first time a political meeting in the constituency upon the invitation of the local Conservative Association. After this meeting a resolution was adopted by the committee that Mr Gordon was a fit and proper person to be invited to come forward and contest the seat in the Unionist interest at the first opportunity. In answer to this resolution Mr Gordon informed the committee that if, when an election came the Association and the Unionists generally agreed to put him forward as their candidate, he would consider the question then, and that he would defray the expenses of the election period, but that he would expect the local associations to defray the expenses of their political work until the election period. There was no pledge or understanding either by him or by the committee binding him to accept the candidature or them to give an invitation. In his evidence Mr Gordon described his position as that of "prospective candidate." He was thereafter adopted as prospective candidate by both Unionist Associations. The respondent left the counties for a short time but returned on 20th February, and with the exception of a few days remained in the constituency till 8th May. During that time he held more than forty meetings throughout the constituency, and visited numbers of the electors personally at their homes. In visiting the electors he was accompanied by Mr Foster, the organising secretary of the County and Burgh Unionist Associations, who also made the arrangements for the meetings. On 8th May he left, but returned to the constituency in October, when he remained three weeks, addressed two meetings and visited some of the electors. He was absent from the counties from October 1894 till the end of May 1895, when he returned. The expenses of these meetings were defrayed out of the funds of the Conservative Association by Mr Wink, who was ultimately Mr Gordon's election agent, but was then acting in his capacity as secretary and treasurer of the Association, an office which he had held since 1879. These expenses amounted to £59, 13s. 9d. On 22d June Mr Gordon left for the south not intending to return till the autumn, but on the journey south he heard of the defeat

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of the Government on 21st June, and determined to return at once to the constituency. On 26th June it was officially announced that the policy of the new Government was a policy of dissolution. Mr Gordon was formally adopted as Unionist candidate on 5th July, but he addressed a meeting as candidate at Forres on the 2d. Parliament was dissolved on 8th July, and the writ for the counties arrived at Elgin on the 9th. Up to 6th July the respondent was always referred to in all formal motions and minutes as a prospective candidate. All expenses incurred by Mr Gordon on and after 2d July were included in the return. Mr Gordon's personal expenses during 1894 were £134, and during 1895, prior to 2d July, £72. After 2d July to the end of the election they were £87. Those incurred prior to 2d July 1895 were not included in the return, and no part of these expenses was paid through the election agent.

Mr Foster came into the counties on 8th January 1894, as organising secretary of the County and Burgh Unionist Associations. From that date to the date of the election he was working in the constituency in that capacity. He deponed that his duties were "to meet parish Unionist committees, to strengthen them, to get up facts for the Registration Courts, and to see that there was a constant stream of Unionist speakers in the constituency, and that it was part of his work to secure the return of the Unionist candidate at the election, whoever he might be." He was paid by the Unionist Associations, and received in all £223 for salary and outlays. This sum was not included in the return of election expenses. The respondent subscribed £120 in each of the years 1894 and 1895 to the funds of the Conservative Association, and at Christmas 1894 he made Mr Foster a present of £10. If the payments for the meetings addressed by Mr Gordon in 1894, (amounting to £59, 13s. 9d.), and the payments to Mr Foster (amounting to £223) had been included in the return, the maximum allowed by statute would have been exceeded by about £250. The maximum expenses in the constituency were £890, the actual return £854.

The facts in regard to the part of the petitioners' case dealing with the employment of M'Hardy are sufficiently stated in Lord M'Laren's opinion, at p. 189.

In the course of the proof Mr Wink stated that in each of the years 1894 and 1895 Mr Gordon subscribed £120 to the funds of the local Conservative Association.

Counsel for the petitioners proposed, in re-examination, to ask the following question:—"How much did the other subscribers give to the Association?"

Counsel for the respondent objected.

Argued for the petitioners;—The petitioners' case was that these expenses ought to have been included in the return. It now appeared that they were defrayed, not by Mr Wink as election agent, but as secretary of the Association, to which Mr Gordon paid a large subscription. It was very important in proving the petitioners' case to shew that nine-tenths of this Association's funds were subscribed by Mr Gordon. The object was to shew that the Association in this matter was really identified with Mr Gordon, as he was practically the sole subscriber, and used the Association as a means of paying election expenses without including them in the return. There was notice of a charge that payments were made through Mr Wink and Mr Foster.

Argued for the respondent;—This was an attempt by the petitioners

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to prove a case in re-examination of their own witness which had not been suggested in examination-in-chief. There was no notice of this case in the statement of particulars as finally amended. The Court had already held that charges as to payments by societies were irrelevant.

LORD M'LAREN.—My opinion is that the Court has already got all the relevant evidence on the subject of Mr Gordon's contributions to the political interests of his party through the Conservative Association, and it is quite open to Mr Shaw to argue that the sum of £120 per annum, which was contributed to the Conservative Association, was indirectly a contribution towards the respondent's election expenses, but I think the Court is not here for the purpose of making any inquisitorial investigation into the transactions of political associations, and such an investigation would not be relevant to the present inquiry. I am therefore in favour of disallowing questions as to the total income or expenditure of political associations which have taken part in political work in these counties.

LORD KYLLACHY.—I am of the same opinion. I sympathise with Mr Dickson's argument that the introduction of this matter is somewhat late and irregular, especially in view of what we know took place at the time the specification of particulars was amended. I should not, however, be disposed to reject the evidence on that ground alone. I prefer to go upon the ground which your Lordship has expressed, viz., that we ought not to enter into a collateral inquiry which has not, so far as I see at present, even a remote bearing on the true question before us, for the purpose of getting fuller information as to the exact amount of Mr Gordon's contributions to the funds of this Association. The Court has already got evidence that very substantial amounts were contributed by Mr Gordon, and I am not prepared to go further.

THE question was accordingly disallowed.

Argued for the petitioners;—(1) On the charges of incurring expenses in excess of the statutory maximum. (*a*) From February 1894 Mr Gordon must be regarded as a candidate engaged in the active work of promoting his candidature. He was not merely promoting the views of a political party. (*b*) The services rendered by Foster were virtually paid for by Mr Gordon, and the outlay incurred by him as well as by Mr Gordon were expenses "on account of and in the conduct and management of the election," within the meaning of sections 8 and 28 of the Corrupt Practices Prevention Act, 1883.[1] If this were so, then the statutory maximum had been greatly exceeded. Mr Gordon's personal expenses also exceeded £100. (2) As to the charge under section 17 of the Corrupt Practices Prevention Act, 1883. M'Hardy, whose case might be taken as the strongest for the petitioners,

[1] The Borough of Rochester Case, 1892, 4 O'Malley and Hardcastle, 156, *per* J. Cave, 159, Day's Election Cases, p. 98; the Hexham Case, 1892, 4 O'Malley and Hardcastle, p. 146, Day's Election Cases, p. 90; the Borough of Stepney Case, 1892, 4 O'Malley and Hardcastle, p. 178, Day's Election Cases, pp. 116, 117, and 118; Borough of Walsall Case, 1892, 4 O'Malley and Hardcastle, p. 123, *per* J. Hawkins, p. 125, Day's Election Cases, pp. 106, 112, and 113; Borough of Norwich Case, 1886, 4 O'Malley and Hardcastle, pp. 84, 85, and 86.

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was employed nominally as a polling agent, but he really performed the duties of a subagent, and was paid as such. He was engaged in election work before the election, and on the election day acted as a subagent at the polling station and in the district rather than as a polling agent, whose duties were confined to the booth.* If M'Hardy was truly employed as a subagent, then there was a contravention of section 17, as the full number of subagents was employed already. To adopt such a course as this was to evade section 17, by which the number of persons who could be lawfully employed as subagents was limited.

Argued for the respondent;—The case nearest to the present was the *Kennington*[1] case, in which it was held that a payment by the candidate of a sum of £500 in order to establish a newspaper for the purpose of influencing the election did not require to be included in the return of election expenses. The expression "expenses incurred on account of and in the conduct and management of the election" must be taken to refer to proper election expenses—expenses incurred in the actual contest, dating from the nomination or the issue of the writ or the occurrence of the vacancy. Any of these dates might be taken, but until one or other of them arrived, no one could have the status of a candidate.† A candidate was not required to appoint his election agent till the date of nomination, and this shewed that it was not intended to include payments made months or years before that date among those that must be paid by the agent.

On the remaining question, counsel for the respondents was not called upon.

LORD M'LAREN.—It was thought convenient, as the evidence had extended to the greater part of three days on the branch of the case that falls under the general head of illegal practices, that we should give our judgment upon that branch of the case in order to simplify the subsequent conduct of this election petition, which will then be confined to the specific charges of bribery and corrupt practices.

The points which have been argued under the present branch of the inquiry are two—First, it is said that there has been a violation of the provisions of sections 8 and 28 of the Statute of 1883, because during the period of eighteen months which preceded the dissolution of Parliament political expenses were incurred, either directly on the instructions of Mr Gordon, or through his political friends with his approval and for his benefit, which expenses have not been included in the election account as required by statute.

The two sections of the statute which are founded on are directed to different objects, but I think that the error, if any, is the same under whichever clause of the statute we examine the facts. Section 8 evidently bears reference to a scheduled maximum scale of expenditure for an election which is proportionate to the magnitude of the constituency, and it prohibits in general terms all expenditure in excess of that scale. Section 28, in so

* The Ballot Act, 1872 (35 and 36 Vict. c. 33), sec. 4; Registration of Voters Act, 1843 (6 Vict. c. 18), sec. 85.

[1] The Kennington Division of the Borough of Lambeth, 1886, 4 O'Malley and Hardcastle, p. 93.

† Corrupt and Illegal Practices Prevention Act, 1883, sec. 63 (1).

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far as it is important to the present inquiry, provides that all election expenses shall be paid through an election agent; and it is said in this case that the expenses which were incurred by the Conservative Association, including the employment of a salaried agent, Mr Foster, the payment of his travelling expenses, and the expenses of various meetings which were held for the purpose of diffusing political information, when added to the election account, would bring the total over the maximum allowed by the statute. Thus the facts are said to constitute an illegality under either of those sections—first, because the maximum was exceeded, and secondly, because those heads of expenditure were not included in the election account. But if we should come to be of opinion that political expenditure incurred while Parliament is sitting, and when there is no prospect of a dissolution, or of a supervening election, are not expenses of the character contemplated in section 8, then of course it would follow that it is unnecessary to include them in the election account so as to comply with the provisions of the 28th section.

Without in any way making use of our knowledge of the discussions which arose in Parliament upon the wording of section 8, we may at least take notice of this fact, that the House of Commons in framing the 8th section, which was intended to limit the expenditure at elections, dealing with a subject which by the Constitution can only be initiated in that House—a subject with which its members are peculiarly conversant—because all this legislation is necessarily founded upon the experience of the members of the House, has refrained from giving any definition of what is meant by the "conduct and management of an election," or from fixing any time at which expenditure under this head shall be held to begin. It would have been very easy on the one hand to make use of words which would have limited the scope of the section to expenses incurred subsequent to the dissolution of Parliament, or in the case of a casual election, subsequent to the issue of the writ. One objection to such a limitation would be, as everyone must see, that it would have entirely defeated the object of the promoters of the enactment, because it would have led to all the expenses being arranged for before the issue of the writ, and perhaps paid before that time in order to reap the benefit of an expenditure in excess of the maximum prescribed by the statute. Again, it would have been very easy, if such had been the will of Parliament, to have prescribed that all costs incurred for the benefit of a candidate—for the promotion of his political interests in the constituency at whatever time—should be entered in an election account, which was not to exceed the maximum sum authorised, and then the only limit would be the limit of the interval of time between the election in dispute and the next preceding election. But I think it is perfectly plain that it was not intended that the whole political expenses of a candidate during the sitting of Parliament, from one election to another, should be included in an election account, for this simple reason, that Parliament has not said so, but has used an expression of a much more limited meaning, namely, "Expenses on account of or in respect of the conduct or management of such election." We are to construe election statutes fairly, and so as, if possible, to prevent evasion, but where there is no question of corrupt practices or of evasion, but a proper question of construction for determining the meaning of an expression which has been left indefinite, my view would

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be that the statute must not be extended by putting upon the words a meaning which they do not naturally bear, and which might quite easily have been expressed in other language. I think, therefore, that "conduct or management of such election" means a definite election within the knowledge and contemplation of the parties who are engaged in conducting and managing it.

Now, it is said—and I concur in the observation of Mr Justice Field in the *Kennington*[1] case—that this is a question of fact to be determined with reference to the particular case. One sees that in such a case as that of *Kennington*,[1] where the preliminary expenses may have extended over some months, it might be necessary to hold that from the moment the Redistribution Act had passed, and when it was certain that an election would take place, although Parliament could not actually be dissolved at the time, the election had begun. It is not necessary for the purposes of this case to give an opinion on such a question; but I can perfectly understand that where it is known that an election is to take place, and the Ministers of the Crown are only waiting for the completion of a new electoral roll to dissolve Parliament, and especially if this has been announced on authority in Parliament, from that time the electors are put upon the selection of a candidate, and intending candidates are open to offer themselves for the suffrages of the constituency.

Again, there may be a case of a death vacancy, unexpected, where an election could not be in the thoughts of the people until the vacancy occurred. But there may be intermediate cases, and the late general election sufficiently illustrates my meaning—the case where there is a vote in the House of Commons adverse to the Ministry, and where from the moment when that vote is published everyone is looking forward to a dissolution of Parliament, with a view to determining whether the Government of the day is to continue to enjoy the confidence of the country. I should certainly hold that from that time the election had begun in the sense of the sections we are considering. I do not say that it may not be begun at an even earlier period. If, for example, a candidate, not proceeding upon any public and patent facts, but trusting to his own political sagacity, and looking round the political horizon, thinks that an election is imminent, and proceeds to institute what is called a canvass of the constituency, which he continues without intermission down to the election, it may very well be that in such a case his own judgment as to when it is necessary to attend to his electoral interests shall be taken as fixing the commencement of that particular election for him.

I think I have said enough to indicate that in the view of the statute which I adopt it is impossible to lay down any definite rule as to when the conduct of an election begins, or to deal with this otherwise than as a question of fact in which the general political history of the period and the conduct of the individual candidate are alike taken into account.

Now, when we come to consider the facts of the case, Mr Gordon's connection with the constituency is admitted to have begun early in February 1894, that is, about sixteen months preceding the events which led to the dissolution of Parliament. He says that he considered himself in no way

[1] 4 O'Malley and Hardcastle, p. 93.

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bound to become a candidate, but that he had so far engaged himself to the constituency that he was willing to make their acquaintance and to address them in hope that if he were acceptable, and if he continued in the same mind, he might allow himself to be nominated as the candidate. He describes his position as that of a "prospective candidate," and that seems to be a good enough designation if you limit the meaning of "candidate" to its official meaning as that of a person nominated on the nomination day. But of course in construing the Election Acts it is impossible to put so limited a meaning on the word "candidate." I think that from February 1894 Mr Gordon was a candidate, and that, for example, if a case of corrupt practice by an agent of his subsequent to that time were proved, it would be impossible to resist the conclusion that Mr Gordon was a candidate in the sense of making himself responsible, so far as the statute puts it upon him, for the act of his agent.

But this does not solve the question whether Mr Gordon's visits to the constituency and the work that was done for him was work done in the "conduct and management of the election" of 1895. My opinion is, that for the period between February and October 1894, when there is no evidence that an election was immediately in view, when from one's own knowledge of contemporary history it does not appear that there was any immediate prospect of an election, Mr Gordon's expenditure in cultivating the goodwill of the electors, and recommending himself to the constituency, is not to be regarded as expense falling within the scope of the 8th section of the statute. After October 1894 no expenses were incurred by Mr Gordon, except personal expenses. It follows, in my opinion, that the expense incurred by Mr Foster, in so far as the candidate had the benefit of it, is not to be regarded as expense falling under section 8. But with regard to Mr Foster's salary and expenses, I think they are excluded on a more general view, because I do not think that it was intended by the Act of 1883 to interfere with the regular work of political organisations. In our country it has always been treated as a constitutional principle that all citizens should be free to meet together to discuss public questions, to petition Parliament if they please, or, if they are dissatisfied with their representatives, to endeavour to influence their fellow electors to bring about a change in the representation. It is impossible to conceive of Parliament deliberately interfering to put a stop to a practice of such inveterate and perfectly established regularity. But political organisation cannot be carried on successfully without incurring expense, and it is not a new thing I think, but a perfectly familiar feature in our political system, that there are associations in constituencies which are assisted by salaried agents, and which defray the expenses of political meetings and advertising. It might be a legitimate purpose,—one possibly deserving the consideration of Parliament,—to limit in some way the sums of money that might be expended on such objects. But I do not find in the Act of 1883 any reference to political work of any kind except that which is incurred on behalf of the candidate at an election, and I agree with the view expressed by the Judges in the *Kennington*[1] case that this kind of expenditure, which is commonly

[1] 4 O'Malley and Hardcastle, p. 93.

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known as registration expenditure,—because of course the ultimate test to which everything is brought is, how many electors of your party can you put upon the register,—that this kind of expenditure is outside the proper business of the election. It is true that during part of the year, especially during the winter of 1894-95, Mr Foster, who I may say gave his evidence most candidly and fairly, stated that the registration being over he employed himself in promoting the interests of the Conservative Association by getting up meetings that were addressed by strangers. A considerable part of his travelling expenses, and I think also the account for advertising and hire of halls, is of this nature; but as regards that part of the expenditure my opinion is that it is not election expenditure, and that, until Parliament chooses to limit it, every political association must exercise its own judgment as to the means which it will employ and the expenses which its members choose to incur in the promotion of their aims and objects. On this subject we also have some light from the *Kennington*[1] case, although it is not very direct,—I mean the ruling that money expended in founding a local newspaper was not to be treated as election expense, although, in point of fact, the newspaper was established at a time when an election, in the sense which I have given to the word, was pending,—that is to say, after it had been announced on official responsibility that a dissolution would take place.

I think I have exhausted all that I need to say regarding the first head of this branch of inquiry, and with regard to the other objection I shall be able I think to deal with it more shortly.

The objection is not that the total number of salaried agents authorised by the statute was exceeded, but that while *ex facie* of the letters of appointment Mr Gordon had no more agents of the various classes than the statute authorised, yet the persons were employed and paid nominally in one capacity with the intention, and I suppose under contract, that they should render services in another capacity.

Now, the enactment that he is said to have violated is section 17 of the Act of 1883, and that section prohibits engagement or employment for payment for any purpose or in any capacity except for any purposes or capacities mentioned in the first and second parts of the first schedule thereof. The persons who may be employed, as enumerated in the schedule, are an election agent, who has the general supervision of the candidate's affairs, and then for each district there may be a subagent, a polling agent, a clerk, and a messenger. The duties of these officers are not very strictly defined. I do not think there is any definition of the duties of a subagent, but it sufficiently appears that he is a person through whom payments may be made at the request of the principal agent. In all other respects his agency seems to be perfectly general. Then a polling agent is defined by a reference to the Ballot Act, and to a previous Act of 1843, which, as originally passed, did not apply to Scotland. The Act, however, must now be taken to apply to Scotland as well as to England, because it is incorporated with the Act of 1883, which is a general enactment applicable to the whole of the United Kingdom. I do not read the section; it was referred to by counsel,

[1] 4 O'Malley and Hardcastle, p 93.

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and it sufficiently indicates that a polling agent is a person who is to represent the candidate in the polling booth to detect personation. It was suggested in some of the answers given by the witnesses that in order to qualify himself for this duty the agent must make himself acquainted with the electors in his district—at least to the extent of knowing their faces and also of knowing something of their political opinions—that he may consider whether it is his business to take an objection should a case of personation occur. But I need hardly consider that extension of duties very much, because in the case which has been selected as the best case for the petitioners—that of M'Hardy—M'Hardy stated that before his appointment he was perfectly acquainted with the electors of his district, at least those with whom difficulties were most likely to occur, namely, the fishermen at Burghead and the neighbouring coast; and it was admitted by Mr Stewart, the assistant agent, that M'Hardy was selected because of his knowledge of the fishermen in the district, and in the belief that his knowledge might be useful.

Now, the general and leading purpose, as I think, of section 17, is to keep down expenditure by prohibiting the employment of a larger number of persons than are mentioned in the schedule. It may very well be that the clause would also prohibit the employment of an agent for money to perform additional duties to those which are indicated. But in order to invalidate an election because an agent had performed duties additional to those for which he was expressly engaged, it would be necessary that we should have a case of evasion very clearly proved; and it is evident that it would be extremely difficult to establish a case of that description, a case of colourable employment of a man in one capacity, in order that he might perform duties in another capacity. The only political disability which the statute applies to any person who is paid for his services is that his right to vote is suspended for that election; but, as I read the Election Acts, the employee is in no way inhibited from using his personal exertions as an elector to influence the votes of other electors; nor, so far as I see, is there any restriction on the right of a paid agent or officer to render services to the candidate, such as he may think fitting, except that he cannot be employed in the payment of election expenses unless he is the sub-agent.

In the case of M'Hardy his appointment as polling agent was not made until two days before the election, and in the notes of the evidence (to which I have just referred) he states that he had been working for Mr Gordon before he got his appointment—I suppose it had been arranged that he was to get it—but that after he got his appointment he had not done anything in the nature of direct canvassing. Then with reference to the polling day his evidence comes to this, that having occasion to leave the polling booth to get his dinner, and before returning to the polling place, he spoke to some fishermen whom he saw going about the streets, or at the seaside, and asked them to vote. His absence from the polling place, according to his own statement, did not exceed an hour. That gives one a notion of the extent of his action as a canvasser. Out of that hour he had to drive several miles, and to get his dinner, and therefore there would not be time, I should think, for canvassing to any greater extent

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than what he himself admits, speaking to such people as he happened to meet on the way.

Now, assuming the relevancy of the objection—a somewhat critical objection perhaps—that a man who is employed in the capacity of a paid agent or servant is violating the statute if he interferes in the work of another paid servant, we have to consider whether the fact that Mr M'Hardy, on the polling day, spoke to voters and asked them to come to the poll is evidence that he was employed and paid £17 to act as a district agent and subagent. If he was employed for that purpose, and if it be the duty of a district agent to bring up people to the poll, it is plain that this duty was only performed in a very limited and, I should think, in a very inadequate degree by M'Hardy. If, on the other hand, he acted in this matter as a voluntary assistant in the election, and because he was interested in its success, then I fail to see that he was guilty of any illegal practice, because, as I have pointed out, no disability attaches to the acceptance of a paid office except that the agent is excused from giving his individual vote.

There are some points indicated in the specification of particulars relating to payments made by persons other than the election agent. These payments were small in amount, and although nothing was said on the subject in the argument, it is right that they should be noticed, because they are in the record. The payments in question related to the hiring of halls and posting of advertisements of meetings incident to the election. One reason for requiring that all payments should be made through a responsible agent is to prevent the possibility of money being paid for one purpose while a receipt is taken for another; to put a check, as far as possible, on the tendency to employ voters in the hope of securing their support at the election. But really when we come to the hire of a hall, which is open to both parties at a fixed charge, and to such trivial expenses as the necessary advertising of a meeting, it would be hopeless to maintain that a payment of that kind, when made by an unauthorised agent, was a serious violation of the spirit of the Act; and therefore, if such a case had been proved, I should have thought it a case for equitable relief. But it is right to say, as the point has been raised, that in my opinion the duty of an election agent in regard to payments is that he shall satisfy himself that the account has been justly incurred and is fairly charged, and also that the payment must come from himself. But if he performs those duties I think he may send a messenger, or may ask a friend who is willing to undertake the duty of a messenger to carry the money and get the receipt. It is like the case of paying by a cheque, where, of course, the bank pays the money on the authority of the election agent.

The result of my opinion is that in both heads of the case the petitioners have failed to establish any case of illegal practice.

Lord Kyllachy.—Your Lordship has stated, I think, quite fully the facts to which this branch of the case relates; and that being so, I do not propose to resume them. Neither do I propose to refer further to those English decisions and *dicta* of English Judges to which our attention has been directed. I am inclined to think that, so far as decision goes, the questions here raised must be held as open; and further, that but little

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help can be got from previous judicial *dicta*—those *dicta* being at best not very explicit, and not very apposite to the particular facts which we are here to try.

The question before us, stated broadly, is whether there ought to have been included in the respondent's election accounts certain expenses disbursed in connection with what was undoubtedly political work done in this constituency, prior to the 21st of June last, when the late Government were defeated in the House of Commons. These expenses are of three classes, (first) expenses of certain meetings addressed by the respondent in the spring and autumn of 1894; (second) salary paid to Mr Foster, the organising secretary of the Unionist Association, for registration and other work done during the period from January 1894 to June 1895; (third) personal expenses incurred by the respondent during the same period. The suggestion is that these were all expenses which, to use the words of the Act, were incurred "in the conduct and management of the election"; and it is said that being in that category they ought (first) to have been paid through the respondent's election agent; and (second) to have been entered in the respondent's election accounts.

The respondent does not dispute that the payments in question were made; neither does he dispute that they were made with his knowledge—at all events that he knew enough to make him responsible for their being properly dealt with. What he maintains is—(first) that the payments for the meetings and to Mr Foster, were disbursed not by him or on his behalf, but by the two Unionist Associations for their own purposes; and (second) that his personal expenses, although incurred in furtherance of his intended candidature, were yet, by reason of the period to which they applied, and the whole circumstances, outwith the category of proper election expenses.

I do not find it necessary, and I am not disposed to discuss the question, how far these three heads of expenditure were incurred and disbursed in furtherance or promotion of the respondent's candidature. I confess I am of opinion that with regard to Mr Foster's salary it is quite impossible to maintain that it was a payment of that character. I take it as the result of the evidence that Mr Foster was an official of the Unionist Associations—that at least his chief duty was that of a registration agent—that he was paid a salary at a certain rate per month—and that his salary would probably have been paid all the same although Mr Gordon had not appeared on the scene, or had not appeared until immediately before the election. I do not consider that in these circumstances it is possible to suggest that Mr Foster's salary comes under the category of expenses incurred in furtherance or promotion of the respondent's candidature. The other expenses, however,—I mean the expenses of meetings, and the respondent's personal expenses,—although not of large amount, are perhaps in a different position, and are quite sufficient to raise the question, and with regard to these I propose to assume—although I do not decide—that they did represent expenditure made in furtherance or promotion of the respondent's intended candidature. In that view, the question we have to decide is a comparatively short question, and is simply this—Whether it is according to the just construction of the Act of 1883 that those expenses—expenses of meetings and personal expenses—incurred during the period from February 1894 to June

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1895, were proper election expenses, that is to say, expenses incurred in the conduct and management of this election?

Now, I am bound to say that keeping in view the period covered—a period extending back eighteen months before the actual election—the suggested construction appears to me to be at least exposed to serious difficulties. In the first place, the words of the Act—the words, "in respect or on account of the conduct or management of the election,"—do not strike me as suggestive of a period extending back indefinitely it may be for years, or to the last election. A candidature, or intended candidature, may no doubt so extend, and if it had been so meant, it would have been easy for the Legislature to have said in plain words that no expense shall be incurred in promoting or procuring the election of any candidate, except such as shall be paid through his election agent, and shall enter the statutory account. That could easily have been expressed, and there was nothing to prevent its being expressed. A phrase which would have expressed it occurs in various other clauses of the statute—I mean the phrase "promoting or procuring the election of any candidate." But that is not the language used. For some reason, good or bad, the Legislature has confined the enactment to expenses which can be attributed to the "conduct and management of the election," and these words, it seems to me, at least suggest and contemplate an election which is not *in nubibus*, but is reasonably imminent.

Again, what is to be said of the provision of the statute that those expenses which I have called for shortness election expenses (the expenses in question) must be paid through the election agent, while, according to another section of the statute, the election agent need not be appointed until the day of the nomination? How, it has been fairly asked, can expenses incurred eighteen months before be paid through an agent who, according to the scheme of the Act, does not exist until eighteen months after? No doubt the election agent may be appointed earlier if the candidate chooses; the appointment is in the candidate's hands; but the difficulty is to say that the statute contemplated an appointment months or years before the date expressed, viz., the date of nomination. It is at least an observation which the respondent may well make, that if the Legislature had really meant that the whole expenses of the candidature should be paid by or through the election agent, it would have been natural to provide that the election agent should be appointed at or before the commencement of the candidature. That, however, is not provided. What is provided is, that the election agent shall be appointed "on or before the date of nomination." And that, I think, goes at least to shew that in the view of the Legislature the expenses which were to be paid through the election agent were not necessarily co-extensive with the expenses of the candidature. I say nothing as to the further difficulty which has been pointed out with respect to expenses incurred (as they lawfully may be) by outsiders (that is to say unauthorised outsiders) in supporting the candidature of some particular candidate. I confess I do not myself see how the acts of outsiders—unauthorised outsiders—can be acts in the conduct and management of the election. If, however, the petitioners are right that the conduct and management of the election covers anything done in the pro-

motion of the candidature of any candidate, the result then certainly is that many persons and bodies who are accustomed to intervene in elections, and to do so quite lawfully, but have no control over the appointment of the election agent, appear to be placed in a very serious position.

These considerations, I confess, suggest very strongly to my mind that what the Legislature had in view as to the period of the election—the period of the election which was to be conducted and managed—was a period not at least much anterior, I will not say to the date of nomination, but to the group or series of events which immediately precede the nomination, and which, as we all know, begin in the case of a general election with the announcement of the dissolution, and in the case of a bye election with the announcement of the vacancy. It is then, and not till then, that, unless in exceptional circumstances, the candidates join issue, and the contest, as distinguished from the preparations for the contest, begins.

At the same time, it has certainly to be noted—what your Lordship has emphasised—that the Legislature has abstained, and we must hold deliberately abstained, from defining the period at which the election shall be held to begin. The statute might have defined that period, but it has not done so, and no doubt for this good reason, that if a hard and fast line had been fixed, a hard and fast date fixed, facilities would have been offered for evasion of the Act—evasion by dishonest candidates desiring to evade it and defeat its object. Accordingly, while I think that the Act indicates plainly enough the kind of period which it contemplates, it contains nothing in the shape of hard and fast definition; and that being so, I apprehend the result is, that it is left to us as Election Judges, and it becomes our duty to consider each case with respect to its own facts, and to say in each case whether or not special circumstances exist requiring us to hold that the election began prior to what I may call the normal period. In considering that question I apprehend we are to have regard to the whole facts—the nature of the work done, and of the expenses incurred; the extent and amount of that work, and of those expenses; the question how far the operations of the candidate were continuous up to the election, or were intermittent, taking the shape merely of periodical visits to the constituency. Above all, we are, I apprehend, to have regard to this—whether we have before us evidence of any attempt to evade the Act,—evidence for example, of profuse expenditure purposely antedated so as to escape the Act; or whether, on the other hand, everything appears to have been done in good faith and ordinary course—the pre-election operations and pre-election expenditure being on the whole fair and reasonable, that is to say, fair and reasonable having regard to the position of the candidate and the character of the constituency.

Applying these principles, I have to ask myself this question, whether there is anything in the history of the respondent's three visits to this constituency—in the spring of 1894, in October 1894, and in June 1895—anything which makes it necessary or just that we should here take the extreme course of holding that the election of July last, 1895, began eighteen months before, in February 1894. That is, I think, the question which I have to answer, and after full consideration all I have to say is, that I have come, and come without much difficulty, to a conclusion in the negative. I

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do not require to consider what is the exact term which best describes Mr Gordon's position during the period in question. That position was in itself plain enough. He had been selected, not perhaps formally and finally, but yet practically, as the person who was to contest the county when the time came for a new election. On his part again, he had resolved, barring contingencies, and if all went well, to accept and take advantage of that selection. That was his position, and being in that position, he paid periodical visits to the constituency feeling his way, making the acquaintance of the electors, and, as it seems to me, acting generally like most of those other persons who during the years between 1892 and 1895, in contemplation of a probable candidature at next election, paid visits more or less frequent to constituencies within Scotland, and addressed more or less frequent meetings within these constituencies. That, it appears to me, is the substance of all that has been proved with respect to the respondent's proceedings, and that being so, I am satisfied that we only do justice in holding that this objection to the election must be repelled.

Then as to the other matter—the alleged payments to Mr M'Hardy and others—the suggestion is that certain persons, nominally employed and paid as polling agents, were truly employed and paid as subagents, and that thereby the number of subagents authorised by law was exceeded. As to that suggestion, which has all along seemed to me to be somewhat difficult, I desire to reserve my opinion with respect to the duties for which it is lawful to employ and remunerate subagents, polling agents, and messengers respectively. It may be, as the petitioners contend (I say nothing to the contrary), that to employ and remunerate, for example, Mr M'Hardy, nominally as a polling agent, but really to canvass voters, would be illegal. I say nothing to the contrary, but such an employment is not to be presumed; it must be proved; and in my opinion it is certainly not proved, first, by proving that in point of fact the polling agent was an active partisan who as a committee man or volunteer canvassed voters or brought voters to the poll; secondly, by proving that he did so in the knowledge or even at the request of the election agent; or thirdly, by proving that it was an element in his selection as polling agent that he was a person who was an influential elector or even an active partisan. It appears to me upon the evidence that in none of the cases before us does the petitioners' proof go beyond this, and therefore in my opinion it fails. *Prima facie*, I may admit that the amount of remuneration paid to Mr M'Hardy and some others required explanation, but I am not prepared to say that the explanations given have been insufficient, and therefore on that matter also I concur with your Lordship.

The petitioners then proceeded to lead evidence on the charges of bribery, but after some witnesses had been examined it was intimated by counsel that they did not propose to proceed with the charges of bribery and treating.

The Advocate-depute, in answer to Lord M'Laren, intimated that he had no objection to offer.

On 23d November the Court pronounced the following interlocutor:—"Find that the averments of fact in the petition are not proved: Therefore dismiss the petition, and find that the

respondent, John Edward Gordon, was duly elected Member of Parliament for the counties of Elgin and Nairn, and decern: Find the petitioners liable to the respondent in the expenses of the cause, as the same shall be taxed as between agent and client."

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JAMES FALCONER, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—CROWN AGENT—Agents.

No. 44.
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Glasgow, Yoker, and Clydebank Railway Co. v. Lidgerwood.

THE GLASGOW, YOKER, AND CLYDEBANK RAILWAY COMPANY, Complainers (Respondents).—*D. Dundas—Grierson.*
WILLIAM VAN VLECK LIDGERWOOD, Respondent (Reclaimer).—*Jameson—C. J. Guthrie.*
WILLIAM ROBERTSON COPLAND, Respondent.
WILLIAM BORLAND, Respondent.

Railway—Compulsory acquisition of lands—Arbitration—Interdict.—Note of suspension and interdict to stop proceedings in an arbitration under the Lands Clauses (Scotland) Act, 1845, *refused* on the ground that the complainer had failed to shew that the respondent's claim to compensation was not relevant, or to shew any other cause for staying the proceedings in the arbitration.

1ST DIVISION. Ld. Kyllachy.

BY special Act of Parliament passed in 1893, the Glasgow, Yoker, and Clydebank Railway Company were authorised to divert the Forth and Clyde Canal and the Boquhanran Road, near Clydebank, in the county of Dumbarton, for the purposes of their undertaking. While they were in the course of carrying out these operations a notice of claim in the following terms was served upon them by William Van Vleck Lidgerwood:—"The claimant is heritable proprietor of land at Clydebank, . . . bounded . . . on the south by land belonging to the proprietors of the Forth and Clyde Canal; and on the West by the Boquhanran Road, with the buildings and others thereon.

"The claimant himself occupies the said lands and buildings in connection with his business.

"In exercise of the powers conferred upon them by the Glasgow, Yoker, and Clydebank Railway Act, 1893, the said company are in course of diverting the Forth and Clyde Canal so as to take away from the said land about 900 feet of canal frontage.

"The said company further are in course of diverting the Boquhanran Road so as to take away from the said land about 120 feet of frontage to that road.

"The taking from the said land of the canal and road frontage above referred to will injuriously affect the said land and the buildings thereon, and cause serious loss and damage to the claimant as owner and occupier thereof.

"In respect of the above-mentioned injurious affection to the said land and building, and all loss and damage incurred and to be incurred by the claimant as owner and occupier thereof, the claimant claims as compensation from the said Glasgow, Yoker, and Clydebank Railway Company the sum of £7680 . . ."

On 31st May 1895 Lidgerwood appointed, in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, an arbiter on his part for settling the question of compensation. On 21st June the railway company, under protest, made a like appointment.

A few days later the railway company presented a note of suspen-

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sion and interdict against Lidgerwood and the two arbiters who had been nominated for the purpose of having the respondents interdicted from proceeding with the arbitration. The note was passed of consent.

The complainers stated;—(Stat. 2) "The lands belonging to the respondent William Van Lidgerwood, in respect of which he claims compensation for alleged damage by the exercise by the complainers of the powers conferred upon them by their said Act of 1893, are situated to the north of a strip of land which intervenes between his lands and the said canal as existing. The said respondent's lands are bounded on the west by the Boquhanran Road, but they nowhere immediately adjoin the said canal, nor does the canal intersect his lands. A strip of land from 30 to 100 feet wide lies between the respondent's lands and the portion of the canal to be diverted." (Stat. 3) "The complainers, under the powers of their Act, are diverting the canal to the southward, and are also constructing a new road leading from the Boquhanran Road under the old line of the canal as diverted. The Boquhanran Road northward of the canal is not interfered with by the operations of the complainers in the slightest degree. The line or levels of the said road are not altered in any way. The only part of the said road which is vested in the respondent William Van Vleck Lidgerwood, or adjoins his property, is the part of the road northwards of the canal. The said road southwards of the canal is only available for foot-passengers, but the new road will be available also for vehicular traffic." (Stat. 5) "The claim of the claimant respondent is incompetent. His property has not been damaged or injuriously affected within the sense and meaning of the complainers' Act, or Acts incorporated therewith, and particularly the Lands Clauses Consolidation (Scotland) Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, by the exercise by the complainers of the powers conferred upon them by their said Act of 1893. No question of disputed compensation has thus arisen which the claimant respondent is entitled to have referred to arbitration in terms of the said Act or Acts. . . ."

The respondent Lidgerwood denied that his property had not been injuriously affected by the complainers' exercise of their statutory powers. He stated that the strip of land alleged to intervene between the canal and his property consisted of the canal bank, the towing path, and a path leading from the Boquhanran Road to the canal bank, all of which formed part of the canal undertaking; and that by the statutes under which the canal was administered he, as an adjoining proprietor, was entitled to use the canal for lauding and embarking goods. He further stated that the complainers were diverting the Boquhanran Road, which formed the western boundary of his property at a point 120 feet north of his southern boundary; that, as a result of their operations, the existing road south of the point of diversion would no longer be a thoroughfare to the Dumbarton Road, and that he would have no frontage to the substituted road.

On 14th November 1895 the Lord Ordinary (Kyllachy), before answer, allowed parties a proof of their averments.

Both parties reclaimed.

Argued for Mr Lidgerwood;—The case must be considered on the claim which this reclaimer had put in, and the claim made was relevant on both grounds upon which compensation was claimed. (1) It was a relevant ground for claiming compensation that the operations of the complainers would deprive the claimant of his frontage and

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access to the canal,[1] and the complainers had made no relevant answer to this ground of claim. Their statement that a strip of ground intervened between the claimant's property and the canal was insufficient, unless they also stated to whom the land belonged, and that the claimant had no right of access over it. (2) The claimant's titles and the complainers' plan both shewed that his property was bounded upon the west by the Boquhanran Road. It was not denied that that road was to be diverted at a point 120 feet north of the south boundary of the claimant's property. Nor was it denied that the old road was to be shut up at a point opposite the claimant's southern boundary. It was clear, therefore, that the claimant's property would be "injuriously affected" by the complainers' operations, as he would be deprived of 120 feet of frontage to a thoroughfare, and of the existing direct access from that part of his property to the Dumbarton Road.[2] The claimant having stated a good *prima facie* case for arbitration, and the complainers having failed to state any objection which clearly excluded his right to compensation, the Court would not intervene at this stage.[3] If any question of law affecting the claimant's right to compensation arose before the arbiters, that could be brought before the Court afterwards, but if a proof were allowed now the parties might be put to the expense of a second proof in the arbitration. The note should therefore be refused.

Argued for the railway company;—The question was one of convenience in procedure. If there was clearly no valid claim made, the Court would stop the proceedings, and if it was doubtful whether there was good ground for a claim, the Court might have the doubt cleared up by ordering proof. (1) In regard to the canal there was a conflict in fact as to whether the claimant was a frontager, which should be cleared up in the present proceedings; but behind that question were questions of law (*a*) as to whether the claimant had a right of access to the canal under the Forth and Clyde Canal Act, and (*b*) as to whether the diversion of the canal constituted a case of injurious affection. These were questions for the Court, and not for the arbiters, to decide. (2) The complainers were not interfering with the existing road opposite the claimant's lands. He would still have a frontage to that road after their operations were completed, and his claim was founded on loss of frontage. It was true that they were closing the road after it passed his lands, but this did not deprive him of access to the Dumbarton Road, because he would have a better access by the substituted road which was being constructed. On the statements on record there would be no interference with frontage in the sense of the cases, and it was clear that no appreciable injury would be caused to him either in respect of loss of frontage or access. In all the reported cases, *e.g.*, *Walker's Trustees*,[2] in which parties had been held to have a good claim for compensation in respect of loss of access, the injury had been in effect great. If the Court were convinced that the claimant had no right to claim compensation on account of the diversion of the road, they must grant the interdict

[1] M'Carthy v. Metropolitan Board of Works, 1874, L. R., 7 E. and I. App. 243.

[2] Walker's Trustees v. Caledonian Railway Co., Jan. 21, 1881, 8 R. 405, March 29, 1882, 9 R. (H. L.) 19.

[3] Dumbarton Water Commissioners v. Lord Blantyre, Nov. 12, 1884, 12 R. 115.

No. 44. craved, as the claim was for a lump sum. But if they were not so convinced, then a proof should be allowed.

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LORD PRESIDENT.—I think the proper order in which to consider the questions in this case is, first, to look at the claim and consider whether it contains a relevant averment of damage entitling the claimant to compensation under the statute. Now, reading the claim, I think it does set out a relevant case for compensation, both as regards deprivation of the road by its being diverted from a part of the claimant's property, and also as regards the claimant's exclusion from the canal, which he avers he has heretofore used in virtue of a title to land abutting thereon.

Turning now to the terms of the record of the railway company—and what one is in search of is some salient and exclusive objection such as would justify us in granting interdict now—I can imagine, upon both these matters, both as regards the road and as regards the canal, that questions may arise in the course of the arbitration as to the quality of the injury done to the claimant, or still more probably as to the degree of legal injury which he has sustained. But that does not justify us in stopping these arbitration proceedings, and I am of opinion that the railway company have failed to shew cause entitling them to have interdict pronounced at once, or to have a proof antecedent to the arbitration.

I am of opinion, therefore, that we should recall the interlocutor of the Lord Ordinary, and refuse the note.

LORD ADAM.—I am of the same opinion. I will say nothing upon the merits of the case; it may turn out in the course of the proceedings before the arbiter that the claimant is not injuriously affected, but if we look at the claims as they were stated, they appear to be *ex facie* relevant. I agree that the claimant is therefore entitled to have his case sent to arbitration, unless it could be made clear by the complainers that these claims, though *ex facie* relevant, are not really so. But that has not been done, and there is nothing to suggest that there is no relevancy in them.

LORD M'LAREN.—It is confessedly an unusual step which we are asked to take, that of interfering with the progress of an arbitration, which is founded on an *ex facie* relevant case of liability under the statute. The more usual course, where there is a possibility that an arbiter may be invited to decide questions beyond his statutory powers, is to leave such anticipated questions to be determined after the arbitration is closed. If notwithstanding the apparent relevancy of the claims it should appear that there is a good answer to them, which admits of being instantly verified, *e.g.*, that the company's Act prescribes a special mode in which such claims are to be dealt with, then, on our being satisfied that the compensation claimed was excluded by statute, interdict might be granted. I agree, however, that a necessary condition of staying proceedings in an arbitration is that there should be a substantial case displacing the *prima facie* right to compensation which accrues under the Lands Clauses Consolidation Act. I confess that I do not see any such case here; on the contrary, the arguments which we have heard leave an impression on my mind that, if we had all the facts before us, we should find nothing tending to discredit the

relevancy of the claims, nothing that could not be dealt with effectively under an action for interpreting, or it might be for setting aside, the arbiters' decision. No. 44.

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LORD KINNEAR.—I think we cannot grant interdict to prevent the parties proceeding to arbitration, unless it is clear that the arbiter is being called upon to exercise powers which he does not possess. I agree that the question necessarily depends, in the first instance at all events, on the claim submitted to the arbiter. I also think that the claim, so far as its terms are set forth, is *prima facie* a relevant claim. The railway company state an answer to it, which they may or may not be able to make good. They may or may not be able to shew either that the rights or interests alleged by the claimant are valueless, or to satisfy the arbiter or the Court that the loss of such advantages as he enjoys from his frontage to the canal, or to the road, however valuable, will not entitle him to compensation under the statute. I am not prepared to say that the railway company have established either defence now, and indeed as regards one branch of the claim they do not maintain that they have. If we had to decide the merits of the case I should have thought that the Lord Ordinary had taken the proper course, because material facts are in dispute. But that shews that we should not grant the interdict which is craved. I think the rule laid down by the late Lord President in the case of the *Dumbarton Water Commissioners* v. *Lord Blantyre*,[1] is applicable, that "we are not entitled to interfere with the action of the arbiter to the effect of preventing him from entertaining a claim which we do not ourselves at present clearly see our way to determine."

I am therefore of opinion with your Lordships that the Lord Ordinary's interlocutor should be recalled, and the arbitration allowed to proceed.

THE COURT recalled the interlocutor of the Lord Ordinary, and refused the note.

W. & J. BURNESS, W.S.—MACONOCHIE & HARE, W.S.—Agents.

THOMAS SMITH AND OTHERS (Gray's Trustees), Pursuers (Reclaimers). —*Dickson—Aitken.*
THE ROYAL BANK OF SCOTLAND, Defenders (Respondents).—*Balfour —Johnston—D. Dundas.*
JAMES GIBSON AND OTHERS (Gray's Trustees), Pursuers (Reclaimers). —*Dickson—Aitken.*
THE ROYAL BANK OF SCOTLAND, Defenders (Respondents).—*Balfour —Johnston—D. Dundas.* No. 45.

Nov. 27, 1895. Gray's Trustees v. Royal Bank.

Executor—Compensation—Retention—Mutuality of debt and credit—Bank—Claim of bank to retain against debt of deceased customer funds lodged by his executors.—Held (*rev.* judgment of Lord Stormonth-Darling) that a bank to whom a debt was owing by a deceased customer, whose estate was found to be insolvent, was not entitled to withhold payment of sums lodged with the bank by his executors either on the plea of retention or of compensation.

THOMAS AITKEN GRAY, tanner, Maybole, died on 16th April 1894. Mr Thomas Smith and others, the trustees and executors named in

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[1] 12 R., at p. 120.

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his settlement, administered his estate till 22d November 1894, when it was sequestrated at the instance of certain creditors.

In the course of their administration the trustees had opened in their names as trustees two accounts in the branch of the Royal Bank at Maybole, and at the date of the sequestration the sums of £465 and £537, stood at their credit in these accounts.

Mr James Gibson, the law-agent for the trust, and one of the trustees, had also lodged in the same bank in September 1894, four sums, amounting in all to £4119, belonging to the trust on deposit-receipts in his own name for behoof of himself and the other trustees and executors of Mr Gray.

In January 1895 an action was raised by the testamentary trustees, with concurrence of the trustee in the sequestration, against the bank for payment of the two sums first mentioned, and another action was raised by Mr Gibson, with concurrence of the testamentary trustees and of the trustee in the sequestration, for payment of the sums standing on deposit-receipt.

In their defences to both actions the Royal Bank stated that the deceased at the time of his death was due to the bank £5207 on an overdrawn cash-credit account.

The pursuers admitted this statement.

In both actions the defenders pleaded;—(3) The defenders being justly entitled to retain the sums standing at the credit of the said accounts against and apply them towards satisfaction of the debt due to them by the late Mr Gray and his estate, decree of absolvitor ought to be pronounced, with expenses.

On 5th July 1895 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"The Lord Ordinary, having considered the cause, sustains the third plea in law for the defenders, and in respect thereof assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

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* "OPINION.—I see no good answer to the bank's plea of retention in either of these cases.

"It is admitted that the late Mr Gray was, at the date of his death, on 16th April 1894, indebted to the bank in the sum of £5207, 17s. 7d. On 22d November 1894 his estates were sequestrated. In the meantime, his testamentary trustees had opened two accounts with the bank at its Maybole branch, on one of which, at the date of sequestration, there was a credit balance of £465, 8s. 5d., and on the other, a credit balance of £537, 18s. 7d. The law-agent of the trustees, who was himself a trustee, had also deposited with the bank four sums, amounting in all to the sum of £4119, 6s., and the deposit-receipts were taken in the name of 'James Gibson, solicitor, Maybole, for self and others, trustees and executors of the late Mr T. A. Gray.' The testamentary trustees in the one action (with concurrence of the trustee in the sequestration), and Mr Gibson in the other action (with concurrence of the testamentary trustees, and of the trustee in the sequestration), now sue the bank for payment of these several balances and deposits, and are met with the plea of retention founded on the debt due by the deceased.

"The answer which the pursuers make to this plea is that compensation (or retention) can only be pleaded where the debts are mutual, and that in the words of Professor Bell (Com. ii. 124), 'to constitute this mutuality of debt and credit the sums reciprocally due must be owing to the parties in their own right respectively.' Here, the pursuers say, there is no mutuality, because the debt due to the bank was a debt due by the deceased, and the

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The pursuers reclaimed, and argued;—The defenders' claim amounted to a claim of compensation. This was excluded, there being no *concursus debiti et crediti*. The debt due to the bank was a debt of the deceased. The debt due by the bank was due to the trustees arising out of a transaction between them and the bank. There was therefore no mutuality.[1] The trustees were not *eadem persona cum defuncto*. They were only liable to pay the creditors of the deceased so far as the estate would allow, and were bound to pay *pro rata*.[2] Compensation might be pleadable by the bank against executors who were also heirs *in mobilibus*. This was the meaning of the passage in Erskine quoted by the Lord Ordinary.[3] That passage afforded no support to the present claim. The trustees having after the truster's death deposited trust funds realised in administration were entitled to uplift them. The bank must claim against the trust-estate in the ordinary way. It was common ground that the trustees in lodging the funds did not intend to confer any preference on the bank. The bank, therefore, were *in mala fide* in making their present claim.[4]

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debt due by the bank is a debt due to the trustees in the one case, and to Mr Gibson as representing the trustees in the other.

"The fallacy of this argument is, that the debt due to the bank, though originally due by Mr Gray himself, became on his death a debt due by the trustees as his representatives. It was a debt limited no doubt by the amount of the estate in their hands, but that affects merely the extent and not the quality of the obligation. The mutuality of the debts is completely satisfied by the one being due by and the other to the trust-estate. Accordingly, Erskine (Inst. iii. 4, 13), after stating the rule that each of the two parties must be both debtor and creditor in his own right, adds,—'An executor confirmed is, in this question, accounted the same person with the deceased, for by the confirmation he becomes debtor to the creditors of the deceased, and creditor to his debtors.'

"The only case which the pursuers were able to adduce in their favour was an English one in 1855, *Rees* v. *Watts*, 11 H. and G. 410. But that was a case which turned on the wording of the English Statute of Set-off, and cannot be an authority on a rule like retention, which is founded on the common law of Scotland.

"Further, I think the bank is entitled to absolvitor *de plano*, for the figures are admitted, and none of the relevant facts are in dispute. In Gibson's action there is an averment that he placed the money in deposit-receipt for 'safe custody.' I take it that this is nothing more than a statement of the purpose which everybody has in depositing money with a bank. But in a case *Robertson's Trustees* v. *Royal Bank*, 18 R. 12, in which the words 'for safe keeping on your account and subject to your order' appeared in the receipt which a bank granted for certain bonds deposited by a customer, the Court held that these words did not constitute a specific appropriation of the securities, and the late Lord President said,—'The presumption is that custody gives a right of retention, and I think that that presumption cannot be rebutted without something express and distinct.'

"Again in both actions there is an averment that, after the death of Mr

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[1] Rees v. Watts, June 30, 1855, 11 H. and G. 410.

[2] Heritable Securities Investment Association, Limited, v. Millar's Trustees, March 18, 1893, 20 R. 675.

[3] Erskine, iii. 4, 13; Stair, i. 18, 6; Bell's Com. ii. 125, Williamson v. Tweedie, Nov. 12, 1628, M. 2613; Children of Monswell v. Lawrie, Feb. 14, 1662, M. 2614.

[4] Taylor v. Forbes, Dec. 14, 1830, 4 W. and S. 444.

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Argued for the defenders;—This was a proper case of retention, and the test was whether mutuality of debt and credit existed. The defenders did not plead the technical rule of compensation, but the rule of retention resulting in compensation. The only course open to the bank was retention.[1] Mutuality existed, and no specific appropriation of the sums lodged had been made; the debt was due by a customer before his death; his representatives who took over his estate lodged the sums in bank. Except for the case of *Rees*[2] the pursuers' case was not arguable; but it did not apply, as it was inconsistent with the doctrine of Scots law that an executor is *eadem persona cum defuncto*. Besides that case was decided on the particular terms of the English statute,[3] which was really an attempt to simplify the complicated pleading of the time. This was a testamentary trust, not a trust for creditors, and there was neither averment nor plea of *mala fides*.

At advising,—

Lord Young.—Mr Gray, tanner and currier at Maybole, died in April 1894, and the pursuers are the trustees and executors nominated in his will. They acted as such till 22d November 1894, when Mr Gray's estate proving to be insolvent was sequestrated under the Bankrupt Act. The trustee in the sequestration is a concurring pursuer. The purpose of the actions (for there are two) is to recover from the defenders £5122, 13s., being the amount of money belonging to the executry estate of the deceased, which his trustees and executors had, in the course of their duty, and within, I think, six months of his death, realised and deposited in the defenders' bank for safe keeping, in accounts, and on deposit-receipts, in terms which signify the fact that the money was executry estate, and was deposited as such by the executors, who were responsible for its safe keeping till required for distribution among those beneficially interested. These facts are admitted.

On the other hand it is admitted that the defenders (the Royal Bank) were creditors of the deceased testator (Mr Gray) at the time of his death for £5207, 17s. 7d., due on a cash-credit account. The defenders' third plea in law (in each action), which the Lord Ordinary has sustained, is

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Gray, it was found to be doubtful whether his estate would prove solvent, and that this fact was well known to the bank. Also it is said that the bank is now trying to take advantage of the trustees having selected it as their bankers to the effect of obtaining an unfair and illegal preference over the other creditors of the deceased. But it is not said that the bank used any unfair means to obtain possession of the money, and it would be exacting rather too high a standard of virtue from a commercial company to expect them to say when money is offered to them in the ordinary course of business, 'Don't you think you had better take the money to some other bank, in case it may turn out that the estate is not worth twenty shillings in the pound?' The pursuers say that the trustee in the sequestration holds them personally liable for the money. That may be hard for them, but the considerations which would establish their liability are not before me, and the mere threat of the trustee cannot affect the decision of the present question."

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[1] Robertson's Trustee v. Royal Bank of Scotland, Oct. 24, 1890, 18 R. 12.

[2] Rees v. Watts, June 30, 1855, 11 H. and G. 410.

[3] 2 George II. c. 22.

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that they are entitled to retain the sums deposited by the executors, and at the credit of the executry accounts, and apply them towards satisfaction of the debt due to them by the late Mr Gray.

The Lord Ordinary sustains this plea, which he calls a plea of "retention." The misnomer (as I think it is) is immaterial—the right urged by the defenders—and on which alone the plea is founded, being a right to pay the debt due to them by the deceased with the money deposited by his executors, or to set off the one debt against the other. I think the proper Scots term for this is "compensation." In England they appropriately call it "set off."

It must, I should think, occur to anyone considering the matter, that the preference which the Lord Ordinary has, by his judgment, given to the defenders, by allowing them to keep over £5000 of the executry funds wherewith to pay their own debt in full, necessarily involves either injustice to the other creditors of the deceased, who, according to the amount of their debts, have the same beneficial interest in the executry estate as the defenders, or hardship to the executors, if the view of the trustee in the sequestration be sound, that they are personally liable to make the money good to the estate.

On the death of Mr Gray, when his estate passed to and was taken up by the pursuers for administration, the defenders were in no different position from other unsecured creditors, nor, so far as I can see, could they by any proceeding whatever obtain a preference. The whole estate of their debtor had passed to the pursuers as trustees for administration, for behoof of all who were legitimately interested. The defenders could not stop or interfere with the pursuers' administration so long as they acted according to their duty, which it is not suggested they ever failed to do. Their duty was first to ascertain the amount of the estate and of the claims upon it; second, to realise and ingather the estate with reasonable dispatch; third, to put the money realised into safe keeping till needed for distribution; and finally to make the distribution among those beneficially interested according to the ability of the estate to meet their just claims. They were not only not bound, but not entitled, to pay any of the deceased's creditors until they had, using due diligence, ascertained the amount of the estate available for the payment of all of them, and the amount of the debts to be paid. I now say nothing about privileged or secured debts. Leaving these out of view, and taking account only of unsecured and unprivileged creditors, such as the defenders admittedly were, the pursuers were certainly never in a position to pay any of them—for when they were superseded by the sequestration, and the trustee under it, the estate had been only partially realised and ingathered, and they could not know what dividend it would yield. It is superfluous to say that they could not lawfully—that is, consistently with their duty as trustees and executors—confer any preference upon the defenders to the prejudice of other creditors having equal interest in the estate under their administration.

These propositions seem, therefore, to be clear enough, viz., first, that at the commencement of this executry trust the defenders were ordinary unsecured creditors who could do nothing to interrupt the executry administration or obtain a preference over other creditors; and second, that the

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executors were at no time in a position to pay their debt or give them a preference.

The defenders, nevertheless, by the plea which the Lord Ordinary has sustained, claim a very substantial preference, or what may be so, which they had not to begin with, could do nothing to acquire, and which the executors could not lawfully or without violation of their duty to others, give them. The estate may, for aught we know, yield not much short of full payment to the creditors, but we must consider and decide upon this plea exactly as if the deposited money in question proved to be the whole estate, the defenders claiming it to the exclusion of all other creditors. It is, I suppose, not doubtful that it is the duty of an executor or other trustee who ingathers considerable sums of money, to be administered by him on account of others, to deposit it in a place of safety till needed for actual use, and that a respectable bank is usually selected, the deposit being so made as to identify it as trust property. In short, the mode adopted by the pursuers here in making the deposits in question with the defenders was a lawful, and the most useful mode of performing the duty which I am referring to, and which was undoubtedly laid upon them with respect to the trust money deposited. I have therefore no hesitation in holding that these deposits were made by them in the performance of that duty, and with no intention of violating their duty to deal equally with all the creditors of the deceased by giving a security or preference to the defenders, or enabling them to pay the deceased's debt to them, and so dealing with them differently from other creditors in the same position, and therefore to the prejudice of these other creditors. The Lord Ordinary thinks, perhaps rightly, that a high standard of virtue ought not to be exacted from a commercial company. But virtue apart, and having regard only to common intelligence, I cannot think that the defenders' agents or other officials thought that Mr James Gibson, when he made the deposits of the executry money as he received it, meant to benefit the Royal Bank at the cost of the other creditors, or that he could lawfully, not to say honestly, do so.

The doctrine of compensation stands, as the text writers all state very distinctly, upon consideration of expediency and justice, the expediency of avoiding cross actions and circuitous proceedings to settle accounts between parties mutually indebted, and where debts and credits may, without injustice to themselves or others, be set off against each other. The doctrine is, in my opinion, inapplicable to sufficiently identified trust money deposited for safe keeping, or in the hands of a trustee or agent who has ingathered it. Such money must, according to well-established rules of law, be preserved while identifiable for behoof of those having the beneficial right to it. There is here, in my opinion, no *concursus* between the executors' claim against the bank for the executry money deposited, and the bank's claim against the executors for such a sum as may be found in the course of a due executry administration to be payable to them as unsecured creditors of the deceased. It is quite inaccurate to say that the executors are, or ever were, debtors to the bank for the deceased's debt to them, and to say that the estate is their debtor is to use figurative language. The executors are only debtors for a due administration of the executry estate, and to pay to each creditor what shall on such administration be found to be his share.

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Executors are only trustees, and responsible for no more than other trustees, viz., a due realisation of the trust-estate, and distribution of it among those having the beneficial right to it. The most proper language to use is that any creditor of a deceased testator or intestate is entitled to be paid such a dividend as his estate duly administered will yield, and that it will not signify to his right whether the administrator is an executor, a judicial factor, or a trustee in sequestration. When I say that an executor is not debtor for the debts of the testator or intestate, I mean more than that he is not personally liable. Of course he is not personally liable, an executory title not being a passive title, although an executor may make it so by misconduct, as, for example, by vitious intromission. What I mean is that the confirmation of an executor does not make him debtor to the creditors of the deceased testator or intestate, any more than the due and regular appointment of a trustee on a sequestrated or other estate, or of a judicial factor, makes the person appointed a debtor to those having claims to be taken account of in the administration.

The only argument stated to us in support of the defenders' plea was that an executor being *eadem persona cum defuncto*, he may give any preference to a creditor of the defunct which the defunct himself could have given in his lifetime. I have no difficulty in rejecting that view. *Eadem persona cum defuncto* is at the best figurative language, which sometimes is, and in this case was, in my opinion, very inaccurately used. It is true that for many purposes an executor stands exactly in place of the deceased, and that questions between him and others, say a creditor of the deceased, may very properly be dealt with on the same grounds and considerations in fact and in law as they would have been with the deceased himself. Thus, if a question arises, whether a particular claim was a just debt of the deceased at the time of his death, or what is the amount of it, these questions will be considered and determined with the executor exactly as they would have been with the deceased, but the *eadem persona cum defuncto* argument is ridiculous upon the statement of it if you use it with reference to the power of an executor to deal with the estate. The deceased in his lifetime might have given away his property in charity, or spent it as he pleased, or he might, there being nothing but the bankruptcy laws to restrain him, have preferred one creditor to another. When a living debtor prefers one creditor to another, or puts his estate into that creditor's power, although it may be unfair to others, he is acting in the exercise of his legal right as a proprietor, unless where some rule of bankrupt law affords a remedy. But a trustee or executor (who is just a trustee) is not at liberty to deal with the estate otherwise than as a trustee, and with a due regard to the right of those beneficially interested in the trust-estate. He cannot give away the estate in charity, or spend it in riotous living, as the owner might have done, and cannot prefer one creditor to another, but must deal justly and equally by all having equal rights. Take the case of Mr Gibson, who made the greatest part of the deposits in question (over £4000), and was the man of business of the trust, and himself a trustee. Suppose he had been the sole executor. It does not signify that he was acting along with others. As executor he was, according to the argument, *eadem persona cum defuncto*. As an individual he was, let us suppose, an unsecured creditor of

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the deceased for £4000 or more, and as trustee he ingathered £4000 of the executry estate. As *eadem persona cum defuncto*, he could have paid his own debt in full leaving any number of other creditors to go unpaid. In short, this *eadem persona cum defuncto* argument would lead to this, that an executor, if also a creditor of the deceased, may pay his own debt with the first money which he ingathered leaving other creditors only the chance of any residue after he is paid. The argument, good for this, if good for anything, was really the only argument that was stated to us, and without dwelling further upon it, I am of opinion that the Lord Ordinary has misapprehended the case, and that the trustees are entitled to judgment in terms of the conclusions of the action, the defence which the Lord Ordinay has sustained being repelled.

I have not distinguished in any way between the two small accounts in name of the trustees—one for about £500, and the other about £400,—and the larger deposits made by Mr Gibson. I think the same legal considerations are applicable to them all. It is, however, proper to say that I think the explanation of these accounts is satisfactory. The trustees were empowered by the trust-deed, if they saw fit, to carry on the deceased's business for a time, with the view of selling it as a going concern, and they did accordingly so carry it on for a few months, their conduct in doing so not being impugned. The money which went into these accounts was admittedly trust money, and it is upon the face of the accounts identified as such. There is no other distinction; the other money is really in the very conspicuous position of trust-estate ingathered by the agent for the trust, and put into the bank for safe keeping, and to allow the bank by paying themselves to take an advantage over the other creditors, whether at the cost of the other creditors, or at the cost of the executors, if they are liable for this money as having been lost in their hands, would, in my opinion, be contrary to justice, and unsupported by any rule of law with which I am acquainted.

Lord Trayner.—The plea which the Lord Ordinary has sustained is one under which the defenders maintain their right to retain money lodged with them by the pursuers in extinction of a debt due to the defenders by the deceased Mr Gray, whose trustees the pursuers are. In the argument addressed to us, the distinction between a right to compensate or set off one debt against another, and the right to retain, as on a balancing of accounts in bankruptcy, was not always carefully observed. And I think this must also have been the case in the Outer-House. The distinction, however, is or may be important, for although the pleas of compensation and the right to retain, as on a balancing of accounts in bankruptcy, come very near each other, yet there are conditions necessary to admit of the application of the former which are not required in the case of the latter.

This being, as I have said, a case of retention and not of compensation, I agree with the Lord Ordinary in thinking that the case of *Rees* v. *Watts*,[1] cited by the pursuers, has no application. That was a proper case of compensation or set-off, and its decision depended upon the construction of a special statute. I should doubt whether, even in England, that case would

[1] June 30, 1855, 11 H. and G. 410.

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be regarded as an authority in a case like the present, having regard to what was said by Parke, B., in the case of *Foster* v. *Wilson*,[1] who points out that the right of set-off is dependent on statutory provisions which are and have long been distinct and separate from other statutory enactments which provide for the case of retention in bankruptcy. I think the pursuers, if desirous of supporting their views by a citation of English authorities, would have found something nearer to the point here at issue in the principles which were given effect to in the more recent case of *Bailey* v. *Finch*.[2] But decisions in England which depend upon the construction and application of statutory provisions, special to England, can scarcely be regarded as authorities in the disposal of a question which depends upon the common law of Scotland.

The facts of the present case have already been referred to sufficiently. The question is, can the defenders retain money lodged in their hands by the testamentary trustees of Mr Gray *eo nomine* in satisfaction of a debt due to them by Mr Gray? I agree in thinking that they cannot. It appears to me that the Lord Ordinary has erred in holding that there is here mutuality of debt and credit. The defenders are the creditors of the late Mr Gray, but they are the debtors of Mr Gray's trustees. The Lord Ordinary thinks that this amounts to the same thing, and that the bank are creditors of the trustees, because the debt due to the bank is now due "by the trustees" as the representatives of Mr Gray, and he refers to a passage in Erskine in support of this. I venture to think otherwise. The trustees represent Mr Gray only in a popular sense, and as used in this case I fear that sense is misleading. The defenders do not certainly represent Mr Gray in the sense in which an heir *in mobilibus* (called an executor in our law as distinguishing him from an heir, *i.e.*, in heritage) represents the person to whom he succeeds. Such an executor, in a former state of our law, incurred absolute liability for all the debts and obligations of the deceased. He took the whole moveable estate, and with it all the debts and liabilities. He was *eadem persona cum defuncto*. But there were other executors who did not so represent the deceased. An executor-creditor does not do so, because he is not an heir or successor, but an administrator merely for his own behoof, and for behoof of others having claims against the deceased. In my opinion the pursuers are only executors in that sense. They are bound to administer the estate for behoof of all concerned, but have no liability or obligation beyond the duty of the administration. I doubt whether in the passage referred to Erskine[3] had in view any other than an executor proper (or heir *in mobilibus*), and Stair,[4] in dealing with the same subject, I think plainly means such executor, for he puts "heir" and "executor" together in a manner which shews that he is speaking of successors, heirs in heritage, and heirs in moveables. If this be so, then there is no authority for holding that testamentary trustees represent the testator in the sense in which an executor or heir in moveables represents the person whom he succeeds. They are not like him *eadem persona cum defuncto*. But if not, then the mutuality of debt and credit fails.

The Lord Ordinary further observes that the mutuality of debt and credit

[1] 22 L. J. Exchq. 191.
[2] L. R., 7 Q. B., 34.
[3] Erak. iii. 4, 13.
[4] Stair, i. 18, 6.

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is completely satisfied by the one being due by and the other to the trust-estate. But what is the defenders' claim at the present moment against the pursuers? Surely not for the debt due to them by the deceased. The pursuers may never be liable for that sum. If preferable claims carried off the whole assets of the deceased the defenders would have no claim whatever against the trustees or the estate. All that the trustees are bound for at present—the only obligation which the defenders could enforce against them—is due and fair administration. It is difficult to see how the defenders can plead retention of money paid to them by the pursuers against a debt not demandable from them, a debt which in easily conceivable circumstances may never be demandable, and a debt which, in its entirety, never can be demandable if the deceased's estate is insolvent.

In addition to what I have said, it has to be remembered that the right of retention as on a balancing of accounts in bankruptcy is an equitable remedy. If a person has money or securities in his hands belonging to his debtor, he may retain them till his debt is satisfied. If the deceased had lodged moneys or securities with the defenders, then their right of retention would have been clear. But are they to take the same benefit from the accident—for it was an accident—that the pursuers lodged with them the funds realised by them in the execution of their duty as administrators? I think not. The trustees never intended to benefit the defenders in that way, and were not entitled to confer any such benefit, for any benefit conferred on the defenders was just so much loss or detriment to the general body of creditors. Nor can the defenders in equity claim such a benefit. The funds in question were deposited with them in name of the pursuers as trustees, plainly intimating thereby that they were trust funds. The defenders, therefore, knew that these funds were subject, with the other assets of the deceased Mr Gray, to all claims competent against him, and if the estate was insolvent, then to the claims of all the deceased's creditors, according to their several rights. The defenders suffer no wrong if these funds be now applied as, at the time of their deposit, the defenders knew they should be, and only could be lawfully, applied. I think the defenders' case is not covered by the equitable remedy on which their defence is based, and am of opinion on the whole matter that the defences should be repelled.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

IN each action the Court pronounced an interlocutor recalling that of the Lord Ordinary, and giving decree for the sum sued for.

DAVID TURNBULL, W.S.—DUNDAS & WILSON, C.S.—Agents.

JAMES CULLENS Junior, Pursuer (Respondent).—*W. Campbell—Salvesen.*
THE CAMBUSBARRON CO-OPERATIVE SOCIETY, LIMITED, Defenders (Reclaimers).—*D. Dundas—Constable.*

No. 46.
Nov. 27, 1895.
Cullens v. Cambusbarron Co-operative Society, Limited.

Property—Servitude—Implied grant—Right of access where disponee owns adjoining ground.—A co-operative society were proprietors of a piece of ground with buildings which faced upon the west a street known as Store Brae. In 1872 they acquired a piece of ground adjoining their property on the east under a feu-charter which bound them to erect on the ground a dwelling-house "to be used in the meantime as a bakehouse," and to erect a fence on the east side of the feu. The feu-charter contained no provision as to access. There was an access from Store Brae through the society's property by a pend four feet wide, but the only practicable access for carts was over a ploughed field belonging to the superior, which bounded the bakehouse feu on the east. In building the bakehouse the society brought carts over this field, and after it was built they continued to use the track as an access for carts.

In 1895 the proprietor of the field brought an action against the society for declarator that they had no right of access over it.

The defenders pleaded that the grant of the feu for the purpose of building a bakehouse implied a grant of a suitable access, and that the use which had followed the grant shewed its meaning.

From a proof it appeared that it was practicable for the bakehouse business to be carried on without an access for carts by the use of hand-barrows from the pend. There was evidence to shew that before commencing the building of the bakehouse the society applied for the superior's permission to bring carts over his field.

Held (*aff.* judgment of Lord Low) that there was no implied grant of access over the field.

M'Laren v. *City of Glasgow Union Railway Co.*, July 10, 1878, 5 R. 1042, *commented on.*

2D DIVISION. Lord Low.

IN 1872 the Cambusbarron Co-operative Society, Limited, were proprietors of a piece of ground bounded on the west by a street known as Store Brae. In that year they feued from Dr John Saunders Muschet a piece of ground adjoining their property on the east.

The feu-charter described the ground feued as bounded on the east "by the remaining lands of Chapel Croft" belonging to Dr Muschet, and contained a provision that the Society should be bound within a certain time to build on the ground "a substantial dwelling-house to be used in the meantime as a bakehouse," and that the Society should be bound "to put up (so far as not already done) a proper fence of thorns and beech or privet upon the east of the ground hereby feued, and that within six months' from the date hereof."

The feu-charter contained no provision as to access to the ground feued. The only available access through the Society's ground was by a pend four feet wide in their buildings facing Store Brae.

The site chosen for the bakehouse was at the south end of the ground feued about sixty yards distant from the pend. The Society carted the materials for the building from the Chapel Croft Road over the south end of a field forming part of Dr Muschet's lands immediately to the east of their feu, and after the bakehouse was completed they continued to use this track for carting flour to the bakehouse.

Upon Dr Muschet's death his lands passed to the Crown as *ultimus hæres*, and in 1894 the Queen's Remembrancer, as donee in trust for the Crown, granted to James Cullens junior, butcher, Stirling, a dis-

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position of the field lying immediately to the east of the ground feued to the Society in 1872, "declaring that the said subjects hereby disponed shall be burdened with the servitude of any legal right of access competent to the Co-operative Society through the said subjects to their feu lying on the west side thereof."

In 1895 Cullens raised this action against the Society, concluding for declarator that the pursuer held his property "free of any servitude of right or possession or right of way for passengers by foot or horse, or with vehicles," and for interdict against the defenders going upon the lands.

The defenders stated;—(Stat. 5) "At the date of the charter in favour of the defenders, there were only two possible accesses to the feu, one by the road or way" above mentioned across Dr Muschet's field, "leading to the Stirling Road by way of the Chapel Croft Road, and the other through some other property belonging to the defenders on the west side of the feu leading to the Store Brae. This last-mentioned property, belonging to the defenders, had been feued from another superior, and was built on, and the only means of access to the public road through it was through a pend four feet wide and down some stairs, which made it impossible as an entrance for vehicles or for the conveyance of heavy materials, such as are required for the working of a bakery. In view of the purpose for which the property was to be used, the road or way leading to the east was thus a necessary means of access to the defenders' feu. With reference to the answers hereto, it is explained that the alleged access at the north-west corner of the defenders' feu consists of a footpath which passes through the properties of third parties. Explained further, that the ground fronting the Store Brae, afterwards acquired by the defenders, was not obtained from the same superior as their other feus. It could only be made an access for carts to the defenders' bakery with great cost and difficulty, and when made would be inconvenient and unsuitable."

The pursuer answered;—(Ans. 5) "Denied. Explained that, at the date of the charter, the defenders had an access to their feu at the north-west corner thereof and across the burn, and that they had property immediately adjoining the bakehouse feu, facing the Store Brae, through which a sufficient access could have been obtained. Explained further, a cart entrance is not necessary for the conveyance of flour and fuel to the bakehouse, as all that is required for the small business they do can be carried or wheeled in a hand-barrow through the pend in the defenders' front property without inconvenience. Explained further, that a few years after the bakehouse feu was taken off, the defenders, in the knowledge that any access which had been allowed to them through the pursuer's property, then belonging to Dr Muschet, was merely a privilege which could be withdrawn at pleasure, purchased a piece of vacant ground, fronting the Store Brae and lying immediately to the north of their store premises, with the view of preserving their access to the bakehouse property, in the event of the privilege being withdrawn. This additional ground was kept vacant until about two years ago, when a wooden erection was made on part of it, but sufficient space is still left to enable an access for carts or other vehicles to be formed to the bakehouse property should that be necessary."

The pursuer pleaded;—(1) The pursuer, being proprietor of said lands free of any servitude of road or passage, is entitled to have

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decree of declarator, with expenses. (2) The defenders having wrongfully asserted a right to pass over the pursuer's lands as an access to their property, the pursuer is entitled to have them interdicted, in terms of the conclusions of the summons. (3) Any use by the defenders of access to their feu through the pursuer's land having been merely in virtue of a privilege granted to them by the former proprietor, and not having continued for forty years, decree of declarator and interdict should be granted as craved.

The defenders pleaded;—(1) The defenders, as proprietors of land adjoining the property of the pursuer, are entitled to a servitude of right of way over the said property, in respect—(*a*) That the said way has been immemorially, or at least for forty years, used as a pertinent of the defenders' property; (*b*) that the said way was, at the date when the defenders acquired the property, and is, a necessary means of access thereto; (*c*) that the said way was, at the date when the defenders acquired the property, and is, necessary for the reasonable and comfortable enjoyment thereof, and the right thereto passed to the defenders by implied grant along with the feu-disposition in their favour. (2) The defenders being entitled to a right of way over the pursuer's property, and having continued with the knowledge and assent of their and the pursuer's author to use the same, are entitled to decree of absolvitor, with expenses. (3) The pursuer having, as tenant of the servient tenement, acquiesced in the defenders' assertion of the right of way in question, *et separatim*, having purchased his property in the knowledge that the said access existed, and had been used with the consent of the common author as matter of right by the defenders, he is barred *personali exceptione* from now objecting to the defenders' use of the road.

Proof was led, and thereafter the defenders admitted that they had failed to establish the acquisition of a servitude road by prescriptive possession, and that they relied entirely upon implied grant.

The result of the proof fully appears from the opinions of the Lord Ordinary and of Lord Trayner.

On 29th August 1895 the Lord Ordinary (Low) granted decree in terms of the summons.*

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* "OPINION.— . . . The question in this case is whether the defenders have right to a cart road to their feu running along the south side of the pursuer's field.

"In the record the defenders claim the road either as a servitude road, to which right has been acquired by prescriptive possession, or as a road necessary for the reasonable and comfortable enjoyment of their lands, and therefore impliedly granted along with the lands.

"After the evidence had been led, however, the defenders' counsel admitted that the acquisition of a servitude road by possession had not been established, and that he therefore rested his case entirely upon implied grant.

"The material facts appear to me to be as follows:—

"In 1827 Dr Patrick Muschet, the father of Dr John Muschet, feued the ground acquired by the defenders in 1872 to William Watson, manufacturer in Cambusbarron. In the feu-charter in favour of Watson the eastern boundary of the ground feued is described, as in the defenders' charter, as 'the remainder of the said lands of Chapel Croft,' and it is declared that 'the lands hereby feued are to be separated with a stone wall or other good and sufficient fence from the remaining part of the lands of Chapel Croft, which wall or other fence shall be made or erected on or within the ground hereby feued at the sole expense of the said William Watson, and main-

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The defenders reclaimed, and argued;—Their case rested on the principle of the decision in *Cochrane* v. *Ewart*,[1] and subsequent cases, which recognised an implied grant of access where it was necessary to the reasonable, convenient, and comfortable enjoyment of the property. The first point was whether the road in question—which was the only cart access—was necessary to the convenient use of the bake-house. Such an access had been held a necessary adjunct to a bake-house.[2] At least the proof shewed that it was a necessary adjunct. The obligation in the feu-charter binding the Society to erect a fence on their eastern boundary was for the purpose of separating the properties, and did not exclude the possibility of gates in the fence. Further, the road had been used by the defenders for more than twenty years for all their traffic. There was no cart access before the grant, because before then no bakery existed, and no cart access was required. But there was a considerable body of evidence as to the use of this line of approach as a footpath, and the general feuing-plan of the estate made for the superior shewed a road along this line of approach up to the defenders' eastern

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tained by him and his foresaids at their own expense in all time coming.' The fence actually put up seems to have been a thorn hedge.

"Watson was proprietor of ground adjoining that feued to him upon the west, and fronting a street called Store Brae. Watson therefore had access to the ground feued through his own property from Store Brae. He erected a dye or wash-house, partly upon his original property and partly upon the ground feued, and used the remainder of the latter ground as a garden.

"During Watson's time there appears to have been a wicket-gate, some three feet in width, in the south end of the fence, between his feu and the field acquired by the pursuer, so that Watson had an access to his feu from the east upon the line of the road now claimed by the defenders. There was no made path leading across the field to the gate, but only a path trodden along the hedge upon the south side of the field, and generally, when the field was ploughed, the space so trodden appears to have been left untouched. When precisely the gate was put into the fence, or what were the circumstances under which it was put in, cannot now be ascertained.

"Watson died in 1863, and the ground now belonging to the defenders appears to have been re-acquired in some unexplained way by Dr Muschet. Watson's front property was acquired by a Mr Cowie, and for a few years he also occupied the defenders' ground as a garden as tenant of Dr Muschet. About 1866 Cowie and Dr Muschet appear to have had some disagreement about the garden, and it was then let for several years to the witness Gilchrist, who also had a property fronting Store Brae, through which he obtained access to the garden.

"The wicket-gate to which I have referred appears to have fallen into disuse before Watson's death. The witness Mrs Betts is very distinct upon that point, and she says that before Watson's death the hedge had grown right across the gate. After Watson's death there is no evidence of the gate having been used at all, and it appears either to have been blocked up with thorns or with a paling. The pursuer's field also appears at that time to have been ploughed up from fence to fence without any path being left.

"Prior to 1872, therefore, it is proved (1) that the ground had always been owned or possessed by persons having property adjoining it and front-

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[1] Cochrane v. Ewart, Jan. 30, 1860, 22 D. 358, aff. March 25, 1861, 4 Macq. 117, 32 Scot. Jur. 168.

[2] Union Heritable Securities Co., Limited, v. Mathie, March 3, 1886, 13 R. 670, *per* Lord M'Laren, Ordinary, p. 673.

boundary. Implied grant was primarily a question of intention.[1] In the present case the implication of such an intention was derived from several independent circumstances—(1) The previously existing way was important. (2) The purpose for which the feu was granted—the charter expressly bore that a bakehouse was to be erected. In various English cases grantees had been found entitled to rights necessarily incident to the purpose for which the grant was made.[2] (3) The fact that when the tenants of the field had tried to interrupt the use of the cart access, the defenders had directly applied to the superior, and that the latter had then exhibited the feuing-plan shewing the road, as proving the defenders' right to its use. (4) The use of the road from the date of the feu. The Lord Ordinary thought that none of the above elements taken separately was enough to establish a right, but the defenders were entitled to have them taken together in judging of their rights.[3]

Argued for the pursuer;—The Lord Ordinary was right. There

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ing Store Brae, through which they obtained access to the ground; (2) that there had never been any access for carts to the ground from the east; and (3) that the ground, except in so far as Watson had built upon it, had always been used as garden ground. It is also proved that there was an access (although a very narrow and inconvenient one) to the ground from the north, where a small burn is crossed by stepping-stones.

"Now, when the defenders acquired the ground in 1872, they were in the same position as those who had previously held it, in that they were possessed of a property fronting Store Brae, through which they could obtain access to the ground by means of an existing pend entering from the street. In their feu-charter there is no suggestion of any access from the east over the remaining lands of Chapel Croft. On the contrary, as I have already pointed out, they were taken bound to erect and maintain a fence between these lands and the ground feued.

"These circumstances appear to me to be very unfavourable for an implied grant of a cart road through the remaining lands of the superior. If a proprietor buys an addition to his property, I think that, apart from stipulation to the contrary, the presumption is that he is to enter it from his property. That view was stated very clearly by Lord Justice-Clerk Moncreiff in the case of *M'Laren* v. *City of Glasgow Union Railway Company* (5 R. 1042). He said:—'To narrow the category, I should say, on this matter of access, that when a purchase is made by a proprietor of the adjacent property, the inference as regards access is in most cases not only displaced but reversed. Every man is presumed to have access to his own ground, and if he purchases an adjoining plot from a neighbour, the presumption is that he means to enter it from his own side. If a man buy the upper storey of a house next his own, or a corner of a field adjoining his park, the presumption is not that he contemplates using the same access as that used by the seller, but that he means to use an access through his own property. In the ordinary case nothing else could be inferred, and it would lead to the most extravagant results were it otherwise.'

"These remarks were made in a case in which the purchaser was

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[1] M'Laren v. City of Glasgow Union Railway Co., July 10, 1878, 5 R. 1042, *per* Lord Justice-Clerk, p. 1047.

[2] Gayford v. Moffat, L. R., 4 Ch. App. 133; Opinion of Lord Chancellor (Cairns) approved of by Jessel, M. R., in Corporation of London v. Riggs, L. R., 13 C. D. 798.

[3] Union Heritable Securities Co. v. Mathie, 13 R. 670.

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were many special elements to exclude the idea of implied grant. There was no existing cart access from the east at the date of the feu. There was an access from the west. It was possible to carry on the business and working of the bakehouse by means of this western access. Here the physical properties of the feu when acquired were such as to exclude the cart access from the east. A ploughed field intervened between the feu and the chapel road. Although a disposition of heritage implied access, that right was satisfied if the disponee obtained such access as existed at the date of the grant.[1] This was not a question of a necessary access, but rather one of a more convenient access. The proper test was the state of matters at the date of the feu.[2]

At advising,—

LORD TRAYNER.—The defenders in this case claim to have a right of access to their property by a road through the property of the pursuer. As originally stated that claim was based on servitude acquired by possession,

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claiming right to use an existing access, and they therefore apply *a fortiori* to a case such as the present, in which there was no existing access.

"But then the defenders say that the feu was taken by them for the purpose of erecting a bakehouse, that Dr Muschet was aware that that was the purpose for which they took the feu, that a cart road was necessary for the use of the bakehouse, and that Dr Muschet during his lifetime recognised their right to the road.

"Now, there is no doubt that the object which the defenders had in view in acquiring the ground was to erect a bakehouse upon a portion of it, and, apart from the oral evidence, the feu-charter shews that Dr Muschet must have been aware of the fact, because the feu-charter declares that the defenders shall be bound to build on the ground 'a substantial dwelling-house, to be used in the meantime as a bakehouse, stone and slated, and to uphold the same thereon in all time coming'; and it is further provided that an irritancy is to be incurred 'in case the said society or their foresaids shall fail in erecting a dwelling-house as aforesaid.'

"But while it is clear enough that Dr Muschet knew that the defenders intended to use the building as a bakehouse, I do not think that they can maintain (as at one stage of the argument they appeared to do) that Dr Muschet laid them under an obligation to erect a bakehouse, and was bound therefore to supply them with a suitable access. As I read the clause in the charter the only obligation laid upon the defenders is to erect a dwelling-house (presumably to secure the feu-duty), and the use to be made of the house 'in the meantime' is mentioned rather as a concession to the defenders than as an obligation imposed upon them. It seems to me to be plain that if the defenders had erected a dwelling-house instead of a bakehouse the superior could not have objected.

"Now, did the mere knowledge of the superior that the defenders proposed to erect a bakehouse, and his acquiescence in that use of the ground, necessarily imply the grant of a cart road to the bakehouse through the other lands of the superior? I do not think it necessary to consider what would have been the result if such a road had actually been in existence; but as no such road previously existed, it seems to me that it is impossible to read into the conveyance the grant of a road, at all events unless it can be shewn that without such a road the ground could not be utilised for the

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[1] Louttit's Trustees v. Highland Railway Co., May 18, 1892, 19 R. 791.

[2] Gow's Trustees v. Mealls, May 28, 1875, 2 R. 729; Campbell v. Halkett, July 18, 1890, 27 S. L. R. 1000; Walton Brothers v. Magistrates of Glasgow, July 20, 1876, 3 R. 1130.

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and alternatively, implied grant. The former of these grounds has been abandoned by the defenders, and the Lord Ordinary has negatived the claim in so far as it proceeds upon the latter and alternative ground, and accordingly has repelled the defences and decerned in terms of the conclusions of the summons. I am of opinion that the Lord Ordinary is right, and that his judgment should be affirmed.

The Lord Ordinary's opinion, which is fully given, seems to me to dispose so satisfactorily of the defenders' claim that nothing requires to be added, or indeed admits of being added to it, as a ground of judgment. But I may indicate in one or two sentences what appear to me to be the reasons which lead to the conclusion at which, with the Lord Ordinary, I have arrived. First, no right of the kind claimed by the defenders appears *ex facie* of the titles of either party. That, of course, is implied in the statement that the right claimed is maintained in respect of an implied grant. But the titles are referred to only because the conditions there

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purposes of a bakehouse, and that refusal on the superior's part to give such a road would have amounted to a derogation from his own grant. I do not, however, think that the defenders have established that that was the case.

"No doubt it is always a convenience to have a cart access to a bakehouse by means of which sacks of flour and other heavy materials may be brought to the door. But it is not absolutely necessary. Sacks of flour, and such like, may be and are carried considerable distances from the street or road to the bakehouse. It is true that, considering the part of the ground upon which the defenders have chosen to build their bakehouse, to convey the materials from Store Brae would involve great labour and expense. But that is because the defenders have built the bakehouse at the south end of the ground. If they had built it opposite the pend entering from Store Brae, I do not think that there would have been much practical difficulty in carrying in the materials. Therefore, in my opinion, the defenders have not proved that a cart access through the other lands of the superior was necessary to the purpose which they had in view in purchasing the ground.

"But then the defenders say that although a cart road had not actually been made, it was Dr Muschet's intention to make a road, in accordance with a feuing-plan which he had prepared, along the south side of the field acquired by the pursuer, and that both he and they had the proposed road in view when the feu was taken.

"Now the feuing-plan referred to is in a sketch plan (No. 10 of process) which Dr Muschet had obtained in 1833, shewing the manner in which he proposed that his unfeued lands should be given off. Lots Nos. 10, 11, 12, and 13 on the feuing-plan lie between the Chapel Croft Road (which is shewn upon the plan No. 24 of process) and the defenders' ground, and the feuing-plan shews a road running from the Chapel Croft Road to the fence upon the eastern side of the defenders' ground. Lot No. 10 was ultimately feued to a Mr Taylor, and lot No. 11 to James Cullens senior, the pursuer's father, and the field acquired by the pursuer represents lots Nos. 12 and 13. Taylor and Cullens formed a road opposite their feus, but when the defenders acquired the ground feued to them the road had not been formed further to the west, but what was shewn upon the feuing-plan as lots Nos. 12 and 13, with the portion of the road opposite to them, was a grass field. Now the feuing-plan does not, as I understand it, shew a road leading to the defenders' ground. The plan is a little rubbed and the line is not very distinct, but it seems to me that the road runs up to the fence forming the eastern boundary of the defenders' ground, and stops

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imposed on the predecessors of the defenders as to fencing their ground rather point at the complete separation of the two feus than to their being to any extent or effect used the one as an access to the other. Second, the track or passage in question (for it never was a made road, but merely the head-rigg left unploughed and trodden down), was used originally by Mr Watson when in possession of the defenders' feu by the direct permission of the superior, who was then in possession of the pursuers' land. The permission, however, was only for temporary use, and was withdrawn in the lifetime of Mr Watson, to whom it had been granted. The complete withdrawal of that permission is evidenced by the fact that the gate which had been placed in the hedge by Watson at the point where the passage or track gave access to the defenders' feu, was removed by Mr Watson, and the gap in the fence which the removal of the gate occasioned was filled up with stobs, which were subsequently overgrown by the hedge. All access to the defenders' ground by the passage in question from the ground to the

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there. The plan was made in 1833, and at that time the defenders' ground was feued by Watson, and was off the superior's hands. He therefore did not require to consider it, and the plan referred only to the ground which remained unfeued. Further, lots 12 and 13 had not been feued in 1872, and might never be feued; and Dr Muschet was under no obligation, and presumably did not intend, to make the road, unless the ground was feued. Further, even if lots 12 and 13 had been feued, it does not necessarily follow that the road would have been made. Suppose someone had taken both these lots as one feu, a road running straight along the south side of the ground would have been of no use to him. I am therefore of opinion that (at all events apart from the defenders' possession of the road, which I shall deal with presently) the existence of a private feuing-plan shewing a road is not equivalent to an actually existing road, which might be held to be included by implication in the grant of the ground. In regard to the allegation that the defenders had the proposed road in view when they took their feu, I can only say that I gather from the evidence that the defenders were shewn the feuing-plan for the first time long after the feu-charter had been granted.

"The defenders attempted, with the aid of the feuing-plan, to assimilate their case to that of *The Union Heritable Securities Company* v. *Mathie*, 13 R. 670. That, so far as I know, is the only case in which an access not actually in existence at the date of the conveyance was held to be included by implication in the grant. The circumstances, however, were very peculiar, and although the result undoubtedly met the equity of the case, it is difficult, as Lord Rutherfurd Clark remarked, to find a ground of judgment. I therefore do not regard the decision as adding anything to the law upon the subject, but as a special case which was decided entirely upon its peculiar circumstances. Further, it is very easy to distinguish that case from the present.

"There remains for consideration the effect of the possession which the defenders have had of the road.

"When the defenders commenced to build the bakehouse they put a gate in the fence forming the eastern boundary of their ground, and carted all the materials for the building along the south side of the pursuer's field, upon the line of the road shewn on the feuing-plan. After the building was completed, the defenders continued to bring the flour and other stores for the use of the bakery along the road in question, and they to some extent formed the road by putting down stones and ashes. All this was done with the knowledge and consent of Dr Muschet.

"The defenders, while they admit that the possession which they have

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east was thus entirely excluded. Third, after Watson had ceased to use the passage as an access to his ground, and for several years before the defenders acquired the property, the passage in question left unploughed while Watson was using it was ploughed over like the rest of the field, and the passage was obliterated. There was no passage used, or indeed in existence, when the defenders acquired the ground. There was nothing, therefore, in the physical condition or appearance of the ground to suggest to the defenders that there was any access to their land from the east. Fourth, the access claimed was not, and is not, necessary to the defenders in the reasonable use and enjoyment of their subjects. That it might be very convenient may be admitted, but that it is not necessary is, I think, clearly established. The defenders' ground has all along been held either by feuars or tenants in connection with other property fronting the Store Brae, and is now so held by the defenders. Through that property, so fronting the street, access can now, as formerly, be had to the defenders' feu, and I think the Lord

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had is not sufficient to constitute a servitude right of way, maintain that the possession interprets the conveyance in their feu-charter, and shews that the road was included in the grant. The pursuer, on the other hand, avers that the defenders' use of the road was a mere privilege conferred upon them by Dr Muschet.

"It appears to me that upon the evidence the contention of the pursuer must be sustained. There is only one witness, William Smith, who is able to speak definitely as to the circumstances under which the defenders began to use the road. At the time when the feu was taken he was the chairman of the committee of the defenders' society, and in that capacity he was one of those who negotiated with Dr Muschet for the feu. He says that after the rate of feu-duty had been settled, and it had been agreed that the defenders should take the feu, he asked Dr Muschet for the privilege of bringing in the building materials through the pursuer's field, which Dr Muschet granted. Other witnesses, who were members of the society at the time, no doubt say that their understanding was that the society had right to the road, and that Dr Muschet recognised the right. The evidence of all these witnesses, however, is very vague, and they mostly give only the impression which they received from the reports of those who formed deputations which on various occasions met Dr Muschet. Smith's evidence, on the other hand, is quite distinct, and as he was one of those who actually carried through the negotiations for the feu, he has the means of knowing precisely what passed, and as I saw no reason for doubting his truthfulness, his evidence must, in my opinion, be accepted as conclusive in regard to the way in which the defenders first obtained the use of the road.

"Further, it seems to me that the probabilities of the case point in the same direction. If, as they now say, the defenders regarded the acquisition of the road as an essential matter, I cannot but think that they, or their law-agents, would have taken care to have the right inserted in the feu-charter. On the other hand, if Dr Muschet had been granting a servitude road, I think that he would have had the conditions upon which the grant was given precisely defined. I think that it is most unlikely that he should have assured the defenders, or that, if he did so, they should have accepted the assurance that a right to a non-existing road was included in a mere conveyance of the ground which, moreover, contained an obligation upon the defenders, enforceable upon pain of forfeiture, to fence it off from the field through which the road was to pass. It is much more probable that Dr Muschet gave the defenders permission to pass through the field. It was his interest that the building should be completed as quickly as possible, and very probably the fact that he contemplated that a road would

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Ordinary is right in applying to this state of matters the law as laid down by the late Lord Justice-Clerk in the case of *M'Laren*.[1] Fifth, any possession which the defenders have had has been in consequence of the superior's permission, and there is nothing whatever to shew that he intended to give more by such permission than a temporary convenience, such as he had many years before granted to Mr Watson. These are, I think, the main grounds on which the Lord Ordinary proceeds in repelling the defenders claim, and which I have perhaps unnecessarily repeated. They seem to me sufficient for the decision which has been pronounced, and in which I concur.

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ultimately be made through the field made him the more ready to give the concession. The same consideration might have influenced him in allowing the defenders, after the building was completed, to bring the not very large supply of flour, and so forth, which they required at the bakery, through the field. It was a privilege which he might naturally enough have granted to his feuars, especially as it does not seem to have interfered with the letting of the field.

"Some time after the bakery was established, a deputation of the defenders' society again went to Dr Muschet about the road. It appears that Mr Cullens senior objected to the use which the defenders were making of the road which he had made opposite his house, and of the field of which his firm were then tenants. He accordingly put a padlock upon the gate into the field, and the defenders sent a deputation to Dr Muschet on the subject. The defenders attempted to prove that he then assured them that the road was theirs. I am not sure if the evidence is competent; but assuming that it is so, I am of opinion that it is not proved that Dr Muschet expressed the view that the road belonged to the defenders. The question in regard to which they went to him was whether Cullens was entitled to shut up the gate and prevent them having access to the field. All that appears to me to be proved is that Dr Muschet said that Cullens had not right to do so. It was on this occasion that Dr Muschet produced (apparently for the first time) the feuing-plan. The defenders attempted to prove that the plan was produced to shew the road as being a road to which they had right, but I do not think that that was the case. I think that the plan was produced to shew that Cullens, having taken his feu upon the footing that the road would ultimately be carried up to the defenders' ground, had no right to object to the defenders using the road with Dr Muschet's permission.

"I am therefore of opinion that the use of the road by the defenders has throughout been a matter of privilege and tolerance, and not the exercise of a right.

"It was finally argued that the pursuer is barred *personali exceptione* from objecting to the defenders' use of the road. The only ground upon which that plea is rested is, that before he purchased the field the pursuer was tenant of it, and therefore knew the use which the defenders had of the road. Of course, when the pursuer purchased the field, he took the risk of the defenders having a servitude right over it, and if it had turned out that they had such a right, his prior knowledge of their possession would have barred him from repudiating his purchase and making any claim against the seller. But his knowledge that the defenders had used the road did not prevent him stopping that use if he found that it was without legal title.

"Upon the whole matter, I am of opinion that the pursuer is entitled to decree."

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[1] 5 R. 1042.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

DUNCAN SMITH & MACLAREN, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

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MRS ELIZA CATHERINE LIDDELL OR WATSON, Pursuer (Respondent).—*W. C. Smith—C. J. Guthrie.*

HUGH WATSON, Defender (Reclaimer).—*W. Campbell—Craig.*

Parent and Child—Husband and Wife—Divorce—Custody and aliment of children—Conjugal Rights (Scotland) Amendment Act, 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 9.—An order pronounced by a Lord Ordinary in an action of divorce, under the power conferred by section 9 of the Conjugal Rights Amendment Act, 1861, to make provision for the custody and aliment of pupil children of the marriage, ceases to be operative in regard to each child when it emerges from pupillarity.

1ST DIVISION. Ld. Kyllachy.

IN an action of divorce by Mrs Catherine Watson against Hugh Watson, her husband, the Lord Ordinary (Craighill), on 17th March 1880, granted decree of divorce: "Further, of consent of the defender, finds the pursuer entitled to the custody and keeping of Andrew Gordon Watson and John Liddell Watson, the children of the pursuer and defender, for the present, and until the further orders of the Court: . . . Ordains the defender to make payment to the pursuer of the sum of £75 sterling yearly, as aliment for each of the said Andrew Gordon Watson and John Liddell Watson, the children of the marriage of the pursuer and defender . . . so long as the said children shall remain in the custody of the pursuer: Reserving to either the pursuer or the defender at any time to move the Court in the present action to increase or diminish the aliment now awarded to the pursuer for said children, should a change of circumstances occur rendering such an increase or diminution necessary or expedient in the opinion of the Lord Ordinary or the Court, and decerns."*

At this date the children, Andrew Gordon Watson and John Liddell Watson, were respectively four and three years of age.

By assignation dated and recorded in May 1880 the defender assigned to trustees a bond and disposition in security for payment of the aliment decerned for.

In 1895 the pursuer, Mrs Watson, lodged a minute craving that the aliment for each of the children should be increased in order to meet the expenses of their professional education.

Hugh Watson lodged answers, and also a minute stating that the two children of the marriage had now nearly attained majority, the elder being twenty, and the younger nearly nineteen, and that he himself had been reduced to poverty. He therefore craved the Court to put an end to the aliment, and to ordain that the balance of the

* The Conjugal Rights Amendment Act, 1861 (24 and 25 Vict. c. 86), sec. 9, enacts,—"In any action for separation *a mensa et thoro*, or for divorce, the Court may from time to time make such interim orders, and may, in the final decree, make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates."

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£3000 assigned to trustees by the assignation in 1880 should be restored to him.

On 17th October 1895 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"Refuses the motion made by the pursuer in said minute for an increase of the aliment awarded to the pursuer for the maintenance of their children, Andrew Gordon Watson and John Liddell Watson, by the interlocutor of 17th March 1880; also refuses, *in hoc statu*, the motion made by the defender in said minute No. 41 of process, that the aliment should now terminate: Grants leave to reclaim."

The defender reclaimed, and argued;—The interlocutor of Lord Craighill must be read as applying to pupils and not to minors, both on account of its terms, and also because the Lord Ordinary had no power to regulate the custody of children in an action of divorce[1] save under the provisions of section 9 of the Conjugal Rights Act of 1861, which applied only to pupils and not to minors. Children who had emerged from pupillarity could not be regarded as in the custody of their mother.[2] The decree had therefore ceased to be operative, and, that being so, the subjects assigned for the purposes of that decree should be restored.[3]

Argued for the respondent;—A child did not necessarily cease to be "in custody" on ceasing to be a pupil.[4] Even assuming that the interlocutor of Lord Craighill had now ceased to be operative, the Court could not ordain trustees to denude of their trust by an order in an action of divorce.

At advising,—

LORD PRESIDENT.—In my opinion, the Lord Ordinary who pronounced the interlocutor of 17th March 1880 had no power to assign to the pursuer the custody of these children after they had ceased to be pupils. His Lordship's jurisdiction necessarily rested on the Conjugal Rights Act, 1861, for apart from that statute questions of custody are not competent to a Judge in the Outer-House. Now, the 9th section of the statute applies only to pupils. Seeing, then, that the interlocutor is an exercise of the statutory jurisdiction, it is to be read, and I think may fairly be read, as relating solely to the period of pupillarity. The custody having ceased, the aliment has also ceased. Were the true meaning of the interlocutor wider, to that extent it would be *ultra vires* and ineffectual. This being so, the interlocutor ceased to be operative as regards each child when he passed pupillarity.

In this view the present process has ceased to be one in which any order of custody or aliment can competently be pronounced. On this ground, I consider that the defender's motion should have been refused absolutely, and not *in hoc statu* merely.

The rights *inter se* of the defender on the one hand, and his sons on the other, if these come in dispute, must be determined in some other process, and may arise in relation to the disposal of the money remaining in the

[1] Fraser, Parent and Child, p. 69.

[2] Hardie v. Leith, Oct. 31, 1878, 6 R. 115; Symington v. Symington, March 18, 1873, 2 R. (H. L.) 41.

[3] Reid v. Moir, July 13, 1866, 4 Macph. 1060, Lord Justice-Clerk (Inglis) at p. 1063, 38 Scot. Jur. 551.

[4] M'Iver v. M'Iver, July 2, 1859, 21 D. 1103, 31 Scot. Jur. 619.

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hands of the trustees. There may also arise any equitable claims which the wife may have arising out of the conduct of the husband in allowing her, while *de facto* providing for the children, to enter into onerous engagements for their benefit. None of such questions are now competently before us.

I am for varying the Lord Ordinary's interlocutor of 17th October 1895 by omitting the words *in hoc statu*, and *quoad ultra* adhering.

LORD ADAM.—I am of the same opinion. The Lord Ordinary had no jurisdiction to regulate the maintenance, custody, and education of children before the Conjugal Rights Amendment Act of 1861. But section 9 of that Act empowers the Lord Ordinary to make such provision as to him shall seem just and proper "with respect to the custody, maintenance, and education of any pupil children of the marriage." It appears that the jurisdiction of the Lord Ordinary does not go beyond the power to regulate the custody, maintenance, and education of pupil children, and that he has none to regulate those of minors. That being so, the question is—What is the meaning of the Lord Ordinary's judgment? I agree with your Lordship that there is no doubt that it must be read with reference to the jurisdiction which he possesses. If that be so, the meaning is that the children referred to in the decree are pupil children, and that the virtue of the interlocutor ceases as soon as the children cease to be pupils. I therefore agree.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT varied the interlocutor of the Lord Ordinary by the omission of the words *in hoc statu*, and *quoad ultra* adhered.

PRINGLE & CLAY, W.S.—JAMES ALLAN, Solicitor—Agents.

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Nov. 28, 1895.
Barony Parish Council v. Glasgow School Board.

BARONY PARISH COUNCIL, Pursuers (Respondents).—*D.-F. Asher*—*Deas.*
SCHOOL BOARD OF GLASGOW, Defenders (Appellants).—*Dickson*—*Sym.*

School—Land acquired by School Board by voluntary purchase—Deficiency of poor-rates—Lands Clauses Consolidation (Scotland) Act, 1845 (8 *and* 9 *Vict. c.* 19), *sec.* 127—*Education (Scotland) Act*, 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 37—*Education (Scotland) Act*, 1878 (41 *and* 42 *Vict. c.* 78), *sec.* 31.—Where a school board acquired land for the site of a school by voluntary purchase, and without adopting the procedure prescribed by section 31 of the Education Act, 1878, and obtaining a confirming Act, *held* that the school board were not liable under section 127 of the Lands Clauses Act, 1845, to make good the deficiency in the poor-rates caused by their having acquired the land.

1ST DIVISION.
Sheriff of Lanarkshire.

THE SCHOOL BOARD OF GLASGOW, for the purpose of erecting two public schools, acquired certain properties in Glasgow, and demolished the buildings on the properties. The Barony Parish Council thereafter brought an action against the School Board in the Sheriff Court at Glasgow for payment of £25, 0s. 11d., being the difference of the rates for the year 1894-5 on the properties which the School Board

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had taken as compared with their value for the year 1892-3* (the rates for 1893-4 having been, it was alleged in error, settled for).

The defenders admitted the acquisition and demolition of the properties, but explained that they had acquired them for the sites of schools by ordinary purchase from the owners.† The pursuers, in the course of the action, admitted that the defenders had neither applied for nor obtained a confirming Act in relation to the properties.‡

The defenders pleaded;—(2) The defenders are entitled to absolvitor, with expenses, in respect (*a*) the defenders acquired the sites in question in virtue of their power under the Education Act, 1872, to acquire sites, and not in virtue of the powers contained in the Lands Clauses Consolidation Act, or the special Act, or any Act incorporated therewith; (*b*) *separatim*, even supposing it were in virtue of the Lands Clauses Consolidation Act that they did acquire the sites in question, there is in regard to these sites no special Act as defined in section

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* Section 127 of the Lands Clauses Consolidation (Scotland) Act, 1845 (8 Vict. c. 19), enacts, that "if the promoters of the undertaking become possessed by virtue of this, or the special Act, or any Act incorporated therewith, of any lands charged with the land-tax, or liable to be assessed to the poor's-rates or prison assessments, they shall from time to time, until the works shall be completed and assessed to such land-tax and poor's-rate and prison assessment, be liable to make good the deficiency in the several assessments . . . by reason of such lands having been taken or used for the purposes of the work, and said deficiency shall be computed according to the rentals at which said lands with any building thereon were valued or rated at the time of the passing of the special Act. . . ."

† The Education (Scotland) Act, 1872, sec. 37, enacts,—"In performing their duties under this Act, it shall be lawful for any school board to acquire by purchase or otherwise sites for schools . . . [And for the purpose of the purchase by a school board of any land or building in pursuance of the provisions of this Act the clauses of the Lands Clauses Consolidation (Scotland) Act, 1845, with respect to the purchase of lands by agreement shall be incorporated herewith . . ."]

The portion of section 37 within brackets was repealed by the Statute Law Revision Act, 1883 (46 and 47 Vict. c. 39).

‡ The Education Scotland Act, 1878 (41 and 42 Vict. c. 78), enacts, sec. 31,—"With respect to the purchase of land by school boards for the purposes of the Education (Scotland) Acts, 1872 and 1878, the following provisions shall have effect—(that is to say):—

"(1) The Lands Clauses Consolidation (Scotland) Act, 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the special Act, and in construing these Acts for the purposes of this section the special Act shall be construed to mean the principal Act and this Act, together with the confirming Act hereinafter mentioned. . . .

"(2) The school board before putting in force any of the powers of said Acts with respect to the purchase and taking of land otherwise than by agreement shall"—[Here follow provisions for the publication and service of notices describing the object for which the land is to be taken, and the obtaining of an order from the Scots Education Department authorising the taking of the lands].

"(6) No order so made shall be of any validity, unless the same has been confirmed by Act of Parliament; and it shall be lawful for the Department . . . to obtain such confirmation, and the Act confirming such order (herein called the confirming Act) shall be deemed to be a public general Act of Parliament."

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31 of the Education Act, 1878, and therefore section 127 of the Lands Clauses Consolidation Act does not apply.

On 22d June 1895 the Sheriff-substitute (Guthrie) decerned against the defenders as craved.*

* "NOTE.—By the Education Act, 1872, sec. 37, the clauses of the Lands Clauses Act with respect to the purchase of lands by agreement are incorporated with the Act 'for the purpose of the purchase by a school board of any land or building in pursuance of the provisions of this Act.' These words occur in the section which authorises the School Board to acquire sites and schools by purchase or otherwise, and appear to apply to the 6th and following clauses of the Lands Clauses Act, which gives facilities for buying land from owners under disability. It is unnecessary to consider whether this incorporation included the 127th section of the Act on which this action is founded, because by the Education Act of 1878, sec. 30, the whole of the Lands Clauses Act, with an unimportant exception, is incorporated with the Education Acts of 1872 and 1878.

"The 127th section of the Act of 1845 (section 133 in the English Act) makes the School Board liable 'to make good the deficiency' in certain rates, including poor-rates, 'by reason of lands having been taken or used for the purposes of the work,' and that 'from time to time until the works shall be completed and assessed.' This action is brought for a deficiency said to arise in this way in the assessment for the year 1894-95 on lands taken for school purposes in Barony Parish, the deficiency being ascertained—as I assume, though it is not so stated—by comparison with the assessment of the previous year.

"The defenders object to this claim on two grounds. They say that the 127th section does not apply to them (1) because they have not bought under the provisions of the Lands Clauses Act, but under the power to acquire lands conferred by section 37 of the Act of 1872; and (2) because in any view, the 127th section provides that the deficiency 'shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act,' and in the present case no special Act exists in the sense of section 31 of the Education Act, 1878.

"1. The Lands Clauses Act, with the exception referred to, is incorporated with the Education Act, and no reason has been suggested why the 127th section should have no effect where lands are bought by private bargain, and without any use being made in regard to the properties in question (as is alleged in argument, though not admitted) even of the powers in the 'purchase by agreement' clauses. The natural meaning of incorporation is that the whole Act, so far as not inconsistent with the Education Act (*Att. Gen.* v. *G. E. Railway Co.*, L. R., 7 Ch. 475), is embodied in the Education Act, and the school board is not entitled to hold itself free from certain of its provisions and to take advantage when the occasion arises of others; and as it is impossible to say in such a case as this that the possession of compulsory powers (however qualified in the Act of 1878) has not indirectly benefited the defenders in bargaining about these properties, it is not unfair to say that they should take the incommodum of the Act along with the commodum. This point, however, seems to be concluded by the very full explanation of what incorporation means in the preamble of the Act of 1845, which is to be construed 'as one Act with the Education Act.'

"2. It is perhaps a more arguable question which is raised on the proviso in the Lands Clauses Act as to computing the deficiency already quoted, taken along with the provisions of section 31 of the Education Act, 1878. The latter introduces a rather peculiar and cumbrous procedure regarding the taking of land compulsorily, consisting of an application to the Education Department for an order, which becomes final only by a con-

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The defenders appealed, and argued;—(1) Section 127 of the Lands Clauses Act, 1845, did not apply. The defenders had acquired the properties by voluntary purchase. They were entitled to do that under section 37 of the 1872 Act. That part of section 37 by which the Lands Clauses Act was incorporated had been superseded by section 31 of the 1878 Act, and ultimately repealed. It had not been necessary for the defenders to call in aid the compulsory powers of the Lands Clauses Act at all. They had not required to adopt the procedure set forth in section 31, and to obtain a confirming Act, but it was only after such an Act was obtained that the incorporation of the Lands Clauses Act under section 31 took effect. (2) Besides, it was essential for the practical working of section 127 that a special Act should have been obtained, for the deficiency of the rates had to be computed with reference to the date of the special Act. But it was evident from subsec. (6) of section 31 that without a confirming Act there could be no special Act. There was no confirming Act here, and it was impossible, therefore, duly to ascertain the deficiency of rates in terms of section 127.

Argued for the respondents;—(1) Section 31 of the 1878 Act took

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firming Act of Parliament. Subsection 1 of section 31 enacts that in construing the Lands Clauses Acts and amending Acts 'for the purposes of this section, the special Act shall be construed to mean the principal Act (1872) and this Act, together with the confirming Act hereinafter mentioned.' The contention made is that as there is no confirming Act in regard to the purchase of the subjects condescended on, there is no special Act at the passing of which the rental can be computed, and therefore, as I understand the argument, the conditions necessary for the operation of section 127 of the Lands Clauses Act do not exist. The assumption is that in all cases the deficiency to be made good depends on a comparison of the rental of the present year with the year in which the special Act was passed. I am not satisfied that this is a sound construction of section 127. It rather appears that the main provision is that until the works are completed and assessed the promoters shall make good the deficiency in rates by reason of their taking and using the lands, and that the provision as to computation is merely ancillary. In most cases there is no doubt or difficulty, because the special Act is easily ascertained and is of no remote date, while here the definition above given refers us to an Act which has never come into existence, and but for the definition above given we should have to look to 1872 or 1878 for the passing of the special Act. It seems to me, however, that the intention of the Legislature is that the deficiency shall be made good in all cases where lands are taken and the work not yet completed, and that the subsidiary provision does not limit the general enactment, but is applicable only where there is a special Railway or Canal Act, or the like, authorising the taking of specific lands—the *species facti* which no doubt was directly contemplated by the framers of the Act of 1845. In more recent times the taking of land has been authorised in a variety of ways, and by classes of promoters not then thought of, and general powers have been given to proceed under the Lands Clauses Act. I cannot doubt that all these 'promoters' must make good the deficiency, and that the special subsidiary proviso as to computation must receive effect in those cases only to which it is applicable. Many cases of 'beneficial' construction of statutes are found which go further than this, *e.g.*, *Cortis* v. *Kent Waterworks*, 7 B. and Cr. 314, illustrates the principle, and I think that the adaptability of this very clause to circumstances apparently not contemplated is shewn by *Bristol Guardians* v. *Mayor of Bristol*, 18 Q. B. D. 549, and the earlier cases of *Wheeler and Stratton* v. *Metropolitan Board of Works*, there cited."

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the place of section 37 of the 1872 Act, and by it the Lands Clauses Act was incorporated. The incorporation was altogether independent of the special procedure prescribed for the case of lands acquired otherwise than by agreement. Land acquired by a school board must therefore be liable to the conditions imposed by that Act. By it a school board obtained higher powers and greater advantages than they formerly had, and they were not entitled to take benefit by some and to ignore others of its provisions merely because these latter appeared disadvantageous, unless they were also inconsistent with the Education Acts.[1] That was not so here, and there was no reason why lands acquired by private agreement should not be included within the operation of section 127. (2) The obvious intention of section 127 was to provide for the deficiency of rates occasioned by the promoters taking land—however they might take it—being made good until the works were completed and assessed. There was no practical difficulty in ascertaining the necessary dates, and the passage in section 127 as to computing the deficiency was merely ancillary to the main provision, and was inserted to meet what was the most likely case to occur. The Court would construe a subsidiary clause of that kind liberally, so as to give effect to the main purpose of the section.[2]

LORD PRESIDENT.—This claim is rested upon the 127th section of the Lands Clauses Consolidation (Scotland) Act, and it is necessary, first of all, to see what is the relation of this school board to the Lands Clauses Act under the several statutes which deal with the matter. In the Act of 1872 there was a partial incorporation of the Lands Clauses Act, but in 1878 a different system was substituted. Without expressly repealing the provisions in the Act of 1872, the Act of 1878 did this. It incorporated the whole of the Lands Clauses Act with the Act of 1872. But then it provided that before putting in force any of the powers of the Act with respect to the purchase and taking of land otherwise than by agreement certain procedure was to be gone through. That procedure may be shortly stated thus:—A provisional order was to be obtained, and a confirming Act of Parliament followed upon that. Now, in one view, the position of the school board was strengthened, and in another it was weakened by this. But that the two systems were inconsistent the one with the other, or rather that the system of 1878 was intended to supersede and sweep away the system of 1872, is shewn by this, that the Legislature subsequently, holding the one to supersede the other, formally repealed the provisions of the Act of 1872 in this regard. Now, that being the net result of these statutes, we have to consider, in the matter now in hand—Has the School Board exercised the powers of the Lands Clauses Act vested in them by the Act of 1878? And we have to regard that in relation to the very definite terms of this section 127. We are told by section 127 that if lands have been taken in virtue of the Lands Clauses Act, and a deficiency has arisen in the assessments, that shall be made good, but that the deficiency shall be computed according to the rentals at which said lands, with any buildings thereon, were valued or rated at the time of the passing of the special Act.

[1] Attorney-General v. Great Eastern Railway Co., 1877, L. R., 7 Ch. Ap. 475.

[2] Governor of Poor of Bristol v. Mayor of Bristol, 1887, L. R., 18 Q. B. D 549; Stratton v. Metropolitan Board of Works, 1874, 10 C. P. 76.

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counsel, there is substituted for that power a new incorporation of the Lands Clauses Act itself under the conditions of that Act. Therefore it seems to me to follow of necessity from the concession, that until the School Board has obtained authority to take land it has not been brought within the scope of the Lands Clauses Act of 1845 at all. Now, that being so, I agree with your Lordships that none of the conditions under which section 127 would be brought into operation have been satisfied. The promoters or the School Board have become possessed of land, but not by virtue of the Lands Clauses Act, because that has not yet been brought into operation, nor by virtue of any special Act or Act incorporated therewith, because the special Act has not yet come into existence. They might obtain a special Act by following certain procedure, but they have not, and therefore I agree with your Lordships in thinking that they are possessed of the land by virtue of the powers conferred upon them by the 37th section of the Education Act of 1872, and not otherwise. For these reasons I agree that the interlocutor of the Sheriff-substitute should be recalled, and that the appeal should be sustained.

THE COURT sustained the appeal, and assoilzied the defenders.

MACKENZIE, INNES, & LOGAN, W.S.—H. B. & F. J. DEWAR, W.S.—Agents.

No. 49.

Nov. 29, 1895. Shedden v. Shedden's Trustees.

MRS JANE DUNLOP COCHRAN OR SHEDDEN AND ANOTHER, Pursuers (Reclaimers).—*Salvesen—M'Lennan.*

THOMAS DUNLOP WILSON AND OTHERS (Mrs Shedden's Trustees), AND OTHERS, Defenders (Respondents).—*R. V. Campbell—Craigie.*

Trust—Inter vivos disposition—Right to revoke.—By trust-disposition and assignation S assigned and disponed certain heritage described in the deed, and the whole remainder of her estate, heritable and moveable, to trustees, first, for behoof of herself in liferent, exclusive of the *jus mariti* and right of administration of any husband she might marry; and second, for behoof of her two sisters and their respective heirs in fee. In the third place, she provided that, notwithstanding the above provision of liferent and fee, it should be within the power of her trustees, at any time, in their sole discretion, to advance to her the whole or such part of the capital as they might think fit. She further declared that the deed should be held as an alimentary provision for behoof of herself, and should not be affectable or attachable by her debts or deeds, or the diligence of her creditors.

The deed was delivered to the trustees, who accepted office, and was thereafter recorded in the Register of Sasines.

Held (*aff.* judgment of Lord Kyllachy) that the deed was not revocable by S.

1ST DIVISION. Ld. Kyllachy.

ON 27th January 1894 Miss Jane Dunlop Cochran, residing at Grange Cottage, Dunlop, who was then fifty-four years of age, executed a trust-disposition and assignation bearing to be in contemplation of her approaching marriage, whereby she assigned and disponed to certain trustees a small heritable property in the parish of Dunlop, two heritable bonds for £900 and £600 respectively, and the whole remainder of the means and estate, heritable and moveable, then belonging to her, or which might belong to her at the time of her death, in trust for the following purposes, viz.:—First, for her own liferent use and enjoyment allenarly during all the days of her life exclusive of the *jus mariti* and right of administration of any husband

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Nov. 29, 1895. Shedden v. Shedden's Trustees.

she might have; second, for behoof of her sisters Margaret Cochran or Muir and Jessie Cochran or Anderson equally between them and their respective heirs in fee. In the third place, she provided that, "notwithstanding the provision of liferent and fee hereinbefore contained, it shall be within the power of my said trustees, or the survivors of them, at any time in their or his discretion, ... to advance and pay to me while in life either the whole or such part of the capital as they may deem expedient and think fit, and that without any consent or concurrence of any kind whatever, declaring that all such payments as may be made to me shall be exclusive of the *jus mariti* and right of administration of any husband I may have; . . . and I further declare that these presents shall be held as an alimentary provision for behoof of myself, and shall not be affectable or attachable by the debts or deeds of me, nor by the diligence of my creditors. . . ."

The deed was delivered to the trustees named therein, who accepted office by minute dated 31st January 1894, and the deed was recorded in the Register of Sasines on 14th February 1894.

On 6th February 1894 Miss Jane Dunlop Cochran married John Shedden, and in December 1894 she brought an action, with the consent and concurrence of her husband, against the trustees and beneficiaries named in the trust-disposition and assignation (1) for reduction of the said deed, the minute of acceptance by the trustees, and the warrant of registration written on the deed on behalf of the trustees; or alternatively (2) for declarator that the said deed was revocable by her with her husband's consent, and had been validly revoked.

The pursuer averred, *inter alia*, that the deed had been granted by her in the belief that it was merely testamentary, and that, if this was not its character, it had been executed by her under essential error as to its import and effect, induced by the agent who acted for her in drawing it.

She also pleaded,—(1) The said trust-disposition and assignation being revocable in its nature, and having been validly revoked by the pursuers, decree of declarator should be pronounced in terms of the alternative conclusion of the summons.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant and insufficient. (2) The trust-deed challenged having been executed in contemplation of marriage, and for the female pursuer's protection during marriage, the same is not revocable by her. (3) The trust-deed challenged being in its nature and terms irrevocable, the pursuers have no ground of action.

On 8th June 1895 the Lord Ordinary (Kyllachy) repelled the first plea in law for the pursuers, and before further answer allowed the parties a proof of their averments.*

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* "OPINION.—In this case I have come to the conclusion that the disposition and assignation challenged is, upon its legal construction, a deed which operated as a divestiture of the pursuer, and was therefore irrevocable. I need not explain at length the grounds of that opinion. They come simply to this, that the deed is a conveyance to trustees for certain purposes, which appear to me to leave the truster merely such rights as are provided to her under the trust-deed, and I do not think it material—at all events I do not think it conclusive—that under the deed the trustees have in their discretion certain powers which might enable them in effect to restore the estate, or part of the estate, to the granter. I do not, it will be observed,

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counsel, there is substituted for that power a new incorporation of the Lands Clauses Act itself under the conditions of that Act. Therefore it seems to me to follow of necessity from the concession, that until the School Board has obtained authority to take land it has not been brought within the scope of the Lands Clauses Act of 1845 at all. Now, that being so, I agree with your Lordships that none of the conditions under which section 127 would be brought into operation have been satisfied. The promoters or the School Board have become possessed of land, but not by virtue of the Lands Clauses Act, because that has not yet been brought into operation, nor by virtue of any special Act or Act incorporated therewith, because the special Act has not yet come into existence. They might obtain a special Act by following certain procedure, but they have not, and therefore I agree with your Lordships in thinking that they are possessed of the land by virtue of the powers conferred upon them by the 37th section of the Education Act of 1872, and not otherwise. For these reasons I agree that the interlocutor of the Sheriff-substitute should be recalled, and that the appeal should be sustained.

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she might have; second, for behoof of her sisters Margaret Cochran or Muir and Jessie Cochran or Anderson equally between them and their respective heirs in fee. In the third place, she provided that, "notwithstanding the provision of liferent and fee hereinbefore contained, it shall be within the power of my said trustees, or the survivors of them, at any time in their or his discretion, ... to advance and pay to me while in life either the whole or such part of the capital as they may deem expedient and think fit, and that without any consent or concurrence of any kind whatever, declaring that all such payments as may be made to me shall be exclusive of the *jus mariti* and right of administration of any husband I may have; . . . and I further declare that these presents shall be held as an alimentary provision for behoof of myself, and shall not be affectable or attachable by the debts or deeds of me, nor by the diligence of my creditors. . . ."

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The pursuer averred, *inter alia*, that the deed had been granted by her in the belief that it was merely testamentary, and that, if this was not its character, it had been executed by her under essential error as to its import and effect, induced by the agent who acted for her in drawing it.

She also pleaded,—(1) The said trust-disposition and assignation being revocable in its nature, and having been validly revoked by the pursuers, decree of declarator should be pronounced in terms of the alternative conclusion of the summons.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant and insufficient. (2) The trust-deed challenged having been executed in contemplation of marriage, and for the female pursuer's protection during marriage, the same is not revocable by her. (3) The trust-deed challenged being in its nature and terms irrevocable, the pursuers have no ground of action.

On 8th June 1895 the Lord Ordinary (Kyllachy) repelled the first plea in law for the pursuers, and before further answer allowed the parties a proof of their averments.*

* "OPINION.—In this case I have come to the conclusion that the disposition and assignation challenged is, upon its legal construction, a deed which operated as a divestiture of the pursuer, and was therefore irrevocable. I need not explain at length the grounds of that opinion. They come simply to this, that the deed is a conveyance to trustees for certain purposes, which appear to me to leave the truster merely such rights as are provided to her under the trust-deed, and I do not think it material—at all events I do not think it conclusive—that under the deed the trustees have in their discretion certain powers which might enable them in effect to restore the estate, or part of the estate, to the granter. I do not, it will be observed,

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Proof was afterwards led, the result of the evidence being to negative the pursuer's allegation that she had executed the deed under essential error as to its import and effect, and on 20th July 1895 the Lord Ordinary assoilzied the defenders.

The pursuers reclaimed, and argued;—(1) The trust-disposition was a *mortis causa* and revocable deed. It was not a partial conveyance, but dealt with the *universitas* of the granter's estate, and the probabilities were all against it being the granter's intention to divest herself of her whole estate. The trustees were also empowered, at their discretion, to retransfer the whole trust-estate to the granter, and thus to defeat the right of the fiars. Accordingly no such *jus quæsitum tertio* was created as to bar revocation.[1] The deed was therefore of the same character as a disposition to trustees for behoof of the granter in liferent and her issue to be born in fee, and such a disposition was revocable.[2] A deed conceived in such terms as those here in question was not effectual against creditors, and was therefore revocable.[3] The cases of *Murray* and *Robertson*[4] were distinct, for both were cases of partial conveyances, and in neither had the trustees power to reconvey the trust-estate to the granter. The latter consideration applied also to the case of *Smitton*.[4] Further, in both *Robertson* and *Smitton* there were provisions to third parties which were intended to take effect at once. Here the provision in favour of the testator's sisters was only intended to take effect at the granter's death. (2) If not revocable, the deed was reducible on the ground of essential error.

Argued for the defenders;—(1) The deed was irrevocable. It contained a clause excluding creditors, which was equivalent to a declaration that it was irrevocable. A *jus quæsitum* was conferred upon the granter's sisters, who took a vested right subject only to defeasance in the event of the trustees exercising their power to advance. The case was therefore distinct from *Fernie*,[1] *Murison*,[2] and *Mackenzie*.[2] The deed operated as an immediate divestiture of the granter, and was

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go upon the ground that the deed, while essentially revocable, and merely a trust for administration, is yet irrevocable during the subsistence of the marriage. I do not, in short, proceed on the argument which was pressed on me, founded on the application of the cases of *Pringle* (6 Macph. 982), *Torry-Anderson* (15 S. 1073), and *Menzies* (2 R. 507.) I reserve my view upon the application of those cases to trusts of this description. I do not require to consider that question, being of opinion that this was, as I have said, a divesting and irrevocable deed. That being so, I do not know that there is any further question to be now decided, both parties being agreed that there must be inquiry with regard to the averments of the pursuer to the effect that she executed the deed under error. These averments raise somewhat delicate questions, and I am glad that the parties have come to the conclusion that they will best be tried by a proof before answer, which proof accordingly I shall allow."

[1] Fernie v. Colquhoun's Trustees, Dec. 20, 1854, 17 D. 232, 27 Scot. Jur. 86.

[2] Murison v. Dick, Feb. 10, 1854, 16 D. 529, 26 Scot. Jur. 239; Mackenzie v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027.

[3] Spalding v. Spalding's Trustees, Dec. 18, 1874, 2 R. 237; Forrest v. Robertson's Trustees, Oct. 27, 1876, 4 R. 22; Williamson v. Boothby, June 11, 1890, 17 R. 927.

[4] Murray v. Macfarlane's Trustees, July 17, 1895, 22 R. 927; Robertson v. Robertson's Trustees, June 7, 1892, 19 R. 849; Smitton v. Tod, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241.

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therefore irrevocable.[1] In *Smitton* the deed dealt with the *universitas* of the granter's estate. In *Forrest's*[2] case the question was with creditors, not beneficiaries. Further, the *ratio decidendi* in that case[3] was that the trust was not intended to come into operation until the granter's death. (2) At all events the deed was not revocable during the subsistence of the marriage. It had been entered into in contemplation of marriage, and for the protection of the granter, and the trustees were bound to hold in order to safeguard her alimentary liferent.[4] The case of *Williamson*[5] supported this view, and *Mackenzie* v. *Mackenzie's Trustees*[6] would have been decided differently had the deed there in question been executed in contemplation of marriage. (3) The pursuers' case on essential error failed on the evidence.

At advising,—

LORD PRESIDENT.—I agree with the Lord Ordinary both on the construction of the deed and on the result of the proof. The deed, on the face of it, bears to be a present conveyance of the fee to trustees for persons named, and the trust-estate is not to be affectable by the deeds of the truster. The authorities support the conclusion of the Lord Ordinary; and the power of the trustees to give to the truster part of the capital does not displace that conclusion. The power is absolutely at the discretion of the trustees, who hold for the fiars as well as the liferenter, and the estate is in no sense at the call of the truster.

The facts are such that of the more delicate questions put to us in argument, none really arise. This is not the case of the granter of a gratuitous deed who has not understood the true effect of her deed. I agree with the Lord Ordinary that the result of the evidence is that the pursuer was properly informed of the effect of the deed, and fully understood it.

LORD ADAM.—I am of the same opinion, upon the same grounds.

LORD KINNEAR.—I concur.

LORD M'LAREN was absent.

THE COURT adhered.

MACPHERSON & MACKAY, S.S.C.—MILLER & MURRAY, S.S.C.—Agents.

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[1] Turnbulls v. Tawse, April 15, 1825, 1 W. and S. 80; Smitton v. Tod, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241; Robertson v. Robertson's Trustees, June 7, 1892, 19 R. 849; Murray v. Macfarlane's Trustees, July 17, 1895, 22 R. 927.

[2] Forrest v. Robertson's Trustees, Oct. 27, 1876, 4 R. 22.

[3] *Per* Lord President, *ibid.* p. 32.

[4] Anderson v. Buchanan, June 2, 1837, 15 S. 1073, *per* Lord Justice-Clerk Hope at p. 1085, 9 Scot. Jur. 509; Menzies v. Murray, March 5, 1875, 2 R. 507; Standard Property Investment Company v. Cowe, March 20, 1877, 4 R. 695, *per* Lord Gifford at 703.

[5] Williamson v. Boothby, June 11, 1890, 17 R. 927.

[6] Mackenzie v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027, *per* Lord Justice-Clerk at p. 1041.

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M'Kimmie's Trustees v. Commissioners of Inland Revenue.

DANIEL MUNRO AND OTHERS (William M'Kimmie's Trustees), Appellants.—*M'Lennan—Younger.*

THE COMMISSIONERS OF INLAND REVENUE, Respondents.—*Lord-Adv. Sir Charles Pearson—A. J. Young.*

Stamp—Bond—Discharge—Stamp Act, 1891 (54 *and* 55 *Vict. c.* 39)—*First Schedule.*—The Stamp Act, 1891, in the First Schedule under the head "Mortgage," imposes an *ad valorem* duty on "(5) Reconveyance, release, discharge, surrender, resurrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured: For every £100, and also for any fractional part of £100, of the total amount or value of the money at any time secured, £0, 0s. 6d."

Held (1) that the description in article (5) did not apply to a deed granting a partial discharge of a bond which did not completely disburden the subjects, and that such deed not being otherwise chargeable under the schedule required a deed stamp of 10s.; and (2) that a deed granting a discharge for the balance due on a bond was subject to an *ad valorem* duty on the total amount at any time secured.

1ST DIVISION. IN May 1887 William M'Kimmie, Glasgow, proprietor of certain heritable subjects which were subject to a bond for £5000, paid to the creditors in the bond, the trustees of John Greenshields, £2000 to account, and received from them a partial discharge, dated and recorded in May 1887, whereby, in consideration of the sum of £2000 paid to them, they discharged the bond and disposition in security for £5000 to the extent of £2000, and declared the security subjects to be redeemed and disburdened to that extent. This partial discharge was impressed with a 10s. stamp.

In May 1895, William M'Kimmie being then deceased, his trustees repaid the balance of £3000 secured by the bond, and received a discharge from John Greenshield's trustees bearing that they, in consideration of the sum of £3000 paid to them, "being the balance remaining undischarged of the principal sum contained in the bond and disposition in security," thereby discharged "(but only to the extent of the said sum of £3000 paid as aforesaid)," the said bond for £5000, and declared the security subjects to be redeemed and disburdened thereof, and of the infeftment following thereon, "but only to the extent foresaid."

Thereafter William M'Kimmie's trustees presented this instrument to the Commissioners of Inland Revenue, and craved their opinion as to the stamp-duty with which it was chargeable.

The Commissioners were of opinion that the instrument was chargeable with the *ad valorem* duty applicable to the discharge of a mortgage for the full sum of £5000, being "the total amount or value of the money at any time secured" thereby, viz., £1, 5s. They accordingly assessed the instrument with duty to that amount, and, that sum having been paid, the instrument was impressed with the necessary stamps.

William M'Kimmie's trustees required a case, and the present case was accordingly stated, the question for the opinion of the Court being,—"Whether the said instrument, in the circumstances above set forth, is liable to be assessed and charged with *ad valorem* duty of £1, 5s., or whether it is chargeable with *ad valorem* duty of 15s. only?"*

Argued for the appellants;—The bond and disposition in security

* The schedule of the Stamp Act is quoted in the rubric.

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had been discharged to the extent of £2000 in 1887, and duty at the rate of 6d. per £100 had then been paid on that sum. The amount thereafter secured by the bond was only £3000, and that was the whole amount to which the bond was discharged, and required to be discharged by the instrument in question. Stamp-duty was therefore only chargeable upon that amount. The language of the schedule was applicable equally to the case of two deeds as of one. If the sum of £5000 were secured by separate deeds, each could be discharged for duty at the rate of 6d. per £100, and it was unreasonable to hold that more duty was chargeable where a single bond for the same amount was discharged by two separate instruments.

Argued for the Commissioners of Inland Revenue;—The duty of 10s. charged upon the first discharge was not *ad valorem* duty, but the ordinary duty chargeable for a deed, although it happened that the amount of *ad valorem* duty and of the deed stamp was the same. The language of the schedule shewed that it was the intention of the Legislature that where a bond was discharged by successive partial discharges the whole *ad valorem* duty should be assessed on the final discharge, for such duty was to be paid for every £100 of the "total amount of the money at any time secured." The decision of the Commissioners was therefore sound.*

At advising,—

LORD PRESIDENT.—In my opinion, the instrument in question is liable to be assessed and charged with *ad valorem* duty of £1, 5s.

I think the Commissioners rightly read the 5th section—*voce* Mortgage in the schedule—as applying, and applying only, to such discharges as have the effect of wholly freeing the subjects of the security from that security, and that the duty is to be calculated by the maximum of the burden which was ever incumbent by virtue of the security. It results, first, that the duty is payable equally on a discharge of the balance of the money, with a discharge of the whole money; and second, that this section does not apply to a discharge which lifts off from the security subjects only part of the security, but leaves it in part still incumbent.

As this view has the effect of ousting from this section discharges which do not have the effect by themselves, or in combination with previous discharges, of finally removing the burden, it follows that such discharges are liable to an ordinary deed stamp, for they certainly are deeds, and they are not, in the words of the Act, "described in this schedule."

What course the department deem it proper to take in exacting the several duties which the statutes authorise is a matter of administration with which Courts of law have not to do.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT found and determined that the instrument in question set forth in the case is, in the circumstances set forth, liable to be assessed and charged with *ad valorem* duty of £1, 5s. sterling.

CUMMING & DUFF, S.S.C.—SOLICITOR OF INLAND REVENUE—Agents.

* Where the total amount at any time secured is less than £2000, the practice of the Inland Revenue office is to limit the charge upon a partial discharge to 6d. per £100 upon such total amount, each partial discharge thus bearing the same duty as the final discharge.

No. 51.

Dec. 6, 1895. Dinwoodie's Executrix v. Carruthers' Executor.

MRS ELIZABETH DINWOODIE (David Dinwoodie's Executrix), Pursuer (Appellant).—*Dickson—Clyde.*
JAMES WRIGHT (Mrs Mary Carruthers' Executor), Defender (Respondent).—*Comrie Thomson—John Wilson.*

Succession—Donation—Deposit-receipt—Destination.—On 20th September 1892 a brother and a sister took a deposit-receipt from a bank in these terms,—"Received of" the brother and the sister "the sum of £400 as a deposit with" the bank, "to be repaid on 15th July 1895 to them or the survivor of them, and bearing interest at the rate of 5 per cent per annum." Of the £400, £350 was contributed by the sister and £50 by the brother.

Both the brother and the sister died before the date of repayment of the deposit-receipt, the brother being the survivor of the two. The sister was in possession of the deposit-receipt at her death.

In an action by the executrix of the brother against the executor of the sister for delivery of the deposit-receipt, on the ground that its contents had passed to the brother as the survivor, *held* that the deposit-receipt had not the effect of transferring the property of the predeceaser to the survivor, and consequently that the pursuer's only right was to receive the £50 deposited by the brother, with interest.

Foreign—Deposit-receipt—Deposit-receipt issued by English bank to Scottish depositors—Whether rights of depositors inter se regulated by English law.—Two persons, domiciled and resident in Scotland, placed a sum of money, belonging in part to each, upon deposit-receipt with an English bank in their joint names. *Held* that all questions as to the right of the depositors *inter se* in the money deposited fell to be determined by Scots law, and not by the law of England.

2D DIVISION. Sheriff of Dumfries and Galloway.

IN March 1895 Mrs Elizabeth Dinwoodie, widow and sole trustee and executrix of David Dinwoodie, grocer, Lochmaben, raised an action in the Sheriff Court at Dumfries, against James Wright, flesher, Lochmaben, trustee and executor of Mrs Mary Carruthers, Lochmaben, praying for delivery of the following deposit-receipt, which was found in Mrs Carruthers' repositories after her death, or alternatively for payment of £420, with interest:—

"The National Bank of New Zealand, Limited,
"London, 20th September 1892.

"£400. *Deposit-Receipt.*

Not transferable.

"Received of Mr David Dinwoodie, grocer, Lochmaben, and Mrs Mary Carruthers, Lochmaben, N.B., the sum of four hundred pounds stg. as a deposit with the National Bank of New Zealand, Limited, to be repaid on the 15th July 1895 to them, or survivor of them, and bearing interest at the rate of five per cent per annum from the 15th July 1892." (Then came the signature of the secretary of the bank.)

"No cheque or draft can be drawn against this receipt, and interest will cease on the date the deposit falls due."

The nature of the action and the circumstances out of which it arose, as appearing from the record and a proof, were as follows:—

Mr Dinwoodie and Mrs Carruthers were brother and sister. In July 1892 she handed £350 to him to be invested, and he deposited this money, along with £50 of his own, on a deposit-receipt for £400 with the National Bank of New Zealand. The deposit-receipt, which was dated 15th July 1892, was similar to that above quoted, except that it was taken in Mr Dinwoodie's name only. A Mr Charles Burns,

through whom the investment was carried out, deponed that the insertion of Dinwoodie's name only was due to a blunder on the part of the bank, and Mrs Carruthers having objected to the omission of her name, the deposit-receipt was returned to the bank, and a new deposit-receipt, being that above quoted, sent in exchange.

With reference to this change, the pursuer averred,—"This change was made with the intention on the part of Mr Dinwoodie and Mrs Carruthers, and for the purpose of securing for the survivor of them the sole right to the contents of the deposit-receipt, and Mrs Carruthers, after seeing the receipt, and having the effect of its terms fully explained to her, stated that it was as she desired it."

The defender denied this averment, and adduced witnesses who deponed that Mrs Carruthers still objected to the form of the deposit-receipt, on the ground that she wished her money to be invested in her own name only. These witnesses further deponed that she insisted on getting possession of the deposit-receipt, and in point of fact it was handed over to her, and she retained it until her death.

Burns, on the other hand, deponed that, so far as he observed, Mrs Carruthers expressed no objection to the second deposit-receipt, and that, in his opinion, she fully understood that its effect would be to give the whole money to the survivor. Her main motive in having her money so deposited, as far as Burns could discover, was to prevent her husband, who had deserted her, from getting hold of it should he return. Burns also gave this evidence,—"I pointed out to her that if she wished the thing altered she could at any time get a fresh deposit-receipt made out for £350 in her own name. (Q.) You understood that she could get the money retransferred into her own name, and she understood that too? (A.) Yes."

Mrs Carruthers died on 17th January and Mr Dinwoodie on 21st January 1895.

In her trust-disposition and settlement, which was dated 26th February 1894, Mrs Carruthers stated with reference to the deposit-receipt,—"It is my desire to expressly state here that £350 sterling of said deposit-receipt is my exclusive property, the remaining £50 belonging to my said brother David; and further, that it was never my intention that the said deposit-receipt should be issued as repayable to them, or survivor of them, as, having full confidence in my brother, he did it for me quite unknown to me."

The pursuer pleaded, *inter alia*;—(1) Said deposit-receipt being repayable to the survivor of Mr Dinwoodie and Mrs Carruthers, the pursuer, as sole trustee and executrix of the survivor, is entitled to delivery thereof. (2) Mr Dinwoodie and Mrs Carruthers having made a contract that the survivor of them should receive said deposit-receipt and contents thereof, the pursuer, as sole trustee and executrix of the survivor, is entitled to delivery of said receipt. (7) The National Bank of New Zealand, Limited, being an English institution, all questions arising out of the form of said deposit-receipt and the obligations of the bank fall to be determined by English law, and according to it the pursuer, as executrix of the survivor of the persons named in the receipt, is entitled to delivery thereof.*

* With reference to the pursuer's 7th plea in law, the pursuer adduced as witnesses two solicitors from Carlisle, who deponed that, according to English law, under a deposit-receipt conceived in such terms as that in question, the whole sum deposited would pass to the survivor absolutely, a will by the predeceaser being ineffectual to prevent that result.

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The defender pleaded, *inter alia*;—(2) Said deposit-receipt having been issued in the joint names of the late Mr Dinwoodie and Mrs Carruthers without the sanction or consent of the latter, and the statement in said deposit-receipt, that the amount was "to be repaid to them, or survivor of them," having been inserted therein against the wishes of the late Mrs Carruthers, the terms of said receipt are in no way binding on her executor. (3) The said late Mr Dinwoodie having taken said deposit-receipt in the terms therein stated in direct contradiction to the expressed wishes of the late Mrs Carruthers, the terms of said receipt are not operative as a bequest to him, and the interest of his executrix is limited to that portion of the amount (viz., £50) which admittedly belonged to him. (4) The said late Mrs Carruthers having never donated the said sum of £350, or parted with her right of property therein, and by her last will and testament, executed subsequently to the date of said deposit-receipt, having specially directed the defender as her executor to administer said amount, he is entitled to do so, and for that purpose to retain the custody of said deposit-receipt. (6) In any event, the last will and testament of the late Mrs Carruthers operates as a cancellation of the terms of said deposit-receipt, and the defender, as her executor, is entitled to the custody thereof.

On 26th July 1895 the Sheriff-substitute (Campion) pronounced an interlocutor, in which, after findings in fact and in law, he ordained the defender to deliver up the deposit-receipt to the pursuer.

The defender appealed to the Sheriff. On 1st October, the deposit-receipt having matured, of consent the money was uplifted and lodged with the Clerk of Court.

On 7th October the Sheriff (Campbell) recalled the Sheriff-substitute's interlocutor, and, on the ground that the special destination in the deposit-receipt had been revoked by Mrs Carruthers' settlement, found that £50 of the sum deposited fell to be paid to the pursuer, and the balance to the defender.

The pursuer appealed, and argued;—While it could not be disputed that the ordinary rule in Scotland was that a deposit-receipt was a purely mercantile document which could have no testamentary or dispositive effect, that rule would not be extended, and there had even been indications that it might be reconsidered.[1] The document in this case differed from an ordinary Scots deposit-receipt in that it was a deposit for a fixed term, was not recoverable at call, and bore interest at a specified rate. That constituted a contract not of deposit but of loan, and therefore such a deposit-receipt was of the nature of a personal bond or investment with a destination. Such destinations had been held to have a testamentary effect,[2] and if taken by the testator and not by a third party, were not affected by a subsequent general settlement.[3] The bank in this case was an English bank, and

[1] Lord Young in Macdonald v. Macdonald, June 11, 1889, 16 R. 758; Cuthill v. Burns, March 20, 1862, 24 D. 849, 34 Scot. Jur. 426; Watt's Trustees v. Mackenzie, July 1, 1869, 7 Macph. 930, 41 Scot. Jur. 626; Miller v. Miller, June 27, 1874, 1 R. 1107; Crosbie's Trustees v. Wright, May 28, 1880, 7 R. 823; Jamieson v. Macleod, July 13, 1880, 7 R. 1131.

[2] Walker's Executor v. Walker, June 19, 1878, 5 R. 965; Buchan v. Porteous, Nov. 13, 1879, 7 R. 211; Connell's Trustees v. Connell's Trustees, July 16, 1886, 13 R. 1175; Ritchie v. Ritchie's Trustees, July 20, 1888, 15 R. 1186.

[3] Campbell v. Campbell, July 8, 1880, 7 R. (H. L.) 100.

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by English law the destination is effectual to carry the whole sum deposited to the survivor. As the deposit-receipt was repayable in England the law of England must be applied.[1] If this was a good special destination, it was mutual and contractual, the sum being jointly contributed, therefore revocation must be joint; it could not be revoked by Mrs Carruthers' will alone.

Argued for the respondent;—The terms of this document did not differentiate it from an ordinary deposit-receipt. Not being probative or tested, it could not operate as a will.[2] But even if there was here a good special destination it was revocable by each of the parties as regarded his or her own estate, and had been revoked by Mrs Carruthers' will as regarded her estate.[3] The notion that the deposit-receipt constituted a contract, in the sense that it was a mutual settlement which was not revocable except by the parties jointly, was unintelligible when the nature of the deposit-receipt was kept in view. If the deposit-receipt embodied a contract at all, it was a contract whereby the predeceaser agreed to pay a sum of money to the survivor if either or both of them died before a specified date; if both survived that date the whole arrangement came to an end, for it was not suggested that there was any agreement to renew the deposit-receipt. Such a contract was simply a contract of wager, and was bad on that ground. It had nothing in common with a proper mutual settlement. In fact, however, there was no evidence of a contract between the parties. That was the result of the evidence of Burns, a witness adduced by the pursuer, who deponed that in his own opinion, and in the opinion of Mrs Carruthers, she might revoke the deposit-receipt so far as concerned her estate at any time, and the fair inference was that in this Burns also expressed the view of his client, Dinwoodie. The argument that the law of England applied was ill founded. That law might probably regulate the contract between the bank and the depositors, but there was no sufficient evidence that the depositors intended their relations *inter se* to be so regulated. The mere fact that the deposit-receipt was payable in England was not sufficient evidence of such an intention, and there was no other evidence.

At advising,—

LORD YOUNG.—The facts of this case are few, and I do not think that I need take long to state them so far as they are material to the judgment we are to pronounce. It appears that a sum of £400 was deposited in a bank in London in 1892 by Mr David Dinwoodie of Lochmaben. He died on 21st January 1895, and his sister Mrs Carruthers died on the 17th of the same month, and when she died there was found in her repositories the deposit-receipt for £400 dated 20th September 1892. That receipt bears that the money was received of Mr David Dinwoodie and Mrs Mary Carruthers, and that it was to be repaid on 15th July 1895 to them or the survivor of them, and bearing interest at the rate of 5 per cent. Neither

[1] Connell's Trustees, *supra* (shares of English companies).

[2] Cuthill v. Burns, March 20, 1862, 24 D. 849, 34 Scot. Jur. 426; Kennedy v. Rose, July 8, 1863, 1 Macph. 1042, *per* Lord Curriehill at p. 1048, 35 Scot. Jur. 596; Miller v. Miller, June 27, 1874, 1 R. 1107, *per* Lord Neaves at p. 1110; Watt's Trustees v. Mackenzie, July 1, 1869, 7 Macph. 930, 41 Scot. Jur. 626; Milne v. Grant's Executors, June 5, 1884, 11 R. 887.

[3] Lang's Trustees v. Lang, July 14, 1885, 12 R. 1265.

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Mr Dinwoodie nor Mrs Carruthers survived that date. The petitioner here is the executrix of Mr Dinwoodie, and the petition is directed against the executor of Mrs Carruthers, the question being, which is entitled to have the deposit-receipt or the contents thereof? The prayer of the petition is in these terms:—"To ordain the defender to deliver to the pursuer, as sole trustee and executrix foresaid, a deposit-receipt for £400 sterling. . . . And failing his doing so within such period as the Court shall appoint, to ordain the defender to pay to the pursuer the sum of £420," &c.

Now, the facts necessary to be attended to are these. In the first place, as is quite candidly and truly stated by the petitioner in the third article of her condescendence, the original deposit was made on 5th July 1892, Dinwoodie then taking the deposit-receipt in his own name for £400, but of that sum £50 was contributed by him and £350 by Mrs Carruthers. The terms of this receipt were thought unsatisfactory, and so it was returned to the bank, and in lieu thereof a new deposit-receipt—that I have referred to—was handed to Mrs Carruthers. On these facts the petitioner, as executrix of Mr Dinwoodie, who by a few days survived his sister, claims to be entitled to have the £400. It is admitted that £350 of this £400 was Mrs Carruthers' to begin with, but the contention is that the £350 on her death ceased to be part of her estate, and became the property of her surviving brother. Whether this was so or not is the only question we have to decide.

It seems quite clear that if this £350, originally Mrs Carruthers' property, ceased to be so, and became Mr Dinwoodie's, that must have been either by gift, by contract, or by will. There is no other way in which the property could pass. Therefore the question comes to be, whether we have before us evidence of gift, contract, or will. I am of opinion that we have not. Looking to the transaction, to the terms of the original receipt, and of the one substituted for it, I think that there is no evidence of gift. I am also of opinion that there is no evidence of contract, or of any transaction or arrangement between Mrs Carruthers and Mr Dinwoodie which could make property pass from her to him. I am of opinion that the deposit-receipt cannot operate as a will. I think that it was conceded that according to the authorities a deposit-receipt cannot operate as a will, but even if this was not conceded, I am of opinion that it cannot, and of course a will cannot be proved by parole evidence alone. Therefore I am of opinion in fact that there is no evidence of gift, contract, or will to pass the property from Mrs Carruthers to her brother, or to take it from its natural destination.

Now, in point of law I am of opinion that a deposit-receipt does not operate as a gift or a contract, and I have already said that it does not operate as a will. But it was contended that by the law of England it does operate, somehow or other,—it was not distinctly stated here whether as a gift, contract, or will,—to pass property from one person to another.

I am of opinion that the law of England has no application here. If I thought otherwise I should take other means of finding out what the English law is than by the evidence of solicitors from Carlisle. I think that the law of England would have to be applied to determine the bank's obligation, but there is no question as to that. The question is, who is to have the beneficial interest after the bank's obligation has been determined by payment? Now, the law of England has nothing to do with the bene-

ficial interest in the money which has been paid. Really the true meaning of this deposit-receipt is that to avoid questions of probate, confirmation, &c., the bank would pay the money to the survivor. It so happened in this case that there was no survivor, and whether the money belonged to one or the other was a question that could not arise on the terms of the receipt at all. It might have been anybody's; it might have been trust money. The original property was not changed by the deposit in the bank or by the terms of the receipt; therefore it must continue £50 the property of Mr Dinwoodie, and £350 the property of Mrs Carruthers, passing on her death to her estate. It will appear sufficiently from what I have said that my opinion is irrespective of the will of 1894 altogether. That will is of no materiality except in the view that the deposit-receipt operated as a will. It has therefore in my view no bearing on the issue between the parties.

LORD TRAYNER.—I agree with Lord Young in the conclusion at which he has arrived.

There has been a good deal of discussion as to whether what is called by the pursuer herself in the prayer of the petition a "deposit-receipt" is a deposit-receipt or something else. It has been variously represented as in effect, if not in form, a mutual settlement, or a contract, or a mutual conveyance with a special destination; it has been assimilated also to a personal bond. I think it is nothing more or less than what it bears *in gremio* to be—a deposit-receipt. It is no doubt a deposit-receipt for money which is to remain on deposit for a fixed period, and it states the rate of interest payable to the depositor during the currency of that period. These two features may not be found invariably in the ordinary bank deposit-receipt, but I have been unable to see how they can change radically the character of the document, or affect the transaction of which it is at once the expression and the voucher. Taking it, however, as a deposit-receipt, it is maintained for the pursuer that the terms in which it is conceived are sufficient, according to the law of England, to confer on the survivor an absolute right to the whole sum deposited, and that the rule of English law must here be applied, the deposit-receipt having been issued by an English bank. I am of a different opinion. The deposit-receipt represents a contract between the depositor and depository, and both the *locus contractus* and *locus solutionis* are in England. As regards, therefore, any question between the depositor and depository, it may very well be that the English law must govern. But there is no such question here. On the other hand, in any question between the depositors themselves, or their representatives, I think the Scotch law must govern, seeing that the depositors are both Scotch, that they were dealing with moveable estate situated in Scotland, and that they cannot be presumed to have transacted with each other on any other footing than that their respective rights should be determined by the only law with which they are supposed to be acquainted, that is, the law of their own country. Now, according to our law, a deposit-receipt taken in name of the depositor and another or the survivor is not habile as a testamentary disposition. Nor does such a deposit-receipt *per se* support the view of donation, and in this connection it is a material, if not conclusive circumstance, that the supposed donor, Mrs Carruthers, never delivered

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the deposit-receipt to the donee, but retained possession of it till her death. If the deposit-receipt, therefore, was neither a testamentary conveyance by Mrs Carruthers to her brother nor a donation, it confers no right on the pursuer or other representative of the brother other than that which he had irrespective of his sister. That right was to get repayment of what he had deposited, namely, £50, while the remaining £350 belonged to Mrs Carruthers, her right in like manner never having been enhanced by anything which her brother, the co-depositor, had done. This result is, I think, what both depositors intended and had in view when the deposit was made. The evidence of Mr Burns satisfies me of this, for he says that Mrs Carruthers understood that she could at any time get her share of the deposited money placed in her own name, that is, could separate it from her brother's money, and hold it as her own just as it had been hers before the deposit was made.

LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, recall the interlocutor appealed against, and also recall the interlocutor of the Sheriff-substitute dated 26th July 1895: Find in fact (1) that on 15th July 1892 the late David Dinwoodie, acting for himself and his sister, Mrs Mary Dinwoodie or Carruthers, deposited with the National Bank of New Zealand, Limited, London, the sum of £400 as a deposit-receipt in his own name, to be repaid to him with interest at the rate of 5 per centum per annum on 15th July 1895; (2) that of the said sum, £50 was contributed by the said David Dinwoodie and £350 by the said Mary Dinwoodie or Carruthers; (3) that on 20th September 1892 the said deposit-receipt was returned to the said bank by the said David Dinwoodie, and in lieu thereof a new deposit-receipt of that date, being the deposit-receipt referred to in the prayer of the petition, given to him by the said bank; (4) that the said Mary Dinwoodie or Carruthers did not make a gift to the said David Dinwoodie of the said sum of £350 contributed as aforesaid by her, or make any contract or agreement with him to the effect that he should have right to the said sum in the event of his surviving her; (5) that the said Mary Dinwoodie or Carruthers died on 17th, and the said David Dinwoodie on 21st January 1895, and that in March 1895, when the present petition was presented, the aforesaid sum of £400 remained in the said bank on deposit: Find in law (1) that the said deposit-receipt does not import a gift absolute or conditional by either party named therein to the other, or a will by either in favour of the other, or affect their rights or the rights of their executors to the sums contributed by each as aforesaid; (2) that the pursuer, as executor of the said David Dinwoodie, is entitled to receive £50 of the said deposited money, and the defender, as executor of the said Mary Dinwoodie or Carruthers, to receive the remaining £350 thereof: Therefore repel the first, second," and other "pleas in law for the pursuer Assoilzie the defender from the conclusions of the petition Find the pursuer, as executor of said David Dinwoodie

entitled to £50, with the interest due thereon, and find the defender, as executor of Mrs Mary Dinwoodie or Carruthers, entitled to the balance of £350 of said deposit-receipt, with the interest due thereon: Ordain the Clerk of the Sheriff Court to make payment to them accordingly," &c.

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BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—BUCHAN & BUCHAN, S.S.C.—Agents.

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OLIVER HILSON, Complainer (Reclaimer).—*Balfour—Watt.*
GEORGE SCOTT, Respondent.—*W. Campbell—M'Lennan.*

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Hilson v. Scott.

Property—Mill-lade—Title—Disposition a non domino—Prescription.—A mill-lade from the River Jed supplied two mills belonging to one proprietor, of which the Abbey Mill was the upper and the Waulk Mill the lower. The mills were sold in 1845 to separate persons, A and B, in a process of ranking and sale. By the decree the Lords sold and adjudged to B the Waulk Mill and the mill lands, "and particularly the mill-lade," and they found and declared that A and B, the "purchasers of the two mills, have a joint *pro indiviso* right of property in the mill-lade thereof." B obtained from the superior of the mills and mill lands a charter in terms of the decree, and was infeft thereon in 1846, and the mill-lade was subsequently possessed along with the mills. Part of the mill-lade had been made on half of the bed of the river, belonging to C, a riparian proprietor. C did not object to this, and he and his successors continued to use the water of the river by drawing it from the lade.

In a suspension and interdict brought in 1894 by the proprietor of the Waulk Mill against C's successor to prevent him from discharging sewage into the lade, the above facts were proved.

Held (rev. judgment of Lord Low) (1) that the conveyance of the mill-lade in the decree of sale and in the subsequent charter imported a conveyance *quoad* C's land, not of a right of servitude, but of the lade itself and of the ground necessary for its support; (2) that the possession which had followed upon this title for the prescriptive period was sufficient to give B an exclusive right of property in the lade and in the ground supporting it as against C's successor, and that B was entitled to interdict.

2D DIVISION. Lord Low.

THE Magistrates of Jedburgh were proprietors of two mills on the Water of Jed, of which the upper was called the Abbey Mill and the lower the Waulk Mill. In 1835 the weir and intake of the mill-lade were carried away by a flood, and the magistrates rebuilt them further up the stream. They constructed the new part of the mill-lade on the bed of the river within the lands of Thomas Millar. Millar made no objection to this.

In 1845 the town of Jedburgh was in pecuniary difficulties, and the magistrates obtained a private Act of Parliament for the sale of the town property. Under a ranking and sale the upper or Abbey Mill was sold to Robert Laing, and the lower or Waulk Mill was sold to George Hilson, manufacturer in Jedburgh.

By the decree of sale the subjects sold and adjudged to Robert Laing were thus described:—"All and whole that corn mill of Jedburgh commonly called the Abbey Mill, with the whole machinery thereof, and the waterfall, damhead, sluices, and other works thereof, and all and sundry multures, sequels, mill lands, particularly that portion of the ground or embankment lying to the east of the said mill, and between the mill-lead and the Water of Jed, and extending downwards from the said mill to the waste-water sluice in the side of the lead

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between the said mill and the Waulk Mill, and the houses, biggings, yards, and the whole parts and pertinents thereof, all as presently occupied by William Dodd, the tenant therein."

The decree of sale thus described the subjects sold and adjudged to George Hilson:—"All and whole the mill commonly called the Waulk Mill of Jedburgh, with the machinery-house and whole machinery thereof, and the waterfall, damhead, sluices, and other works thereto belonging, and mill lands, and particularly the mill-lead and that portion of ground or embankment lying to the west of the said mill, and between the mill-lead and the Water of Jed, and extending upwards from said mill to and including the waste-water sluice in the side of the lead between the said mill and the Abbey Mill, and the houses, biggings, yards, and whole parts and pertinents pertaining thereto, all as presently occupied by Messrs James and George Hilson, the tenants thereof."

With regard to both subjects the decree contained the following findings:—"Find and declare that the said Robert Laing and George Hilson, purchasers of the Abbey Mill and Waulk Mill, being lots first and second, have a joint *pro indiviso* right of property in the waterfall, damhead or cauld, sluices, and mill-lead thereof, subject always to the conditions as to keeping up, maintaining, and upholding the same, and cleaning the mill-lead, which apply and are stipulated for during the currency of Messrs Hilson's lease of the Waulk Mill, and after the expiry of the said lease then the said purchaser of said mills shall be bound to keep up, maintain, and uphold the said damhead or cauld and sluice, and clean out the said mill-lead down to the said waste-water sluice between the said mills at their mutual expense."

George Hilson conveyed the subjects purchased to his brother James and himself equally between them by disposition and assignation dated 9th December 1845, and their title was completed by charter of sale and confirmation by James Grieve, superior of the subjects, and instrument of sasine thereon, dated 5th May 1846. The superior's charter disponed the Waulk Mill subjects in the same terms as contained in the decree of ranking and sale. The charter confirmed a disposition of the subjects, dated 4th April 1818, in favour of the Magistrates of Jedburgh and the instrument of sasine thereon. This disposition constituted the title of the magistrates at the date of the decree of sale, and it thus described the subjects sold:—"All and whole these three corn mills of Jedburgh, commonly called the Abbey Mill, Town Mill, and Easter Mill, with the Waulk Mill of Jedburgh, and all and sundry multures, sequels, mill lands, houses, biggings, yards, and whole parts and pertinents thereof respectively."

George and James Hilson continued to work the mill and to use the mill-lade, which subsequently came into the possession of Oliver Hilson, manufacturer.

The lands belonging to Thomas Millar, opposite the mill-lade constructed by the magistrates, were held under burgage tenure, and were described in an instrument of sasine in favour of Millar of 14th October 1825 as "bounded by the Water of Jed on the south." Millar and his successors used the water of the river for various purposes by drawing it from the lade. For this purpose some steps were formed in their property down to the level of the lade.

In 1893 George Scott, Millar's successor in the lands, built a house

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and constructed a drain, through which he proposed to discharge sewage into the mill-lade above the Waulk Mill. Oliver Hilson then brought this action of suspension and interdict to prevent him from doing so.

The complainer pleaded;—(1) The complainer being proprietor or joint proprietor of the mill-lade referred to as condescended on, and the respondent having no right or interest therein, the complainer is entitled to interdict as craved. (2) The complainer and his predecessors in title having used the water of the said lade for the purposes of their manufactures for over forty years, for which the said water has all along been fit, and as the discharge of sewerage, &c., by the respondent into the lade would make the water unfit for these purposes, the complainer is entitled to interdict, with expenses.*

The respondent averred, with regard to the new part of the lade formed by the magistrates,—"Said extension was formed by encroaching on the property of the respondent's predecessors in title and of the conterminous proprietors, cutting a channel through said properties, and forming an embankment between said channel and the course to which the river was subsequently confined. Said embankment was erected in that half of the original river bed lying between the lands of the respondent and his conterminous proprietors and the *medium filum* of the river. The said proceedings were taken without any sanction or authority being sought or obtained by the magistrates and town-council from the respondent's authors or from any of the said other proprietors, and constituted an unwarranted interference with their proprietorial rights. By the said proceedings the respondent's authors became the proprietors of the said mill-lade, *solum* thereof, and embankment separating the mill-lade from the river bed, all so far as *ex adverso* of their said lands respectively, subject to a servitude in favour of the magistrates and council of permitting the water to flow through the said lade as if in a natural channel passing through their lands."

The respondent pleaded;—(1) No title to sue, and, *separatim*, title to exclude. (3) The complainer not having had prescriptive possession of the mill-lade referred to upon a habile title, and *separatim*, the respondent and his authors having had a clear and exclusive title to the said lade so far as *ex adverso* of the respondent's lands, followed by uninterrupted possession of the said lade for upwards of forty years, the note of suspension and interdict should be refused, with expenses.

On 28th June 1894 the Lord Ordinary (Low) pronounced this interlocutor:—"Having considered the cause, finds (1) that by virtue of the titles produced, and the possession admittedly following thereon, the complainer has, along with the proprietors of the Abbey Mill of Jedburgh, a joint *pro indiviso* right of property in the mill-lade set forth and described in the prayer of the note of suspension and interdict *ex adverso* of the respondent's property; (2) that it is admitted that the respondent has constructed or laid a drain or pipe for the purpose of discharging, or adapted for the purpose of discharge of, sewage from a house or houses recently erected by him on his pro-

* The complainer subsequently by minute admitted for the purposes of the suspension, that the proposed discharge of sewage from the house recently erected by the respondent would not unfit the water for the purposes for which he had used it for the last forty years, or prejudice his manufacturing processes.

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perty into the said mill-lade; (3) that the respondent is not entitled to discharge sewage or other matter into the said lade by means of pipes or drains: Therefore, to the above extent and effect sustains the complainer's pleas in law, suspends the proceedings complained of, and interdicts, prohibits, and discharges the respondent, and all others acting by his authority, from sending or discharging into the said mill-lade sewerage or any other impure stuff or matter of any kind, or impure liquid or water by means of pipes or drains."*

* "OPINION.— . . . By the decree, as I construe it, George Hilson acquired in property the mill-lead and its south-eastern embankment as far up the lead as the waste-water sluice between his mill and the Abbey Mill. He also *ex facie* of the decree acquired a *pro indiviso* right of property along with Robert Laing to the mill-lead from the place where it leaves the river down to the waste-water sluice. Further, it is not disputed that the Abbey Mill and the Waulk Mill have all along been in operation, and that the mill-lade has supplied them with water power, and with water for purposes of manufacture. That appears to me to amount to possession, and it has continued for more than forty years upon the titles which I have described.

"The history of the mill-lade, as given by the respondent, is as follows:— Prior to 1835 the cauld and intake of the lade were lower down the stream than at present, and at a point below the respondent's property. In that year the cauld was destroyed by a flood, and the town-council made the present cauld, which is above the respondent's property, and also the part of the mill-lade which is now in dispute.

"The respondent avers that the extension of the mill-lade was 'formed by encroaching on the property of the respondent's predecessors in title, and of the conterminous proprietors, cutting a channel through said properties and forming an embankment between said channel and the course to which the river was subsequently confined. . . . The said proceedings were taken without any sanction or authority being sought or obtained by the magistrates and town-council from the respondent's authors, or from any of the said other proprietors, and constituted an unwarranted interference with their proprietorial rights.'

"The respondent's averment that the extension of the mill-lade was formed upon his property is founded upon the fact that in his titles the property is described as bounded on the south by 'the Water of Jed.' Such a boundary presumably carries the property to the *medium filum* of the stream, and the extension of the mill-lade was formed upon what had previously been the bed of the stream, and upon the respondent's side of the central line. That that was the case was stated by the respondent's counsel, and is shewn by a comparison of the plans to which he refers in his statement and has produced. When the old cauld existed the water of the stream was of course dammed back, and covered a considerably greater area than it would have done if there had been no cauld and no damhead, and when the old cauld was swept away and a new one erected higher up the stream, the town-council constructed the extension of the mill-lade upon ground which had previously been covered by the waters of the damhead.

"The respondent's contention is that the complainer's right must be regarded as a right of servitude only, and that he can deal with his property as he likes, unless the complainer can shew that his servitude rights are being prejudiced. I am not sure that the case presented by the complainer on his titles is necessarily exclusive of the idea that the respondent's lands are only burdened with a servitude. There might, I imagine, be a servitude of aqueduct with a right of property on the part of the owner of the dominant tenement in the pipe, drain, or other *opus manufactum* by which the servitude was made available. Indeed, in the case of the *Scottish Distillery Company* v. *Reid* (4 R. 1118), Lord Gifford expressed the opinion

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The respondent reclaimed, and argued;—(1) The decree of sale did not convey to the complainer the mill-lade. (2) The respondent's titles, which prescribed the river as his south boundary, carried his property to the *medium filum* of the river. (3) The Lord Ordinary was wrong in thinking that the respondent admitted that the complainer's possession could exclude his prior right. The complainer had only a title *a non domino*. The respondent, moreover, denied such possession, and the complainer could not shew, as he required to do, that the possession was adverse and exclusive.[1]

The respondent proposed to amend his statement as to the construction of the lade, by averring that the channel had been cut outside the river bed, and therefore unquestionably on his property.

The Court recalled the Lord Ordinary's interlocutor and allowed the proposed amendment, and remitted to the Lord Ordinary to allow a proof.

The import of the proof appears from the Lord Ordinary's note.

On 20th July the Lord Ordinary refused the prayer of the note.*

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that that position of matters was the natural result of a servitude of dam and aqueduct. But, however that may be, the words of the complainer's title are explicit. By the decree, and the charter and sasine following thereon, the complainer's authors were given 'a right of property' in the mill-lade, and there has been for more than forty years possession appropriate to the nature of the subject. But if the property of the mill-lade is in the complainer, the respondent is not entitled to construct a drain for the purpose of discharging sewage into it. . . .

"I decide no more than that the complainer has by his titles and admitted possession a right of property in the mill-lade itself—in the artificial channel by which the water is carried to his mill—and that the respondent was not entitled to construct a sewer to discharge into the mill-lade.

"I think, however, that the terms of the prayer of the note are too wide; at all events, I could not give interdict in such wide terms without inquiry. The prayer asks that the respondent should be interdicted from sending or discharging into the mill-lade sewerage or any other impure matter or stuff of any kind, or impure liquid or water. Now, upon the one hand, the complainer does not found upon any act of the respondent, except the construction of a sewer from the new houses which he has recently built, and, on the other hand, the respondent avers that the natural drainage of his land is towards the south, and that consequently a certain amount of impure matter has always naturally found its way into the lade.

"I therefore cannot do more than find that the respondent is not entitled to discharge sewage or other impure matter into the lade by means of drains or pipes, and grant interdict against such a use of the lade."

[1] Act 1617, c. 12; Campbell v. Duke of Argyll, May 19, 1836, 14 S. 798, 8 Scot. Jur. 358; Christison v. Hope, Nov. 18, 1847, 10 D. 111, 20 Scot. Jur. 29; Earl of Fife v. Sir John Sinclair, Nov. 28, 1849, 12 D. 223, 22 Scot. Jur. 38.

* OPINION.—(The Lord Ordinary, after stating that the evidence shewed that the lade had been constructed in the bed of the stream, and referring to the descriptions of the Abbey Mill and the Waulk Mill contained in the decree of sale, continued)—"It is to be observed that in these descriptions there is no mention of the part of the mill-lade now in question,—that is to say, the portion above the Abbey Mill—the only part of the mill-lade sold and adjudged being that lying between the Abbey Mill and the Waulk Mill.

"The Town Mill and the East Mill were both sold and adjudged, 'with the waterfall, damhead, sluices, and other works thereof . . . and

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The complainer reclaimed, and argued;—(1) The mill-lade was conveyed to him expressly. The whole mill-lade belonged to him, if not exclusively, at least *pro indiviso* with the Abbey Mill proprietor. (2) Even although the magistrates had no title to sell the lade, the complainer could acquire a right by prescription on recorded title. (3) The presumption of the respondent's right extending to the *medium filum* was lessened by his silence in 1835, when he permitted the magistrates to invade what he now declared his property. (4) The complainer had had as full possession as he required. (5) At least the complainer had a servitude in the lade, and through this a right in the *opus manufactum*, including the *solum* and walls. He was therefore entitled to object to the drain-pipe,[1] and that although the quantity of sewage taken by itself would not cause material increase of pollution in the lade.

Argued for the respondent;—(1) The Lord Ordinary's judgment was sound. The titles of the respondent and of the adjoining proprietors made it clear that along the extended part of the lade the subjects had been held burgage, and had been bounded by the Water of Jed. Such a boundary raised a strong presumption that the grant

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whole parts and pertinents,' without any special mention of the lade upon which they are situated.

"The decree, after decrees of sale applicable to each of the properties which were sold, contains various declaratory findings of the rights of the various purchasers in regard to the lades and damheads, and it is among these that the declaration in regard to the right of property in the part of the lade in dispute upon which the complainer's case is rested is to be found.

"It is first declared that Laing, the purchaser of the Abbey Mill, is to have right to remove certain machinery which had been used to drive water into the town reservoirs. There is then the declaration upon which the complainer relies. It is in the following terms:—'Find and declare that the said Robert Laing and George Hilson, purchasers of the Abbey Mill and Waulk Mill, being lots first and second, have a joint *pro indiviso* right of property in the waterfall, damhead or cauld, sluices, and mill-lead thereof, subject always to the conditions as to keeping up, maintaining, and upholding the same, and cleaning the mill-lead, which apply and are stipulated for during the currency of Messrs Hilson's lease of the Waulk Mill, and after the expiry of the said lease then the said purchaser of said mills shall be bound to keep up, maintain, and uphold the said damhead or cauld and sluices, and clean out the said mill-lead down to the said waste-water sluice between the said mills at their mutual expense.'

"I think that it is clear that the part of the mill-lade there referred to includes that in dispute, namely, between the cauld and the Abbey Mill, because Laing and Hilson are to maintain the cauld and to clean out the 'said mill-lead down to the said waste-water sluice,' which is below the Abbey Mill.

"It is then declared in the decree that Laing shall not, by lowering the sluices, obstruct the flow of water down to the Waulk Mill, and that Hilson shall not, by raising the backfall, interfere with the free run of the water from the Abbey Mill.

"There are then declarations in regard to the East Mill and the Town Mill similar to these to which I have referred in regard to the Abbey Mill and the Waulk Mill. . . .

"I have referred to the decree at length, because I think that it is of importance to observe that the declaration in regard to the right of property

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[1] Scottish Highland Distillery Co. v. Reid, July 7, 1877, 4 R. 1118.

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extended to the *medium filum*, and no attempt had been made to rebut this presumption.[1] The riparian proprietors had had no interest to object to the extension of the lade in 1835, because the stream flowing through the lade was more useful to them than the former mill-dam. The effect of the extension was to constitute in the millowners a servitude of aqueduct, precisely corresponding to the right which an ordinary inferior heritor had against an ordinary superior heritor, to insist on the water in a natural stream flowing through their lands being transmitted undiminished in quantity and quality. The decree of sale of 1845 was clearly *a non domino* so far as it purported to confer any right of property in the mill-lade *ex adverso* of the respondent's lands. The Lord Ordinary was therefore justified in subjecting the decree of sale and the charter following thereon to a strict construction, and his construction was sound. The complainer's right, however, depended, not on the decree of sale, but on the charter of sale and confirmation in 1846. This charter was a charter by progress, and was therefore incapable of extending the vassal's right. It contained no doubt the new description of the

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in the upper part of the mill-lade is not introduced in what I may call the dispositive part of the decree, but in the part which deals with the rights *inter se* of the purchasers of the properties situated upon and more or less interested in one or other of the mill-lades.

"Passing now to the way in which George Hilson made up his title under the decree of sale. He first disponed the subjects to himself and his brother James, upon the narrative that he had made the purchase for his brother as well as for himself; and then the brothers obtained a charter of confirmation and sale from James Grieve, the superior of the lands. George and James Hilson took sasine upon that charter, which forms the first writ in the prescriptive progress upon which the complainer founds.

"The charter follows precisely the terms of the decree. The superior dispones the mill with the machinery, and so forth, in the words used in what I have called the dispositive part of the decree; and then it is declared that 'these presents are granted under the whole declarations . . . referred to in the decree of sale,' and then the declarations—including that in regard to the joint right of property in the mill-lade—are repeated.

"Now, I have already said that the respondent's property was held burgage, and that also seems to be the tenure by which nearly all the properties upon the north side of the stream above the Abbey Mill were held. The Abbey Mill and the Waulk Mill, on the other hand, were held by the magistrates in feu of Grieve as subject superior. The magistrates therefore had no title to sell, and Grieve had no title to dispone the mill-lade above the Abbey Mill, so far as the ground upon which it was constructed was concerned. Of course, if the charter unequivocally dispones the *solum* upon which the mill-lade is constructed, and possession has been had upon it for forty years, the complainer's right cannot be affected by shewing that it was originally granted *a non domino*. But if the charter is open to construction, then I think that it is competent to inquire into the state of the title, and the circumstances when it was granted.

"Here I think that the charter is open to construction. The upper part of the mill-lade is not part of the subjects disponed, but is only mentioned in the declarations and restrictions subject to which the disposition is

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[1] Bicket v. Morris, July 13, 1866, 4 Macph. (H. L.) 44, 38 Scot. Jur. 547; M'Intyre's Trustees v. Magistrates of Cupar-Fife, May 24, 1867, 5 Macph. 780, 39 Scot. Jur. 402; Gibson v. Bonnington Sugar Refinery Co., Jan. 20, 1869, 7 Macph. 394.

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subjects taken from the decree of sale, but it also defined the subjects conveyed as forming part of the subjects contained in the older titles, which negatived any right of property in the mill-lade.[1] Infeftment, in order to found a prescriptive right, required to be taken in the appropriate Register of Sasines—Conveyancing Act of 1874, section 34. The mill-lade in question being held burgage, the complainer's sasine, recorded only in the feudal register, was inept. In 1846 sasine in burgage subjects still required to be recorded in the burgh register within sixty days of its date—Act 1681, cap. 11.

(2) Even if the complainer's title was a good foundation for prescription, his right was not fortified by adverse and exclusive possession. His operations were equally consistent with property or servitude, and *in dubio* servitude was to be preferred. Rights of property could not be taken away by equivocal acts of possession. Here the original proprietors had continued to exercise rights which were equally consistent either with property or with servitude, and in the circumstances these must be regarded as a continued assertion of proprietorial rights, and not as servitudes acquired from the complainer at

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granted. In other words, the disponees are declared to have a joint right of property in a part of the lade which is not disponed to them.

"Further, from the nature of the subject, the right of property which is declared is not necessarily a right of property in the *solum*. A mill-lade involves an artificially constructed channel, and I do not think that the declaration in the charter necessarily refers to more than the artificial channel. If there was a servitude of mill-lade over lands other than those disponed, of which the two mills were the dominant tenement, it is quite intelligible that the respective owners of the mills should be declared to have, as between themselves, a joint right of property in the mill-lade, that is in the artificial channel by means of which the water was conveyed to their mills. And so to construe the declaration is the only construction of the charter which can be at all reconciled with the circumstances which existed at the time.

"I do not say that the magistrates had a valid right to a servitude of mill-lade, because they were not entitled at their own hand to substitute a mill-lade for a mill-dam. But they had in fact done so, and for ten years the mill-lade had been in use. It is therefore intelligible that they should have exposed the mills for sale upon the footing that the servitude of mill-lade would pass with them, and also such right as the owner of the dominant tenement in a servitude of the kind has in *opera manufacta* by which the servitude is made available.

"Reading the charter, therefore, in the light of the circumstances under which it was granted, I am of opinion that it was not intended to convey, and does not convey, the lands upon which the lade is constructed.

"The next question is, What has been the possession which the complainer and his authors have had upon the charter? They have had the use of the water coming down the mill-lade for the purposes of their mill, and they have cleaned out the lade and kept it free of obstructions. No other or further acts of possession have been proved. Now there is nothing in that possession going beyond what would be naturally referable to a right of servitude, and I do not think that the possession has been exclusive of the right of the respondent and the other riparian proprietors, whose titles, *ex facie*, carry them *ad medium filum*. Further, it is proved that the proprietors along the side of the lade had steps down to it which they used for

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[1] Hutton v. Macfarlane, Nov. 11, 1863, 2 Macph. 79, *per* Lord Neaves, 88, 36 Scot. Jur. 33; Boyd v. Bruce, Dec. 20, 1872, 11 Macph. 243, 45 Scot. Jur. 153.

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a time when *ex hypothesi* he was himself prescribing a right of property. The use of a running stream was *res meræ facultatis*, and the property in it could not be lost merely because the owner did not exercise his right to the full extent of which it was capable. Assuming the case to be one of servitude, the respondent was entitled to succeed, because the drain-pipe in question did not pierce the wall of the lade, but was merely rested on the top of it. Further, the servitude in the present instance did not give the complainer any right in the retaining-walls or *solum* of the lade, or in the water itself. The extent of the dominant proprietor's right in a case of aqueduct depended on the special circumstances of the case, and here the proof shewed that the complainer's authors had done nothing beyond building a retaining-wall between the lade and the bed of the river. The retaining-wall along the landward back of the lade was the old retaining-wall which existed before the lade was constructed, and it remained the property of the riparian proprietors.

At advising,—

LORD JUSTICE-CLERK.—The subject which is here in question being the mill-lade and the appurtenances of the mill-lade entering from the Jed into an intake above the Abbey Mill and the Waulk Mill of Jedburgh, was dealt with in a process of ranking and sale in the year 1845. By the decree of sale the Lords "sold, adjudged, decerned, and declared, and hereby sell, adjudge, decern, and declare lot second, all and whole the mill commonly called the Waulk Mill of Jedburgh, with the machinery-house and whole machinery thereof, and the waterfall, damhead, sluices, and other works thereto belonging, and mill-lands, and particularly the mill-lead and that portion of ground or embankment lying to the west of the said mill and between the mill-lead and the Water of Jed, and extending upwards from said mill to and including the waste-water sluice in the side of the lead between the said mill and the Abbey Mill, . . . to pertain and belong to George Hilson," manufacturer in Jedburgh. Now, that was a conveyance in language which, in my opinion, does not admit of any doubt as to its meaning. It is prefixed by the word "particularly" as regards

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the purpose of drawing water. That is what one would have expected to find if the mill-lade was a servitude, but not if it was altogether outside the properties adjoining it.

"I am therefore of opinion that the complainer is not proprietor of the *solum* upon which the mill-lade is constructed, and that the lade is only a servitude with which the lands through which it passes are burdened.

"The remaining question is, Whether, in these circumstances, the complainer has a right to object to the drain which the respondent has made from the new house which he has built?

"Now, it is proved that the drain does not cut through, or in any way interfere with, the sides of the lade, but is entirely within the respondent's lands. It is true that any sewage which is discharged from the drain will find its way, by the natural slope of the ground, into the lade; and there is no doubt that the respondent had that in view when he constructed the drain. But the complainer does not now say that he will be injured thereby. He has led no evidence in support of his averments of pollution, but stands entirely upon his claim of property, which, for the reasons which I have stated, I am of opinion is not well founded.

"In these circumstances, I am of opinion that the complainer is not entitled to the interdict which he asks."

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this subject, and is a conveyance of the mill-lade mentioned. That is, as I hold it, a conveyance of the ground, and such works on the ground as are essential for the establishment and working of a mill-lade, and applicable to the mill in question. It is contended that that is not so, that the conveyance has not the effect of a conveyance of the mill-lade throughout its extent as described, because there is a declaration afterwards that Robert Laing and Hilson together, the purchasers of the Abbey Mill and the Waulk Mill respectively, "have a joint *pro indiviso* right of property in the waterfall, damhead or cauld, sluices, and mill-lead thereof."

It does not appear to me that this declaration is at all in conflict with the conveyance of the property to Messrs Hilson. It is declaratory and for an obvious purpose. The other owner of the mill interposed between the intake and the complainer's mill necessarily had a right and interest in the mill-lade, in so far as it was necessary for the purpose of bringing water down to his mill, and down below his mill, for his tail-race. That he had not some right in that mill-lade as long as his mill was there is not a question which could be argued, and it is a *pro indiviso* right to the mill-lade, therefore, which is conveyed to Hilson. The mill-lade of Hilson's mill is plainly and necessarily the mill-lade from its intake down to his mill, because otherwise he could not get the benefit of the water. Hilson's title covers the whole lade, and infeftment followed upon that conveyance with all uses such as property of that kind is capable of. Now, a joint *pro indiviso* right of property does not interfere with his having that title. It is quite plain that if at any time the Abbey Mill came to be disused or to be pulled down, or for any reason not to be carried on, then the only interest in the mill-lade and its use would be the interest of the complainer Hilson. Well, then, this declaration of a *pro indiviso* right is given most properly in the interest of the owner of the mill that was interposed, but the respondent has no concern with the question who is the proprietor of the mill-lade from its intake to its final entry into the river again. The proprietor gets the property in the lade and all that belonged to it as necessary for the use which was to be made. Now, that being so, the question between the complainer and the respondent in this case is, whether the respondent has a right to discharge into that mill-lade sewage from his property. Mr Hilson has possessed beyond the prescriptive period upon his infeftment, and I am of opinion that the respondent in the action of interdict has no right to interfere with that mill-lade by discharging into it any sewage from his property. I cannot see upon what ground he can maintain his right to do so. The complainer has a substantial interest to prevent it, and although it may not be in question whether what is done by this respondent, or proposed to be done by this respondent, might be a substantial injury to Mr Hilson in the use of his mill at present, he is entitled to prevent the mill-lade being used in such a way, because the respondent has no right to do it. It is obvious that if this respondent has the right to do it merely because he is not at present doing any tangible damage, he might be preparing the way for damage, because it is always an accumulation of such matter as it is proposed to put into the stream that is ultimately injurious, and makes the stream unfit for the purposes for which the party below has the right to use it. If the respondent has no right to put sewage into the stream, as he has been

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doing, it is proper that he should be interdicted, because he is discharging into the property of another that which he has no right to discharge.

Upon the whole matter I have come to the conclusion that Mr Hilson is right in his contention in this case, and that we should grant him the interdict which he asks.

LORD ADAM.—In the year 1835 the Provost, Magistrates, and Town-Council of Jedburgh were proprietors of two mills on the Water of Jed, one called the Abbey Mill and the other called the Waulk Mill. In that year it appears that a flood carried away the existing damhead and other works connected with these mills. In that same year the town of Jedburgh, as I may say for shortness, rebuilt the damhead at a distance of some 300 or 400 feet further up the Water of Jed, and they continued the then existing mill-lade also further up the Water of Jed, to the new damhead. Now, in constructing this mill-lade they constructed it upon the bed of the river, and, so constructed, it passed *ex adverso* of the respondent's property, then belonging to the respondent's predecessor,—I have no doubt, as it appears from the titles that the respondent's property was described as bounded by the River Jed, that that carried his right of property *ad medium filum*,—and consequently the Provost and Magistrates of Jedburgh, in taking possession of this property for the construction of this new mill-lade, took part of his property and constructed the walls of the new mill-lade upon it. I see no reason to doubt, from anything that appears in this process, that in so doing the Provost and Magistrates of Jedburgh were doing what they had no right to do; and I should have had little doubt that, if the predecessors of the respondent had chosen to interfere at the time, the Provost and Magistrates of Jedburgh might have been prevented from constructing this mill-lade as they did; but all that took place so long ago as 1835, which is sixty years ago.

Now, matters continued in that state from the year 1835 down to the year 1845. Beyond all doubt the town of Jedburgh was in possession of the new damhead and the whole of the mill-lade, including the new part of it, down to the year 1845. The town seems about that time to have got into pecuniary difficulties, and I see from the decree of sale, which is produced, that they got a private Act of Parliament for the sale of the town property; and accordingly, among other parts of the town property that was sold under a ranking and sale, were those two mills, the upper, or Abbey Mill, being sold to Mr Laing, and the lower, or Waulk Mill, being sold to the predecessors of the present suspender, Mr Hilson. We have here the decree of sale, which was pronounced in that action, and it sets forth the proceedings and the subjects sold. With reference to the Abbey Mill, which is higher up upon the same mill-lade, it finds that this Mr Laing had offered for it, and so on, and then the Lords find and decern that it should belong to him. These are the terms in which it is decerned and declared to belong to him:—"Therefore, and in respect the said Robert Laing has found caution in terms of the said articles, the said Lords sold, adjudged, decerned, and declared, and hereby sell, adjudge, decern, and declare lot first, all and whole that corn-mill of Jedburgh, commonly called the Abbey Mill, with the whole machinery thereof, and the waterfall, dam-

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head, sluices, and other works thereof, and all and sundry multures, sequels, and mill-lands, and particularly that portion of ground or embankment lying to the east of the said mill, and between the mill-lead and the Water of Jed, and extending downwards from the said mill to the waste-water sluice," and so on. Then it goes on, "and the whole parts and pertinents thereof, all as at present occupied by William Dodd, the tenant therein." That is not the conveyance of the mill with which we are directly concerned, but there, although there is no specific *nominatim* conveyance of the mill-lade as in the present case, to which I shall immediately refer, there is a conveyance of the mill and "the whole machinery, waterfall, damhead, sluices, and other works thereof, . . . with the whole parts and pertinents thereof, all as presently occupied by William Dodd, the tenant therein." There is no doubt whatever, and it is not disputed, that at the date of this conveyance the whole mill-lade was occupied by the tenant of the magistrates in the mill, and I should have thought that the general word "works," followed by a proof of possession, such as there is in this case by the tenants of the mill, would have been sufficient to shew that the mill-lade was intended to be carried. I make that remark in passing, because it serves to explain the terms of this decree.

Then when we come to the conveyance of the mill which we have more particularly to deal with, the decree sets forth:—"Therefore, and in respect that at the said sale the said George Hilson, having offered for lot second of the said subjects," a certain price, the Lords "hereby sell, adjudge, decern, and declare lot second, all and whole the mill commonly called the Waulk Mill of Jedburgh, with the machinery-house and whole machinery thereof, and the waterfall, damhead, sluices, and other works thereto belonging, and mill lands, and particularly the mill-lead and that portion of ground or embankment lying to the west of the said mill, and between the mill-lead and the Water of Jed, and extending upwards from said mill to and including the waste-water sluice in the side of the lead, between the said mill and the Abbey Mill, and the houses," and so on, "all as presently occupied by Messrs James and George Hilson, the tenants thereof." These are the terms in which these subjects were decerned to belong to the present suspender's predecessor. Now, it will be observed that there is here, differing from the other case, an express conveyance in favour of Mr Hilson of the mill-lade. I should have thought that was very clear—that it means what it says—the mill-lade. The Lord Ordinary does not take that view. He says, in stating his view upon the construction of that clause,—"By the decree, as I construe it, George Hilson acquired in property the mill-lead and its southern embankment as far up the lead as the waste-water sluice between his mill and the Abbey Mill." I do not see any other way in which he could arrive at that conclusion on the construction of this clause, than by holding that the description "that portion of ground or embankment lying to the west of the said mill, and between the mill-lead and the water of Jed," applies to the mill-lade as well as to that portion of ground.

I think that is an impossible reading, because if you consider for a moment how the description would read, it would be in this way,—"And particularly the mill-lade lying between the mill-lade and the Water of Jed,

and extending upwards from said mill," and so on. Now, how can you convey a subject and describe it as bounded by itself? Yet that is the result of the Lord Ordinary's construction of this clause. I say that cannot possibly be the reading. The real reading is just what the deed itself says, that it is a conveyance of the mill-lade, and of that particular portion of ground or embankment lying to the west of the mill, and between the mill-lade and the Water of Jed. Therefore I have not any doubt, upon the construction of this decree, that it is a conveyance of the whole of the mill-lade *nominatim*. Had there been any doubt about that, it would have been cleared up by the last words, because the subjects are conveyed "all as presently occupied by Messrs James and George Hilson, the tenants thereof," and it is perfectly obvious in this case that those subjects, one and all of them, and the whole of the mill-lade, were occupied and possessed by the tenants thereof, James and George Hilson. Therefore I have no doubt, upon the construction of this deed, that it was a decerniture in favour of the purchaser of the whole of the mill-lade. And that explains how this subsequent declaration which is put in came to be there, whereby the Lords "find and declare that the said Robert Laing and George Hilson, purchasers of the Abbey Mill and Waulk Mill, being lots first and second, have a joint *pro indiviso* right of property in the waterfall, damhead or cauld, sluices, and mill-lead thereof."

Now, I think that is very bad conveyancing. I think the proper way to do it would have been to decern and declare that they were each *pro indiviso* proprietors of the mill-lade. That would have been the proper form of conveyance, but it does not the least interfere with the proper construction of this deed, viz., that to each of them is given *ex facie* a right to the whole; and then it is explained that although *ex facie* each of those two purchasers has a right to the whole of the mill-lade, yet as between themselves the right is merely a *pro indiviso* right. That being so, the deed goes on with certain provisions as to how this mill-lade is to be regulated as between the two proprietors of it. That is the whole deed. I pointed out before, in my construction of the conveyance to Laing, that it amounted to a conveyance in property, and that, although the mill-lade was not particularly conveyed, still, as explained by proof of possession, it came to the same thing. And that is why I said just now that by this decree both the purchaser of the Abbey Mill and the purchaser of the Waulk Mill were declared to be proprietors, and then that the decree declared that their real rights as between themselves were *pro indiviso* rights to the whole. Well, if that be so, that explained the conveyancing—not good conveyancing in my opinion—in questions between the two proprietors, with which third parties have nothing to do. If I am wrong in thinking that the conveyance to Mr Laing was a conveyance of the property of the mill-lade, then the only result is that there is the undoubted possession ever since of the whole in favour of Mr Hilson. That would be the only result as concerns third parties. If I am right in so construing the decree, there is decerned to belong to Mr Hilson's predecessor the mill-lade in property.

Then Mr Hilson's predecessor proceeds to make up his title. I need not go into the detail of it; but he conveys to himself and his brother, and

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they obtain a charter from the alleged superior, under which they take infeftment, and that infeftment is recorded on 5th May 1846. I shall not enter into the particulars of that, because the description of the subjects in it is identical with that in the decree of sale, upon which I have been commenting. Now, at the date of this charter and sasine in favour of Mr Hilson's predecessor in 1845 there is, so far as I can see, no reason to doubt, in so far as regarded this piece of the mill-lade in question, namely, the new bit which had been constructed ten years before opposite the respondent's property, that the grant flowed *a non habente potestatem*. The property on which it was constructed does not appear to have belonged to the Magistrates of Jedburgh, and therefore this title which Mr Hilson's predecessor made up in 1845 is not valid unless it is fortified by possession and prescription. But there is no doubt that he and his predecessors have had uninterrupted possession of this mill-lade during the whole of the time since 1845; and that disposes of any objection to their title on the ground that it proceeded *a non habente potestatem*.

But then the question remains behind—What is the effect of this conveyance of the mill-lade as regards other persons? I beg to point out that the suspender's charter professes to convey the right of property. There is no doubt about that. It does not profess to convey a right of servitude or any minor right whatever. It professes to convey a complete right of property to Mr Hilson's predecessor. Now, is there anything in our law which should prevent a disposition of such a subject as a mill-lade, a permanent construction, an *opus manufactum*—it may be on another man's ground—becoming a subject of conveyance in property? I can see none. It may be a question what is the effect of that conveyance in some respects, but that it is a good conveyance of the *opus manufactum*, the mill-lade, I see no reason whatever to doubt. Whether that would convey the *solum* of the ground, so taken possession of for the purpose of the construction of this mill-lade, *a cœlo ad centrum* I do not know that it is necessary to inquire. If I had to express an opinion, I should be disposed to think that it did, but that is not necessary for the decision of this case. That it is a conveyance of the whole *opus manufactum* as well as the ground necessary for its support, and of the ground in all time coming, I see no reason to doubt, nor do I see where the difficulty lies in law. Therefore, I say, it humbly appears to me that this conveyance of the mill-lade to Mr Hilson's predecessor gives him an absolute right of property in the mill-lade.

Well, then, if that be so, if this mill-lade and the walls and embankments which were constructed to contain the water are his exclusive property, as I think they are, what right has anyone to interfere with them? Nobody has a right to pierce these walls as was proposed by Mr Scott, and to put sewage in the lade, because that is an interference with private property. This is not a case of servitude. The water is no longer flowing in its natural channel. It may be, in a certain sense, flowing very much *in situ* where it was before, but it is no longer flowing in the natural channel. It is flowing in an artificial channel, in a channel which is the private property of other people, and the water itself has been appropriated and applied to the private uses and purposes of other people. It is in my

view just as much while it is so confined within the channel belonging to Mr Hilson his property, and applied to his uses, as if it was flowing in an iron pipe which he had laid down upon the ground. Well, if that be so, what right has any third party to interfere by putting a quantity of sewage or other matter into it? That is an interference, it appears to me, with private exclusive property which ought not to be tolerated. Therefore, in my view in this case, no question of amount of injury caused by the proposed proceedings arises. It may very well be that the parties along whose lands this mill-lade flows may, by taking water from it for forty years, or by using it in other ways for forty years, have upon their part acquired a servitude over it for certain purposes. That may very well be, and it may be that the respondent here has a right to take water from it in certain ways for certain purposes. I do not know, because no such questions are raised in this case. These being my views of the case, I come to the conclusion that we must reverse the Lord Ordinary's interlocutor, and, holding that this mill-lade is the property of the suspender, find that the respondent has no right to interfere with it by putting any sewage into it.

LORD TRAYNER.—I concur with your Lordships in thinking that the interlocutor reclaimed against should be recalled. By the decree of sale in 1845, and in that part of it which the Lord Ordinary calls the dispositive part, I find what is to all practical effects an unambiguous conveyance of the mill-lead in question. I think there is no room for any discussion as to whether that means only the *opus manufactum* erected on the soil, or the soil separate from the erection thereon. I think it is what it is called, the mill-lead, and that that includes at least both soil and erections so far as these are necessary and proper constituent parts of the thing itself. The subsequent part of the decree does not militate against this view. It contains a declarator that the owner of another mill shall "have a joint *pro indiviso* right of property" in the mill-lead. What right that declarator may give to the other mill owner is a question with which the defender has no concern. But one thing is clear from the declarator, namely, that whether joint or not, it is a right of property, not merely servitude, which the pursuer has in the mill-lead. The pursuer has been infeft in that right of property with the exclusive use appropriate to a proprietor for more than the prescriptive period, and I think he is entitled to interdict the defender, whose proceedings—the legality of which he maintains—are an invasion of the pursuer's rights.

THE COURT recalled the interlocutor reclaimed against, and granted interdict as craved.

WINCHESTER & NICOLSON, S.S.C.—J. MURRAY LAWSON, S.S.C.—Agents.

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RUSSELL, HOPE, & COMPANY, Pursuers (Reclaimers).—*Dickson—Mac Watt.*

ALEXANDER PILLANS, Defender (Respondent).—*Salvesen—T. B. Morison.*

Process—Summons—Amendment—Court of Session Act, 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 29.—The Court of Session Act, 1868, sec. 29, enacts, —"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always that it shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading unless all the parties interested shall consent to such amendment."

A firm of iron-merchants raised an action against a rivet manufacturer, concluding for payment of (1) £175; (2) £172, 18s. 11d; (3) £23, 9s. 6d.; (4) £232, 8s. 10d.

In the condescendence the pursuers averred that the defender had entered into a contract to supply the pursuers with 100 tons of rivets, and that in consequence of the defender failing to implement his contract the pursuers had been unable to execute a contract they had made with a shipbuilding company to supply the same quantity of rivets, and had been found liable in an action to pay them the above sums (1) and (2) as damages and costs, and that the pursuers had also lost (3) £23, 9s. 6d., the profits they would have made on the two contracts, and (4) the amount of their solicitor's account in defending the action.

The Lord Ordinary having assoilzied the defender, the pursuers reclaimed, and craved leave to amend the summons by adding an alternative conclusion for payment of £300, and a statement that this sum was the difference between the market price of the rivets undelivered at the date when they should have been delivered, and the contract price.

Held (*diss.* Lord Adam) that the amendment was incompetent.

2D DIVISION. THIS action was raised by Russell, Hope, & Company, iron and steel merchants, Whitehaven, England, against Alexander Pillans, bolt and rivet manufacturer, Motherwell, concluding for payment of "(First) the sum of £175, with interest thereon at the rate of five per centum per annum from the 31st day of July 1890; (second) the sum of £172, 18s. 11d., with interest thereon at the rate of 5 per centum per annum from the 20th day of August 1890; (third) the sum of £23, 9s. 6d., with interest thereon at the rate of 5 per centum per annum from the date of citation to follow hereon; and (fourth) the sum of £232, 8s. 10d., with interest thereon at the rate of 5 per centum per annum also from the date of citation to follow hereon."

The pursuers' averments were to the following effect:—In April 1889 the defender had entered into a contract to supply them with 100 tons of rivets at £7, 15s. per ton, delivery to be made as required. The pursuers had previously entered into a contract to deliver to the Whitehaven Shipbuilding Company, Limited, 100 tons of rivets, at £8 per ton.

By reason of the defender's refusal to supply pursuers with said rivets, as he was bound to do under his contract with the pursuers, they were prevented making delivery to the said Whitehaven Ship-

building Company, and thereby incurred serious liability to that company. No. 53.

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An action was raised by the company against the present pursuers in the English Courts, and judgment pronounced against them for £175, being the amount first sued for in the present action. The present pursuers further paid to the said company the amount of their costs as taxed, £172, 18s., the sum second sued for. (Cond. 6) "The undelivered balance of rivets falling to be supplied by the defender is 93 tons 18 cwts. 2 lbs., the price of which, at £7, 15s. per ton, is £727, 14s. 7d. The price thereof payable by the said company to the pursuers at £8 per ton is £751, 4s. 1d., and the pursuers have suffered loss to the extent of the difference between the said two sums, or £23, 9s. 6d., which represents their loss of profit, and is the sum third sued for." (Cond. 7) "Further, the pursuers have paid to their own solicitors, Messrs Wright & Brown, Carlisle, the sum of £232, 10s. 8d., as the costs of defending the said action at the instance of the said company against the pursuers, being the sum fourth sued for."

The pursuers pleaded;—(1) The defender having failed to implement to the pursuers the contract libelled, is liable to the pursuers in reparation for breach thereof.

After a proof the Lord Ordinary assoilzied the defender.

The pursuers reclaimed, and presented a note to the Court asking to be allowed to amend their record (1) by adding to the conclusions of the summons "or otherwise to make payment to the pursuers of the sum of £300, with interest thereon at the rate of 5 per cent per annum from the date of citation to follow hereon till payment," and by adding to the statement of the pursuers' loss in the condescendence the words "or otherwise the pursuers have suffered loss and damage to the amount of not less than the sum of £300 alternatively sued for, being the difference between the market price at or about 25th March 1890 and the contract price of the rivets then undelivered under said contract, being 93 tons 18 cwts. 2 lbs."

Argued for the pursuers;—The proposed amendment was competent, in respect that it was necessary to determine the real question in controversy between the parties, and that it did not subject to the adjudication of the Court any larger sum or other fund or property than such as were specified in the original summons. The only questions in controversy between the parties were whether the defender was in breach of his contract with the pursuers, and if he was, what was the amount of the damages due for that breach of contract. The action, in short, was an action of damages for breach of contract, and the proposed amendment would not in any way deprive it of that character, but would merely enlarge the criteria which the Court might have in view in assessing the amount of damages. No larger sum was subjected to the adjudication of the Court, for the proposed new conclusion was alternative not cumulative, nor was any other fund or property, for the only fund or property in question was the sum due as damages to the pursuers, if any.[1] Assuming that the Court had a discretion to refuse to allow an amendment even if it were competent, the present amendment ought to be allowed. A proof had been led which was available in this action, but would not be available in another action.

[1] Stewart v. Stewart, 1877, and Shotts Iron Co. v. Turnbull, Salvesen, & Co., 1870, both not reported (Outer-House), but referred to in Mackay, Practice of the Court of Session, i. 485.

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Argued for the defender;—The amendment was incompetent. It would have the effect of converting an action of relief into an action of damages, and so altered the question in controversy between the parties,[1] and it enlarged the conclusions of the summons by claiming a fund not originally concluded for. In any case the Court had a discretion as to allowing amendments, even if they were within the letter of the Act,[2] and that discretion ought to be exercised here by disallowing the amendment.

At advising,—

LORD TRAYNER.—This is an action for damages for breach of contract, the conclusions in which are of a very specific character. The ground of action is this: The pursuers entered into a contract with the defender for a supply of rivets to enable them (the pursuers) to fulfil a contract which they had made with a firm of shipbuilders. The latter contract was broken by the pursuers, and they were, in a litigation which ensued, found liable to the shipbuilding firm in a sum of £175 as damages, and in the costs of the litigation, which amounted to £172, 18s. 11d. They had also to pay the costs incurred by them to their own solicitor, which amounted to £232, 8s. 10d. The breach of contract which led to the pursuers requiring to pay these several sums is said to have arisen from the defender having broken his contract with the pursuers; and accordingly in this action there are specific conclusions that the defender should be decerned to make payment of these specific sums, and so reimburse the pursuers. There is a fourth conclusion under which decree is sought for £23, 9s. 6d., being the loss of profit (at the rate of 5s. per ton) suffered by the pursuers, who had contracted with the defender for rivets at £7, 15s. per ton, while they were entitled to £8 per ton for the same rivets from the shipbuilding firm. On the case thus stated the parties joined issue, and the result is that the Lord Ordinary has assoilzied the defender from the whole conclusions of the summons. The pursuers now propose to amend their summons by adding a new conclusion, alternatively to the existing four, to the effect that the defender should be decerned to pay a sum of £300, with a relative statement of fact that this is the difference between the contract price of the rivets and the price at which they could have been got in the market at the date of the alleged breach on the part of the defender. The pursuers support their motion to have this amendment allowed on the terms of the 29th section of the Court of Session Act, 1868. I am of opinion that the proposed amendment does not fall within the cases provided for by the section referred to, and that it should not be allowed.

The clause of the Act I have referred to distinctly provides that no amendment shall be competent which shall have the effect of submitting to the adjudication of the Court "any larger sum, or any other fund or property, than such as are specified in the summons." That, in my opinion, is what the pursuers propose to do. The original summons in this case concluded (on the grounds which I have already indicated) that the defender should be decerned to reimburse the pursuers in certain sums which

[1] Forbes v. Watt's Trustee, Nov. 9, 1870, 9 Macph. 96; Laming & Co. v. Steater, June 21, 1889, 16 R. 828.

[2] Taylor v. Macdougall & Sons, July 15, 1885, 12 R. 1304.

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they had had to pay, not directly, but consequently upon the defender's breach of contract, as well as another sum of profit which they, in consequence of the same breach of contract, had been prevented from gaining. If the pursuers had got decree for these sums, they could have claimed nothing more on account of the alleged breach from the defender. The sums specially sued for were the measure and limit of their claim. But they propose now to turn this action into an action of damages founded on a different *species facti*, and for an amount to be ascertained by a totally different standard or criterion. They want now to make this action one for damages to the extent of £300 as due to them for breach of contract, arising from the difference between the contract price and market price at the date of the breach, and irrespective and independent altogether of what they were obliged to pay to the shipbuilding firm. This is not amending any "error or defect" in the record, but setting forth and raising a new action. Suppose for a moment that the judgment pronounced by the Lord Ordinary is wrong. In that case the judgment will be reversed, and the pursuers will get decree as originally concluded for. But if the Lord Ordinary is right, and his judgment is affirmed, what then? The pursuers propose by this amendment that we should proceed to consider whether the defender is liable in damages to the extent of £300, more or less, to the pursuers. But where is the conclusion to that effect in the original summons? There is none, for all the original conclusions (in the case supposed) have been adjudicated on, and the defender assoilzied. There is no original conclusion left. The proposed amendment, therefore, if allowed, would, in my opinion, submit to the adjudication of the Court a claim involving a fund or liability not to be found in the original summons, and therefore incompetent. The only conclusion of the summons which bears the slightest resemblance to that now proposed to be added is the conclusion for loss of profit. But obviously the pursuers do not suggest that that conclusion has any connection with the amendment, for that would only make it clearer that the £300 now proposed to be concluded for is greatly in excess of the sum originally concluded for.

If the proposed amendment is incompetent, that is enough to dispose of the question before us. But I may add that, even were the competency less doubtful than it is, I think it would be very inexpedient to allow the amendment in the whole circumstances, and that it should not be allowed if the Court has any discretion in the matter, as I am disposed to think it has.

LORD ADAM.—As my opinion differs from that of your Lordships, I shall shortly state the grounds on which it is based.

The 29th section of the Court of Session Act, 1868, requires the Court to make all such amendments as may be necessary for determining "the real question in controversy between the parties," provided that there shall not be subjected to the adjudication of the Court any larger sum than is specified in the summons.

This is an action of damages in respect of an alleged breach of contract between the pursuers and the defender. The question in controversy is, whether there was such a breach, and if so, what damages are due.

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As originally framed, the summons concluded for payment of certain specific sums which the pursuers had been obliged to pay to another company in respect of the defender's failure to implement his contract with them, and also a sum for loss of profits. There is no doubt that in certain circumstances that might have been a perfectly correct way of measuring the damage. In other circumstances it might not be, and the amount of damage would fall to be otherwise ascertained. It all depended on whether or not the pursuers were able to shew that the loss to them was the direct result of the defender's failure to implement his contract. But after all, this was just a mode of assessing the damage said to be occasioned by the breach of contract. The real question at issue between the parties remained the same, viz., if there was a breach of contract by the defender, what was the loss occasioned thereby to the pursuers.

All that the pursuers propose to do by this amendment is to insert a claim for the amount of damage which had been sustained, if it fell to be calculated by a different mode from that in the condescendence, viz., the difference between the market and the contract price. This amendment is necessary for the purpose of determining the real question in controversy—viz., the amount of damages due. The amendment makes no change in the controversy between the parties. The question in controversy is as to the damages due for breach of contract. The only question proposed to be raised by the amendment is—How are the damages to be estimated? But that does not alter the real matter as in controversy between the parties. It does not subject to the adjudication of the Court any larger sum or different property than is specified in the summons. The sum originally in the summons was £600 and upwards. This alteration makes the sum sued for £300.

I therefore think that the proposed amendment should be allowed.

Lord Justice-Clerk.—I concur in the opinion delivered by Lord Trayner. I certainly would be anxious to give the fullest scope to an Act of Parliament which enabled a pursuer, by altering his pleadings, to get a decision on the real question between the parties. But what is proposed here is to subject to adjudication of the Court a sum which is larger than any of those concluded for in the separate conclusions of the summons. For that reason this amendment, it appears to me, does not fall within the scope of the Act.

Even if it was competent to allow the amendment to be made, I am of opinion that the Act leaves the right to allow or to refuse to allow an amendment to the discretion of the Court, and I think that this is not a case for exercising that discretion by allowing the amendment.

Lord Young and Lord Rutherfurd Clark were absent.

The Court refused the note, and of consent refused the reclaiming note.

W. K. Morton, S.S.C.—P. Morison, S.S.C.—Agents.

WILLIAM GOLDIE, Pursuer (Reclaimer).—*Deas.*
SCHOOL BOARD OF TORTHORWALD, Defenders (Respondents).—*John Wilson.*

No. 54.

Dec. 10, 1895.

Goldie v. School Board of Torthorwald.

School—Schoolmaster—Retiring Allowance—"Salary"—Parochial and Burgh Schoolmasters (Scotland) Act, 1861 (24 *and* 25 *Vict. c.* 107), *sec.* 19.—The Parochial and Burgh Schoolmasters Act, 1861, sec. 19, enacted that the heritors might permit or require a schoolmaster disqualified by old age or infirmity to resign office, provided that where such resignation is not caused by any fault on the part of the schoolmaster, "the heritors shall grant a retiring allowance, the amount whereof shall not be less than two third parts of the amount of the salary pertaining to the said office at the date of such resignation thereof."

Held that the word "salary" did not include school fees or interest on mortified money received by a schoolmaster.

2D DIVISION. Ld. Kyllachy.

WILLIAM GOLDIE, lately schoolmaster of Torthorwald Public School, raised this action against the School Board of Torthorwald Parish, concluding for declarator that the defenders were bound to grant him a retiring allowance of not less than "two-thirds of the emoluments or salary pertaining to the pursuer's office of schoolmaster at the date of his resignation," and for payment of a sum of £51, 16s. 5d. as retiring allowance.

The pursuer averred that on 18th January 1868 the minister and heritors of the parish of Torthorwald appointed him parochial schoolmaster of the parish. The emoluments or salary which, up till 20th June 1873, pertained to the said office, amounted, exclusive of Government grant and house and garden, to £78, 15s., consisting of salary paid by heritors, £47; school fees, £30; interest on mortified money, £1, 15s. After the passing of the Education (Scotland) Act, 1872, the pursuer continued as teacher under the School Board of the parish until, in consequence of old age, he resigned on 3d September 1894.

"By sections 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861, and section 61 of the Education (Scotland) Act, 1872,* the pursuer is entitled, as a matter of right, to a retiring allow-

* By section 19 of the Parochial and Burgh Schoolmasters Act, 1861, it was enacted that the heritors might permit a schoolmaster disqualified by age or infirmity to resign office "provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two third parts of the amount of the salary pertaining to said office at the date of such resignation thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster."

Section 55 of the Education (Scotland) Act, 1872 (35 and 36 Vict. c. 62), enacts,—"Subject to the provisions hereinafter contained regarding the removal of the teachers of public schools appointed previously to the passing of this Act, such teachers shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained. . . ."

Section 61.—"A school board may permit any teacher of a public school to resign his office upon the condition of receiving a retiring allowance . . . . provided always that nothing herein contained shall affect the right under the existing law to a retiring allowance of any teacher appointed under the recited Acts or any of them."

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ance during his lifetime of not less than two-thirds of the emoluments or salary pertaining to his office at the date of his resignation. At the date of the pursuer's resignation the emoluments or salary pertaining to his said office, exclusive of the Government grant and house and garden, was £77, 14s. 8d., consisting of £52 paid by the School Board, probate grant in lieu of school fees, £23, 8s., and interest on mortified money, £2, 6s. 8d. Two-thirds of this is £51, 16s. 5d. per annum, the sum sued for."

The defenders stated that prior to 1872 "the schoolmaster's salary was £47 a year, at which sum it was fixed in pursuance of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861 (24 and 25 Vict. c. 107), which took the place of an earlier Act passed in 1803 (42 and 43 Geo. III. c. 54), dealing with schoolmasters' salaries, which amended an old Act passed in 1676 (1 Will. III. c. 26), dealing with the same subject. By the whole of the said Acts the term salary is restricted to the termly payments therein provided for, and is quite distinct from the school fees, the right to which belongs to the schoolmaster at common law. The pursuer's salary, received from the minister and heritors, did not include either school fees or the interest of the mortified money."

The defenders further stated that after the passing of the Education Act of 1872 the School Board fixed the pursuer's salary at £52, and allowed him to receive in addition his own school fees and what grant he might earn from Government.

After the passing of the Local Government (Scotland) Act, 1889, the School Board remitted all the fees in the school up to and including the fifth standard. "The whole probate-duty grant thereafter received by the defenders in respect of Torthorwald School in lieu of fees was handed over to the pursuer. . . . Neither the school fees nor interest of mortified money form part of the salary upon which, in terms of the Parochial Schoolmasters Act of 1861, the pursuer's right to a retiring allowance is based. . . . The defenders have all along been willing to pay, and hereby judicially tender, to the pursuer a retiring allowance of £34, 13s. 4d., being two-thirds of his salary."

On 26th October 1895 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the retiring allowance payable to the pursuer amounts to £34, 13s. 4d., being two-thirds of his salary at the date of his resignation, and to that extent decerns and declares in terms of the conclusions of the summons." *

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* "OPINION.—The pursuer here is the late schoolmaster of the parish of Torthorwald, and the question is as to the amount of his retiring allowance, he having lately resigned, and the School Board and he being at issue as to his rights under the Education Statutes.

"The pursuer is admittedly entitled to a retiring allowance. He is an old schoolmaster,—that is to say, he was appointed in 1868 under the Act of 1861 and prior to the Act of 1872. His rights therefore depend on the former of these statutes—the Act of 1861—the Act of 1872 providing merely that nothing in that Act shall prejudice the rights of schoolmasters in office at the date of the Act in respect of a retiring allowance or otherwise. Now, what the Act of 1861 provides as to retiring allowance is this: that where a schoolmaster's resignation 'shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation

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The pursuer reclaimed, and argued;—"Salary," under the Act of 1872, included not only the salary paid by the School Board but also the "emoluments" connected with the office, and the pursuer was entitled to a retiring allowance of not less than two-thirds of the emoluments pertaining to the office.[1]

Argued for the defenders;—Before 1872 the retiring allowance consisted of two-thirds of the fixed salary paid by the heritors, which did not include school fees. No change was introduced by the Act of 1872.

LORD YOUNG.—I think the judgment of the Lord Ordinary is right.

A schoolmaster appointed after the passing of the Act of 1872 has no right to a retiring allowance at all. The school board is authorised to grant a retiring allowance, but that is entirely in their judgment and discretion. We have nothing to do with the retiring allowance; that is in the judgment of the board.

The question here regards an old schoolmaster, one who was in office when the Act was passed. It was thought fit not to put teachers of this class in the same position with respect to the retiring allowance, and also with respect to removability—but here we are only concerned with the retiring allowance—as schoolmasters appointed after the passing of the Act. It was thought proper and only just to reserve to them what they were entitled to at the passing of the Act, and that is done by the words in

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thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster.'

"It is not disputed that the pursuer is entitled to two-thirds of the salary which he enjoyed at the date of his resignation. That salary was, it appears, somewhat larger than it was at the passing of the Act of 1872; but the defenders do not dispute that the pursuer is entitled to the benefit of any increase of his 'salary' proper. The question is whether 'salary' in the sense of the Act of 1861 can be held to include school fees, and the interest of a certain mortification which has always been paid to the schoolmaster.

"Now I should be quite disposed to take a liberal view as to what is covered by the word 'salary.' But throughout the whole legislation on the subject it is impossible in my opinion to doubt that a schoolmaster's salary is something different from and exclusive of the fees, to which formerly he had right at common law, and also different from and exclusive of emoluments coming to him from endowments or parliamentary grants. The salary is and always has been an annual sum fixed and paid, formerly by the heritors and now by the school board; and while it may well include (as has been indeed held) sums so fixed and paid in commutation of fees or in commutation of endowments, it is not suggested that anything of that kind occurred here. The minutes of the defenders carefully distinguish between the pursuer's salary and the school fees and Government grant which he received in addition; and indeed, I do not see how if the school fees were held to be part of the pursuer's salary for the purposes of this question, the Government grant could be held to be in a different position.

"On the whole, therefore, it appears to me that the defenders' tender of a retiring allowance equal to two-thirds of the £52 a year paid to the pursuer at the date of his resignation is an adequate tender, and I propose so to find, and to decern for that amount."

[1] Marshall v. School Board of Ardrossan, Dec. 10, 1879, 7 R. 359, *per* Lord Deas, 369.

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section 55, "that such teachers" (that is, teachers before the passing of the Act) "shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained."

This action is with regard to the retiring allowance to which this old schoolmaster was entitled at the date of the passing of the Act of 1872. Here there is no contract or usage on the subject, and therefore we are only concerned with the retiring allowance to which by law he was entitled at the passing of the Act. Now, the only retiring allowance to which by law he was entitled was a certain proportion of his salary, not less than two-thirds of and not exceeding the whole salary. Now, the Act of 1861, which contains the above provisions, specifies the amount of salary which is to be paid to the schoolmaster. This salary was in addition to the fees which were at that time payable direct to the schoolmaster, unless there was a contract whereby the fees should be paid to the trustees of the school, viz., the minister and heritors, who had charge of the school. But the provision as to the salary is limited to the salary, and does not extend to fees at all.

So I think, in the present case, dealing with an old schoolmaster whose rights are regulated by the Act of 1861, the retiring allowance is limited to salary, and does not extend to fees. It makes no difference that fees are in the present case paid not directly to the schoolmaster but are paid to the board, who give the schoolmaster such proportion of them as they see fit. They are fees all the same, and are not to be taken into account any more than fees prior to the passing of the Act. My opinion therefore is in accordance with that of the Lord Ordinary, and I think accordingly that this reclaiming note should be dismissed, and the judgment adhered to.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

J. & A. HASTIE, Solicitors—CONSTABLE & JOHNSTONE, W.S.—Agents.

No. 55.

Dec. 10, 1895. Buchanan & Co. v. Macdonald.

R. BUCHANAN & COMPANY, Pursuers (Respondents).—*Chree.*
JOHN MACDONALD, Defender (Appellant).—*Salvesen—Clyde.*

Sale—Trade Discount—Executory Contract—Notice—Invoice.—A brewer entered into a verbal agreement with a retail dealer to supply him with beer, and to allow him 35 per cent discount when he paid an account. No arrangement was made as to the length of credit to be allowed, but with each consignment of beer an invoice was sent, on which was a printed notice which stated that accounts not paid within three months were not subject to discount. The attention of the dealer was not specially called to the terms of the invoices, and on more than one occasion during a course of dealing extending over two years, the dealer was allowed the usual discount upon accounts not paid within three months.

In an action by the brewer for payment of the full amount of an account not paid within three months, *held* that by the original contract between the parties the price of the beer was fixed at 65 per cent of the nominal

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price; that this contract was not qualified by the terms of the invoices, and therefore that the defender was only liable for the amount of the account after deduction of 35 per cent.

IN January 1895 R. Buchanan & Company, brewers, Inverness, raised an action in the Debts Recovery Court at Inverness against John Macdonald, Lochaber Warehouse, Fort-William, for payment of £45 as the amount of goods supplied by them to the defender between 2d May and 21st July 1894.

On receipt of the summons the defender paid the pursuers £29, 5s., being the amount sued for less discount at the rate of 35 per cent. He denied further liability, pleading that he was entitled to this deduction as the usual trade discount allowed him by the pursuers, and that there was no special stipulation limiting the period of credit.

The pursuers pleaded that the defender had forfeited his right to the usual discount by his delay in making payment.

Proof was allowed. The material parts of the evidence are given below.*

On 20th June 1895 the Sheriff-substitute (Davidson) assoilzied the defender. On appeal the Sheriff (Ivory) recalled the Sheriff-substitute's interlocutor, and decerned for the sum sued for, less the amount paid to account.

The defender appealed, and argued;—The evidence shewed that the so-called discount of 35 per cent was not an allowance for prompt payment, but that the contract price was ascertained by deducting that percentage from the nominal price. It further shewed that, when entered into, the contract was qualified by no limitation as to the length of credit to be allowed. The invoices were not part of the contract between the parties. Their terms had never been agreed

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*The defender deponed,—"I have had dealings with the pursuers since May 1891. . . . I agreed with pursuers' traveller when I began to deal that I should receive 35 per cent discount when I paid an account . . . I got this discount without regard to the length of credit I took. There was no agreement, either by writing or word of mouth, as to the length of credit. . . . I received goods on 16th March 1892 from pursuers, and I paid for them in October 1892, and received discount at said rate of 35 per cent; and in like manner I paid on 15th April 1893 for goods received on 19th July 1892, and received same discount."

The pursuers' traveller, Alexander Fraser (a witness for the defender), deponed,—"When I got my first order from defender I made no arrangement with him as to the length of credit he was to be allowed. I had no special instructions from the firm as to discount allowed to defender, but I knew from the books which I kept that defender retained off 35 per cent in settling his accounts, and that percentage was deducted by him whether he settled in three months or in six months. . . . I would have taken payment of account sued for and allowed 35 per cent off as discount if defender paid me at any time before the account was placed in our law-agent's hands." By the Sheriff.—"I never called defender's attention to the 'terms' on invoice form. . . . I had not these 'terms' in view myself in taking orders and receiving payments for goods." Cross.—"If a customer becomes bankrupt, it is our custom to rank for the full amount of our account."

In the invoices sent with the goods supplied to the defender, there were printed the words:—"Terms—3 months. Accounts not paid in full within that time not subject to discount."

On 1st August 1894 the pursuers wrote to the defender,—"We must have settlement in full before sending any more beer; the nett amount of the account, if paid now, £30."

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to by the defender. Indeed his attention had never been directed to them. They could not, therefore, be held to alter or qualify the contract. It was also clear from the course of dealing between the parties that they were not intended to have any such effect. The allowance of 35 per cent not being a discount for prompt payment, the cases founded on by the pursuers did not apply.

Argued for the pursuers;—The original contract was indefinite in its terms, and did not refer to any specified amount of beer. It was therefore necessary that the invoice sent with each consignment should state the length of credit to be allowed, and the original agreement must be held to be qualified by the terms of the invoices. Each invoice, indeed, constituted a separate contract, and the defender having accepted goods on the conditions therein specified could not subsequently repudiate these conditions. Having failed to pay within the time specified, the defender was not entitled to the discount.[1]

LORD PRESIDENT.—The question is, what was the contract as to the price of the beer sold to the defender? Now, the evidence of the defender is very distinct on this point. He says—"I agreed with the pursuers' traveller when I began to deal that I should receive 35 per cent discount when I paid an account," and the rest of his evidence develops that statement, and makes it perfectly clear that the contract which the defender alleges, and to which he depones, was an agreement that when payment was made there should only be due the nominal price less 35 per cent. His case is that the discount was not a discount depending upon the period of payment, but an alteration of the market price of the beer. That direct testimony is corroborated in an important way by the evidence of the pursuers' traveller, who says—"When I got my first order from defender I made no arrangement with him as to the length of credit he was to be allowed." He goes on to say that in the settlement of the defender's accounts an abatement of 35 per cent was allowed, and was recognised as the right of the defender, and the evidence makes it perfectly distinct that, according to the usual manner in which the accounts were treated, the allowance of 35 per cent was a matter of right irrespective altogether of whether the defender paid in two or three months or more. It is important also to note, as corroborating the testimony of the defender, that the pursuers, in writing to him on 1st August 1894, do not suggest the theory now maintained at the bar; for, having some reason of their own for pulling up this customer sharply, they intimate that they would have payment in full although the period of three months had not then run out. I think therefore that it is proved that there was an agreement between the parties to the effect contended for by the defender.

The case for the pursuers is rested almost exclusively upon the terms of the invoices sent with each parcel of goods delivered to the defender, and they suggest that the invoices contain an expression of the contract made each time goods were sent. I reject that theory, because I hold it proved that there was an antecedent contract subsisting between the

[1] Duncan v. Aitchison & Co., Jan. 28, 1879, 6 R. 582; *In re* Cumberland, 1876, L. R., 3 C. D. 803.

parties in the terms stated, and that the invoice was not sent to vary or to express the contract, but to furnish a statement of the amount of beer sent.

LORD ADAM concurred.

LORD M'LAREN.—I agree entirely with your Lordship, and have only a few observations to add. In the first place I think that the word "discount" has no technical or universal meaning. In what is perhaps its most common meaning it is equivalent to the payment of interest in advance; as, for example, when a banker advances the amount upon a bill of exchange which is not yet due, discounting the interest up to the day of payment. It is used in another sense for the abatement which is given on a debt, because payment is made at an earlier date than it is customary for such debts to be paid. We know that some business firms have different rates of discount which they allow for payments at different periods. But here the word is used in a different sense, as applying to a case where there is a universal and nominal price for an article, while the fluctations of the market price, or the desirability of establishing an account with a particular individual, are met by alterations in the rate of discount allowed to customers. It is impossible to imagine that so high a rate of discount as 35 per cent could be allowed merely in consideration of prompt payment. The figures are altogether disproportionate to such an arrangement, and there is nothing incredible or indeed improbable in the defender's evidence that he was promised 35 per cent discount irrespective of the time of payment of his current account. The only contrary evidence is contained in the terms of the invoice, but I have always understood that a collateral document such as this can only be referred to as modifying a contract in so far as the contract refers to it. Here, according to all the evidence before us, that of the pursuers' agent and of the defender, the verbal contract was in no way subject to the conditions in the invoices which were afterwards sent to the defender to inform him of the quantity and price of the barrels sent, and of the dates at which he was to receive the consignments. I know of no legal principle requiring the defender to be bound by conditions appearing in a printed paper such as this invoice, which bears no relation to the contract of sale, which was not sent to the purchaser as a proposal for an alteration of the contract previously made, and to which his attention was not specially called.

LORD KINNEAR.—I agree. The difficulty arises from the use of the term "discount," because in its usual sense there is no doubt that it means an allowance made to a buyer for prompt payment. I think it does not mean that in this case, but a deduction to be made from the nominal price in order to ascertain the true contract price, which was to be the nominal price less 35 per cent.

The only other point which creates some difficulty is the terms of the invoices, but I think the answer to the argument founded on the terms of the invoices is, as your Lordship has said, that there was an antecedent contract between the parties by which the price was fixed irrespective of the period of payment, and secondly, because both parties say that they did not take the terms of the invoices into view in making their contract. I say both,

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because the traveller was the agent of the pursuers in making the contract with the defender.

THE COURT sustained the appeal, recalled the interlocutor of the Sheriff-substitute dated 20th June 1895, and the subsequent interlocutors; of new assoilzied the defender from the conclusions of the summons, &c.

JOHN C. BRODIE & SONS, W.S.—GILL & PRINGLE, W.S.—Agents.

No. 56. Dec. 11, 1895. Scott v. Thurso River Harbour Trustees.

RODERICK SCOTT (Mackay's Trustee), Pursuer (Reclaimer).—*Jameson—Chree.*
JOHN MACKAY, Pursuer (Reclaimer).
THE THURSO RIVER HARBOUR TRUSTEES, Defenders (Respondents).—*C. J. Guthrie—D. Anderson.*
JAMES BARRON, Defender.

Process—Abandonment of action—Trustee in sequestration—Judicature Act, 1825 (6 *Geo. IV. cap.* 120), *sec.* 10.—The trustee in a sequestration, who had sisted himself as pursuer, and carried on an action raised by the bankrupt prior to sequestration, lodged a minute craving leave to abandon the action. The minuter did not found on the Judicature Act, 1825, sec. 10, and did not propose to pay the defenders' expenses. The Court *refused* the minute.

1ST DIVISION. Ld. Moncreiff.

JOHN MACKAY, contractor, raised an action against the Thurso River Harbour Trustees, and also against James Barron, their engineer, for any interest he might have. The questions raised in the action arose out of a contract under which Mackay had been employed by the Harbour Trustees for the execution of certain works.

After the case had proceeded some length the pursuer was sequestrated, and Roderick Scott, solicitor, Inverness, who had been appointed trustee in the sequestration, was allowed to sist himself as pursuer.

Subsequently Scott lodged a minute containing additional averments, which were allowed to be added to the record, and the case was remitted to proof.

On 9th July 1895 the Lord Ordinary (Moncreiff) found that the pursuer Scott had failed to prove the averments contained in the minute, and on 18th July he further found that the averments made by the pursuers on record were in part irrelevant, and that the questions raised by the remaining averments fell to be submitted to the arbiter named in the contract between the parties.

The pursuers reclaimed, and thereafter Scott, the trustee, lodged a minute, stating "that the minuter had now ascertained that he was unable to verify the cause of action as set out in the summons, and that the estate under his charge would not yield funds to pay the costs of litigation, that he had been recommended by the creditors to abandon further proceedings, and craved leave for himself to abandon the action."

The minute did not bear to be under the Judicature Act, 1825, and it was admitted at the bar that it was not intended to be presented under the statute. The minuter did not offer to pay expenses.

Argued for the minuter;—The trustee desired to withdraw from the action, leaving the rights of the bankrupt therein entire, and he

craved leave to abandon without payment of expenses.* The case was one for exceptional treatment as to expenses, and the motion of the trustee was in the circumstances reasonable.[1]

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Argued for the defenders;—The defenders were entitled to the whole expenses of the action whether it was abandoned or not. Further, it was incompetent to abandon an action except upon payment of expenses. The trustee had taken up the action, and had thereby got the benefit of the expenses incurred prior to the date at which he was sisted, and therefore, according to the usual rule, he must pay the defenders' expenses as a condition of being allowed to abandon.

LORD PRESIDENT.—If this minute of abandonment had been presented in accordance with the Judicature Act, our course would have been clear. The defenders' account of expenses is remitted to the Auditor, and on the taxed expenses being paid the action is then dismissed. But this minute does not purport to be under the statute, and it has been admitted at the bar that it was of distinct intention that it was not presented under the statute. Now, we have no mode of dealing with such a minute, and accordingly I am of opinion that we must refuse it. The pursuer will then be in a position to consider what steps he should take next.

LORD ADAM.—I am of the same opinion. The minuter craves leave, for certain reasons, to abandon the action unconditionally, to get clear of it free of all expense. Now, apart from the consent of the defenders, we could not grant such a motion. A minute of abandonment under the Act is presented under special conditions, viz., payment by the minuter of all expenses, which must be performed before the motion can be granted, but there is no method of dealing with such a minute as this, and accordingly I agree that we must refuse it.

LORD M'LAREN.—I concur. I think it is perfectly plain that the pursuer can only abandon the action under the condition of paying the defenders' expenses. Although he does not offer to do so in the minute which he has lodged, still, if his counsel had stated that he was willing to pay those expenses, I have no doubt that your Lordships would have remitted the defenders' account to the Auditor, with the view of the necessary qualification being inserted in the interlocutor. But when it appears that the pursuer is not willing to pay the defenders' expenses, I think that our only course is to refuse the minute.

LORD KINNEAR concurred.

THE COURT refused the minute.

J. K. & W. P. LINDSAY, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

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* Section 10 of the Judicature Act, 1825 (6 Geo. IV. cap. 120), provides, *inter alia*, that it is in the power of a pursuer "to abandon the cause on paying full expenses or costs to the defender, and to bring a new action, if otherwise competent."

[1] Hare v. Stein, June 8, 1882, 9 R. 910.

No. 57.

Dec. 11, 1895. Mowat v. Caledonian Banking Co., Limited.

PETER MOWAT, Pursuer (Reclaimer).—*Craigie—Christie.* THE CALEDONIAN BANKING COMPANY, LIMITED, Defenders (Respondents).—*W. Campbell—Cullen.*

Sale—Improbative offer for sale of heritage—Rei interventus.—In an action to enforce implement of an improbative offer for the sale of heritage, which had been accepted, the pursuer averred that before accepting the offer he had in the knowledge of the offerer incurred considerable expense and trouble in investigating the value of the heritage, and in endeavouring to form a syndicate for its purchase. He pleaded that the offer was validated *rei interventu.*

Held (*aff.* judgment of Lord Kincairney) that the averments were irrelevant.

1st DIVISION. Lord Kincairney.

ON 28th November 1894 the manager of the Caledonian Banking Company wrote to Peter Mowat, builder, Edinburgh,—"Gerston Distillery. . . . .—I hereby make you definite offer of the above distillery at . . . £11,500 for two months from this date. I hope that you will let us have your acceptance as soon as you conveniently can within that time." This letter was signed by the manager of the bank, but was not holograph of him or tested.

Mowat accepted the offer by holograph letter, dated 26th January 1895.

On 30th January the bank telegraphed to Mowat that their offer had lapsed, as he had failed to deposit five per cent of the price in terms of an arrangement with them.

Mowat thereafter raised an action against the bank; in which he concluded for decree, ordaining them, in implement of their obligation under the letters of 28th November 1894 and 26th January 1895, to grant him a conveyance of the distillery, and alternatively for damages.

In cond. 2 the pursuer set forth the letter of 28th November 1894 by the bank manager. In answer the defenders explained that the letter was neither holograph nor tested, and that the letter fell to be read along with the previous correspondence, and that by letter dated 27th November 1894 the pursuer agreed that along with his acceptance of the defender's offer he would deposit a portion of the price. (Cond. 3) "Following upon said offer, pursuer incurred considerable trouble and expense in making investigations regarding said distillery and its capabilities and prospects. He travelled to London, and also to the north of Scotland, and there, and in Edinburgh, entered into negotiations with various capitalists, with the view of forming a syndicate to work the distillery, and, in connection therewith, he expended considerable time, money, and trouble. This he did on the faith of the offer quoted above, and with the knowledge and encouragement of the defenders and their said manager. . . ." The pursuer then set forth his letter of 26th January 1895, accepting the offer.

The pursuer pleaded;—(3) The defenders are barred from founding on any informality which there may have been in the execution of their offer—(1) *rei interventu*, and (2) *personali exceptione.*

The defenders pleaded that the pursuer's averments were irrelevant.

On 10th August the Lord Ordinary (Kincairney) pronounced this

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interlocutor:—"Finds that no effectual contract of sale of the Gerston Distillery, Caithness, was constituted between the pursuer and the defenders by the missives of sale libelled, in respect that the offer by the defenders founded on is not holograph or authenticated, and that it has not been adopted by any document holograph of the manager of the bank, or otherwise probative: Finds that there are no relevant averments of acts of *rei interventus* on record: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

The pursuer reclaimed, and argued;—The averments of *rei interventus* were sufficient. The fact that the alleged *rei interventus* took place prior to acceptance of the offer did not exclude the doctrine, for informal unilateral deeds could be validated *rei interventu*.[1] The objection that the offer was not holograph was latent, and could not be founded on by the granters.[2] An endeavour to raise money, though abortive, following upon an offer to sell, might bind the offerer if known to him.[3] The averments afforded at least a good ground for a claim of damages.[4]

The defenders were not called upon.

LORD PRESIDENT.—The only part of the case on which we have heard argument is that based upon *rei interventus*, as affecting the defenders' improbative offer, and to that plea there is, I think, a complete answer, viz., that every act which the pursuer avers as constituting *rei interventus* was done by him between the receipt of the improbative offer, and his acceptance thereof, and all the averments amount to is that the pursuer, after receiving the offer, like a sensible man, set about making inquiries as to whether or not it was worth his while to accept it. Accordingly the

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* "NOTE— . . . I am further of opinion that there is no relevant averment of acts of *rei interventus*. There could not have been any such acts done in reliance on a completed agreement, for there was no completed agreement until the date of the pursuer's acceptance, and the defenders' repudiation followed immediately. I do not dispute that an offer expressed as open for a certain time may become binding *rei interventu*, although improbative. The pursuer referred to several cases in which informal unilateral deeds had been made binding *rei interventu*. Such were the cases of *The Dunmore Colliery Company*, 1st February 1811, F. C.; *United Mutual Mining Company* v. *Murray*, 13th June 1860, 22 D. 1185; and the *Church of England Insurance Company* v. *Wink*, 17th July 1857, 19 D. 1079. But I think the pursuer avers no acts which are of the character of acts of *rei interventus*. He does not say that he relinquished any engagement, or renounced any advantage, or entered into any contract on the faith of the contract. All that he did was to make inquiries about the distillery and endeavour unsuccessfully to raise the money by means of a syndicate. Such acts are not within the category of acts of *rei interventus*. Bell's Prin., sec. 26; Bell's Com. i. 346; *Gardner* v. *Lucas*, 8th February 1878, 5 R. 638, *per* Lord Shand."

[1] Mylne v. Smith, Nov. 18, 1823, 2 S. 501; Dunmore Coal Co. v. Young, Feb. 1, 1811, F. C.; United Mutual Mining Co. v. Murray, June 13, 1860, 22 D. 1185, 32 Scot. Jur. 540; Church of England Life and Fire Assurance Co. v. Wink, July 17, 1857, 19 D. 1079, 29 Scot. Jur. 486.

[2] Baird's Trustees v. Murray, Nov. 21, 1883, 11 R. 153.

[3] *Ibid. per* Lord Shand, at p. 166.

[4] Allan v. Gilchrist, March 10, 1875, 2 R. 587.

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proposition in law which of necessity was put forward by Mr Christie is to the effect that when an offer, neither holograph nor tested, has been made, if the person to whom it is addressed does anything to inform himself whether it will be to his interest to accept, such actings will be enough to turn the offer into a completed contract. Such a proposition is contrary both to law and common sense; and accordingly I think the Lord Ordinary's decision is right. The bank are entitled, like everyone else, to stand upon their legal rights, and all that they have done has been to point out and found upon the fact that there was no legal agreement. We are not called upon to inquire into, or make any observations on, their conduct in the matter.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

ANDERSON & GREEN, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 58.

Dec. 11, 1895. Albany Steam Shipping Co., Limited.

THE ALBANY STEAM SHIPPING COMPANY, LIMITED, Petitioners.—*Lorimer.*

Company—Reduction of capital—Dispensation with words "and reduced"—Motion for dispensation on presentation of petition for confirmation—Companies Act, 1877 (40 *and* 41 *Vict. cap.* 26), *sec.* 4, *subsec.* 2.—On the presentation of a petition by a limited company for an order confirming the reduction of its capital, the Court, in virtue of the powers conferred by section 4, subsection 2, of the Companies Act, 1877, on the motion of the petitioners, *dispensed* in the meantime with the addition of the words "and reduced" to the name of the company.

2D DIVISION.

ON 10th December 1895 the Albany Shipping Company, Limited, Dundee, presented a petition to the Court for an order confirming the reduction of its capital. The petitioners stated that there was passed at an extraordinary general meeting of the company on 3d October 1895, and confirmed at a subsequent extraordinary general meeting on 22d October, a special resolution that the capital of the company be reduced from £250,000, divided into 25,000 shares of £10 each, to £125,000, divided into shares of £5 each. The petitioners further stated,—"The reduction of capital resolved upon by the company is a reduction of paid-up capital which is lost or is unrepresented by available assets, and does not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, and does not in any way affect the rights of creditors of the company."

The petitioners prayed the Court "to dispense in the meantime with the addition by the company of the words 'and reduced' to its name," and "to appoint the petition to be intimated in common form, and to be advertised, and to allow all concerned to lodge answers, and on resuming consideration, to make an order confirming the reduction of the capital," and to dispense altogether with "the addition of the words 'and reduced' to the company's name."

In Single Bills the petitioners, in moving for intimation and advertisement, moved also for a dispensation in terms of the first part of the prayer of their petition. They referred to the sections of

the Companies Acts, quoted below,* and to the undernoted authorities.[1] No. 58.

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THE COURT (LORD JUSTICE-CLERK, LORD YOUNG, and LORD TRAYNER) pronounced the following interlocutor:—"The Lords dispense in the meantime with the addition by the company of the words 'and reduced' to its name, and appoint the petition, along with this order, to be intimated," &c.

BOYD, JAMESON, & KELLY, W.S., Agents.

ROBERT LOCKHART ALSTON, Pursuer (Respondent).—*Wilson.*
ALEXANDER ROSS, Defender (Reclaimer).—*Kennedy—Watt.*
ALEXANDER MUNRO AND ANOTHER, Defenders. No. 59.

Dec. 12, 1895.
Alston v. Ross.

Process—Sist—Road—Action to negative alleged right of way—Sist to give County Council opportunity to intervene—Local Government (Scotland) Act, 1894 (57 *and* 58 *Vict. cap.* 58), *sec.* 42.—The proprietor of an estate brought an action against R., concluding for declarator that he held the estate free of any public right of way over a certain part of it, and for interdict against the defender entering upon it. R., who had used a path over the part of the estate in question for sixteen years, lodged defences. The Lord Ordinary allowed a proof. Shortly before the diet fixed for proof the defender moved the Lord Ordinary to sist the action, upon the ground that, his funds being exhausted, he was unable to make the necessary preparations for the proof, and that the case was being considered by the County Council, who were entitled under the Local Government Act, 1894, to take steps to vindicate rights of way. The Lord Ordinary (Kyllachy) refused the motion, and the defender having failed to appear at the proof the Lord Ordinary granted decree as against R. as concluded for.

On a reclaiming note the Court *recalled* the interlocutor of the Lord Ordinary, and *sisted* the action *hoc statu* upon an undertaking by the defender not to use the path during the sist.

ROBERT LOCKHART ALSTON, proprietor of the estate of Rosehall in Sutherlandshire, brought an action in January 1895 against Alexander Ross and others, tenants or occupiers of houses at Inveroykel, con- 1st DIVISION. Ld. Kyllachy.

* The Companies Act, 1867 (30 and 31 Vict. cap. 131), sec. 10, enacts,—"The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words 'and reduced,' as the last words in its name, and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the principal Act."

The Companies Act, 1877 (40 and 41 Vict. cap. 26), sec. 4, subsec. 2, enacts,—"The provisions of the Companies Act, 1867, as amended by this Act, shall apply to any company reducing its capital in pursuance of this Act and of the Companies Act, 1867, as amended by this Act: Provided that where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholders of any paid-up capital—(1) The creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction; and (2) it shall not be necessary before the presentation of the petition for confirming the reduction to add, and the Court may, if it thinks it expedient so to do, dispense altogether with the addition of, the words 'and reduced,' as mentioned in the Companies Act, 1867."

[1] Langdale Chemical Manure Co., Limited, 1878, W. R. 434; River Plate Fresh Meat Co., 1885, W. N. 14.

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cluding for declarator that the pursuer had the sole right and property of the lands of Rosehall free of any public right of way over certain portions of that estate which were described, and for interdict against the defenders traversing these portions of the estate.

It was admitted by the pursuer that the defenders had occasionally during the preceding sixteen years used a path over the portions of the estate of Rosehall described in the summons.

Ross lodged defences, and a proof was fixed for 6th November 1895.

On 30th October Ross lodged a minute, in which he stated that he could not proceed to trial, as he had no funds wherewith to make the necessary preparations for the proof, "that the averments of parties in the present action have been brought before the County Councils of the counties of Ross and Sutherland, who are entitled, under the Local Government (Scotland) Act, 1894, to take proceedings requisite to vindicate rights of way, and are now being investigated and considered by them; that in the event of the said County Councils, or either of them, defending the present action, or instituting proceedings against the present pursuer, with reference to the right of way in question, then the issue in the present action would be properly and fully tried without expense to the defender; that even in the event of their declining to take action, the defender believes that subscriptions would be obtained from the public to an amount to enable him to meet the outlay necessary to prepare and conduct his case; . . . that the defender is willing, in the event of the cause being sisted, or the proof adjourned, without prejudice to his pleas, to undertake to refrain from using the path in question during the period of sist or postponement."

He thereafter craved the Lord Ordinary to sist the cause *hoc statu*, or otherwise adjourn the proof for three months, or other reasonable period.

On 2d November the Lord Ordinary (Kyllachy) refused the defender's motion for adjournment of the proof, and refused also leave to reclaim. On 6th November the motion for adjournment was again made and refused, and on the same date the Lord Ordinary pronounced the following interlocutor:—"Having called the proof, and no appearance being made for the defenders, finds, decerns, and declares, and interdicts, prohibits, and discharges, as against Alexander Ross, the compearing defender, in terms of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.

The defender reclaimed, and argued;—The Lord Ordinary was wrong in refusing the defender's request for delay, as the grounds set forth in the minute were sufficient to support the application. The defender had not come forward at his own time to assert the right of way, but had been brought into Court. He was therefore in a more favourable position as regarded an application for delay than a party who brought an action to have a right of way established. Poverty had been held a sufficient excuse in the case of a pursuer failing to appear at a jury trial,[1] and also in the case of a party failing to lodge papers ordered by the Court.[2] But the defender here had stronger grounds for craving a sist than mere poverty. The Legislature had given the District Committees of County Councils

[1] Sassen v. Campbell, March 10, 1830, 8 S. 707.

[2] Clark v. Newmarch, Nov. 17, 1825, 4 S. 182; Leith v. Leith, June 7, 1822, 1 S. 506.

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the right to vindicate rights of way in the public interest, and a reasonable opportunity should be given the County Council in this case to intervene if it was so advised. The defender's information was that it was not unlikely that the new County Council of Sutherland, which had been elected since the minute was lodged, would resolve to intervene in this dispute. The pursuer would suffer no prejudice by the delay craved, for the defender was willing that the examination of aged witnesses should be proceeded with, and he would undertake not to use the path during the time the case was sisted.

Argued for the pursuer;—The Lord Ordinary's interlocutor should be adhered to. The action had been raised in January 1895, and the application for further delay was unreasonable. The defender having failed to appear at the proof, he was in default.

LORD PRESIDENT.—If the person asserting a right of way had been the pursuer, and he had failed to attend a diet of proof, we should have been slow to alter the Lord Ordinary's interlocutor. But the pursuer in this case is seeking to negative a right of way claimed by the defender, and to interdict him from using a path which admittedly he has been in the habit of using for a considerable number of years. Accordingly we find that the user of the path is the party attacked, and it is his possession of it which would be altered by an interdict.

Now, the defender points to the statute under which a duty is imposed by Parliament upon the County Council to vindicate rights of way, and states that the question of vindicating this right of way is now under consideration by the County Council. Now I think we are bound to give the system a fair chance. We cannot disregard the defender's averments that the County Council are considering whether to assert this right of way, and we are therefore bound to give him some latitude, on his undertaking not to use the path till the case is disposed of.

I am therefore of opinion that we should recall the interlocutor and sist the case *hoc statu* on this undertaking being given by the defender, it being left open to either party to come and make a motion to the Court during the sist should matters move more rapidly than is anticipated.

LORD ADAM.—I am of the same opinion. Of course this interlocutor brings up all the previous interlocutors. I do not understand that we are settling anything about the mode of proof, or anything of that kind. There is no motion of that sort. Our judgment leaves all that open.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT pronounced the following interlocutor:—"In respect said defender has undertaken to abstain from using the road in question during any sist of this action, recall the said interlocutor, and sist process *hoc statu*."

ALEXANDER ROSS, S.S.C.—ANDREW URQUHART, S.S.C.—Agents.

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Dec. 12, 1895.
Haldane's Trustees v. Haldane.

MRS CHARLOTTE ELIZABETH HALDANE AND OTHERS (Haldane's Trustees), First Parties.—*Grainger Stewart.*
JAMES AYLMER LOWTHROP HALDANE, Second Party.—*D. Dundas—Gillies Smith.*
MRS CHARLOTTE ELIZABETH HALDANE, Third Party.—*D. Dundas—Gillies Smith.*

Succession—Trust—Denuding—Demand for payment by one of several liars with consent of liferenter.—A testator conveyed his heritable and moveable estates to trustees for payment of certain legacies and annuities, and for payment of the liferent of the remainder to his widow. He further directed his trustees after the death of the longest liver of himself and his wife to pay a provision of £18,000 to his son, and a provision of £8000 to each of his four daughters, and to hold the residue of his estate for behoof of his son. He declared that the children's provisions should vest at his decease.

The testator was survived by his widow and by his five children. The son applied to the trustees for payment of his provision of £18,000. The widow consented to the application, and offered to discharge her liferent in regard to that sum. The funds in the hands of the trustees at the date of the application were amply sufficient to meet all the children's provisions.

Held that the trustees were not bound to accede to the son's demand, in respect that the daughters were entitled to *pari passu* payment of their provisions along with the son, and that it was possible that when the date of payment arrived the estate might be insufficient to pay the provisions in full.

1ST DIVISION. DR DANIEL RUTHERFORD HALDANE, Edinburgh, died on 12th April 1887, leaving a trust-disposition and settlement, whereby he conveyed his whole estate, heritable and moveable, to trustees for, *inter alia*, the following purposes:—Payment of debts, expenses, and legacies. In the seventh place, for payment to his widow of an annuity of £500 during her lifetime, as also for payment of the following annuities to his children after his decease, but only during the lifetime of his widow, and subject to termination thereof in the event after specified, viz., to his son James A. L. Haldane an annuity of £210, and to each of his four daughters an annuity of £100. In the eighth place, for payment of the free annual proceeds of his estate, after implement of the previous purposes, to his widow during her lifetime, but under burden of her bearing the expense of the maintenance of his daughters so long as they lived in family with her. In the ninth place, at the first term of Whitsunday and Martinmas after the decease of the longest liver of himself and his wife, for payment of the following further provisions to his children, viz., to his son £18,000, and to each of his four daughters £8000. In the last place, the testator directed his trustees to set aside and hold for behoof of his son the whole residue and remainder of his estate. The testator further declared that, notwithstanding the terms of payment before specified, and the provisions therein before granted to his son and daughters, it should be in the power of his son, with the concurrence of his widow, after his decease, to apply for and obtain from the trustees payment of the sum of £5000 as a payment to account of the provision of £18,000, but which payment should not bear any interest against him until the term of payment of the said provision, but on payment of said sum of £5000 the annuity of £210 provided to him should cease. Power was also given in similar terms to any daughter on her marriage to apply for and obtain an advance of £2500 on similar

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conditions as to interest and annuities. It was declared that, notwithstanding the terms of payment of the children's provisions, they should become vested in them at the date of the testator's decease.

The testator was survived by his wife, son, and four daughters.

In exercise of the power conferred upon him, the testator's son obtained advances from the trustees amounting to £3010 to account of his provision of £18,000. After making these advances and discharging the primary purposes of the trust, the value of the investments in the charge of the trustees (including a sum of £4832 placed in the names of the testator's marriage-contract trustees to meet any contingent claims under his marriage-contract) was estimated in 1895 to amount to £60,601. The only subsisting claims against the trust-estate, except those of the testator's wife and children, were certain life annuities amounting to £117 for which the deceased was liable. The total amount of the provisions made to the children under the ninth purpose of the settlement, as reduced by the advances already made to the son, was £46,990.

In these circumstances the testator's son, with the consent and concurrence of his mother, requested the trustees to pay over to him the balance of his provision of £18,000, amounting to £14,990, in exchange for a joint deed of discharge by himself and his mother, in which he would renounce all right to the annuity provided to him, and his mother would renounce all right of liferent over the said sum, and agree that her annuity of £500 should suffer any diminution necessary to admit of the other annuities being paid in full.

The trustees having declined to comply with this request without the sanction of the Court, a special case was presented, to which the trustees were first parties, the testator's son, James Aylmer Haldane, second party, and the testator's widow, Mrs Haldane, third party, in order to obtain the opinion of the Court upon the following question:—"Whether the first parties are entitled and bound to pay over to the second party the balance of his foresaid provision, amounting to £14,990, in exchange for delivery to them of a discharge by him and the third party, in the terms above indicated?"

Argued for the second and third parties;—The widow's liferent and annuity were not alimentary, but were capable of being discharged, and she was willing to discharge her rights. The security for the daughters' provisions would be ample, even if the payment asked for was made. The trustees were therefore bound to pay over the balance of the son's provision which had vested in him, on receiving a discharge from the second and third parties in the terms offered.[1]

Argued for the first parties;—The advance so far as in excess of £5000 would be contrary to the testator's implied intention, and could not be granted without impairing the security of the other fiars—the testator's daughters. In all the cases referred to by Lord Watson in the case of *Muirhead*,[1] where a party entitled to the fee of estate liferented by someone else had been held entitled to payment before the natural expiry of the liferent, the party demanding payment had been alone interested in the fee. The rule of these cases did not apply when other parties were interested in the fee,[2] for

[1] Rainsford v. Maxwell, Feb. 6, 1852, 14 D. 450, 24 Scot. Jur. 221; Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301; Muirhead v. Muirhead, May 12, 1890, 17 R. (H. L.) 45, *per* Lord Watson, at p. 48.

[2] Grieve's Trustees v. Bethune, &c., June 9, 1830, 8 S. 896.

No. 60. in such cases payment to one fiar would decrease the security of the other fiars.

Dec. 12, 1895. Haldane's Trustees v. Haldane.

LORD PRESIDENT.—Unless the trustees are bound to pay over the money which they are asked to pay over by the second party, we cannot answer the question put to us in the affirmative. The question is, "Is there an obligation upon the trustees to pay over this money?" The payment which is asked is of the capital of the provision destined to the second party in fee, but this is not the case of a fund directed to be set aside as the applicant's own property. In such a fund the other beneficiaries have no interest, because they can never have any right to it. Unfortunately the right of the second party is only to share *pari passu* along with his sisters in the fee of this estate,—he to the extent of £18,000, and they to the extent of £8000 each,—and it is perfectly plain that, if the estate by loss on investments should fall to such an extent as to become inadequate to provide for the sum of £18,000 bequeathed to the second party, and for the four provisions of £8000 bequeathed to his sisters, these provisions would suffer a *pro rata* diminution. The trustees point to this consideration, and argue that the question must be answered in the negative. It seems to me impossible to hold that the trustees are bound to make the payment asked for. It may be that they are entitled, in the exercise of their discretion to make it, but with that we have nothing to do.

LORD ADAM.—I agree. I think, with your Lordship, that the question is whether the trustees are bound to pay over the money, not whether they are entitled to do so in the exercise of their discretion. That is not our business. I think, as was pointed out by Mr Grainger Stewart, that this distinction exists in the cases where such advances have been authorised, that in these cases the applicant was entitled to the fee of the whole estate, so that no other party could be injured by the advance. But when the applicant is only entitled to the fee of part of the estate, other parties might suffer if the estate left in the trustees' hands should ultimately prove insufficient to provide for payment of the whole of the provisions of the settlement.

LORD KINNEAR.—I entirely agree. There may or may not be any practical risk in the trustees making the desired payment. That is not a question for us but for the trustees. We, however, cannot answer the question put to us in the affirmative, unless we can say, admitting the possibility of risk, that no liability would attach to the trustees in the event of the estate diminishing in value, and I do not think that we can possibly say that. I agree that, as there are five legatees with equal rights to payment out of a common fund, it is impossible to say that the trustees have now the right to pay one of these legatees in full, leaving any loss which may arise from a future diminution to fall exclusively upon the others. If we were to answer the question in the affirmative, we should affirm, as Mr Dundas conceded, that payment in full to the son would afford the trustees a good answer to any claim which might be made by the daughters in the event of the funds remaining in their hands proving insufficient to satisfy the daughters' provisions. I am of opinion that we cannot say that the trustees

would have a good answer to such a claim, and I therefore agree that we must answer the question in the negative. No. 60.

Dec. 12, 1895. Haldane's Trustees v. Haldane.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—"Find and declare that the first parties are not bound to pay over to the second party the balance of the provision in his favour in his father's trust-disposition and settlement, amounting to £14,990, in exchange for delivery to them of a discharge by him and the third party, in the terms indicated, and decern."

W. & F. HALDANE, W.S., Agents.

THE SCHOOL BOARD OF THE PARISH OF CERES, Pursuers (Reclaimers). —*Rankine—A. M. Anderson.*
WILLIAM M'FARLANE, Defender (Respondent).—*Kennedy.*
JAMES MARTIN AND OTHERS, Defenders. No. 61.

Dec. 12, 1895. Ceres School Board v. M'Farlane.

Property—Competing Titles—Superior and Vassal—School Board possessing transferred school on personal title—Education (Scotland) Act, 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 38.—In 1833 A granted a feu-disposition of a portion of the lands of Craigrothie, upon which a schoolhouse had been built, to B, who entered into possession but did not take infeftment. In 1873 B transferred the schoolhouse and ground to the school board of the parish, who got possession, but no formal conveyance in favour of the school board was executed. In 1883 D bought the lands of Craigrothie, and duly completed his titles by infeftment upon a disposition, which contained a clause of warrandice excepting all feu-rights granted by the disponer or his predecessors.

In an action brought by the school board against D for declarator of their right to the ground possessed by them, the pursuers founded upon the unfeudalised feu-disposition and on section 38 of the Education (Scotland) Act, 1872, which enacts that when a school has been transferred to a school board, the school and the site shall vest in the school board. The pursuers did not allege that D knew of their right at the date of his purchase. *Held* (*aff.* judgment of Lord Low) (1) that D's right to the lands was not affected by the unfeudalised feu-disposition; and (2) that section 38 of the Act did not give the school board a better title than that of their author, and therefore that their title was not valid in competition with the title of D.

Property—Disposition—Warrandice—Exception of existing feu-rights—Unrecorded feu-disposition.—Opinions that an exception in a clause of warrandice "of all feu-rights granted by the disponer or his predecessors," fell to be construed as meaning all feu-rights completed by infeftment.

1ST DIVISION. Lord Low.

BY feu-disposition dated in 1833 William Wilson of Craigrothie, Ceres, in the county of Fife, feued a piece of ground upon which a schoolhouse had previously been built, being part of the lands of Craigrothie, to certain of the inhabitants of the village of Craigrothie. The *reddendo* was one penny Scots, if asked only, and the warrandice was at all hands and against all mortals.

The piece of ground above disponed was possessed by the original disponees and their successors down to the year 1873, the school being managed by a body of trustees, but no infeftment was ever taken upon the feu-disposition. After the passing of the Education (Scotland) Act, 1872, it was resolved to transfer the schoolhouse and ground to the Ceres School Board, and the School Board got possession, but no formal conveyance was executed.

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By a series of gratuitous dispositions the lands of Craigrothie passed from William Wilson to Frederick Honey, who, in 1883, sold the lands to William M'Farlane. The disposition in M'Farlane's favour did not in its dispositive clause except the ground feued in 1833, but it contained the following clause of warrandice:—"And I grant warrandice, but excepting always from the warrandice the current tacks or leases, and all feu-rights and other subaltern rights of the said lands granted by me or my predecessors or authors to the tenants, feuars, and vassals thereof, without prejudice to the right of the said William M'Farlane or his foresaids to quarrel or impugn the same upon any ground in law not inferring warrandice against me or my foresaids." William M'Farlane duly completed his title by infeftment.

In 1894 William M'Farlane intimated to the Ceres School Board that they had no legal title to the ground they occupied, and offered them a feu-charter if they would pay a feu-duty of £5 a year. Upon their refusing to accept this offer he threatened them with eviction.

The School Board accordingly raised an action against William M'Farlane, and against the heirs (in terms of the feu-disposition of 1833) of the parties in whose favour that disposition had been granted, for declarator that the pursuers had the full right and title to the piece of ground disponed in 1833, and to have that piece of ground adjudged to belong to them.

The pursuers pleaded;—The pursuers are entitled to decree as concluded for, in virtue of (*a*) the feu-disposition first referred to; (*b*) the transfer from the said trustees and managers to the pursuers; and (*c*) the provisions of the Education (Scotland) Act, 1872.*

William M'Farlane lodged defences, and pleaded that the pursuers had no legal title which could compete with his infeftment as singular successor.

On 14th November 1895 the Lord Ordinary (Low) sustained the defences and assoilzied the defender.†

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* The Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), section 38, provides,—"With respect to schools now existing, or which may hereafter exist, in any parish or burgh erected or acquired and maintained, or partly maintained, with funds derived from contributions or donations . . . . be it enacted, that it shall be lawful for the person or persons vested with the title to any such school, with the consent of the person or persons having the administration of the trusts upon which the same is held, to transfer such school, together with the site thereof, and any land or teacher's house held and used in connection therewith, to the school board of the parish or burgh in which it is situated . . . and it shall be lawful for the school board, with the sanction of the Board of Education, to accept of such transference; and on the same being made and accepted, the said school, with the site and any land and teacher's house included in the transference, shall be vested in the school board, and the school shall thereafter be deemed to be a public school under this Act, and shall be maintained and managed by the school board, and be subject to all the provisions of this Act accordingly. . . ."

Section 39 provides that "the transference may be effected by an ordinary disposition or other deed of conveyance by the persons vested with the title, recorded in the Register of Sasines."

† "OPINION.—The defender William M'Farlane is a purchaser of the estate upon which the pursuers' school is built, and his title has been com-

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The pursuers reclaimed, and argued;—(1) If the pursuers had been evicted by the defender's author they would have had a claim against him under the clause of warrandice contained in the feu-disposition of 1833, as he was a gratuitous disponee of their author. But the defender was not in a better position than his author, because he had accepted a disposition containing a clause of warrandice which excepted from the warrandice all feu-rights granted by the disponer or his predecessors. This exception included the feu-disposition of 1833, even although that deed had never been feudalised, and that deed accordingly could not be challenged by the defender.[1] A person who accepted a disposition with a clause of warrandice in these terms was put upon his inquiry, and could not found upon the fact that a feu-right granted by the predecessor of his author was not on record. The records were not conclusive in all cases as to the extent of the rights conveyed, *e.g.*, they did not disclose servitudes. (2) At anyrate, the effect of the transference to the School Board was to give them a

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pleted by infeftment. The pursuers' title, on the other hand, is an unfeudalised feu-disposition granted so long ago as 1833.

"It is not said that the defender had any notice of the pursuers' right, or that he even knew of the existence of the school. *Prima facie*, therefore, it is a case to which the general rule that a singular successor takes the lands free from the personal obligations of his predecessor and unaffected by burdens not appearing upon the records applies.

"The pursuers' argument was mainly founded upon the terms of the clause of warrandice.

"That clause excepts from the disposition leases and feu-rights, but gives liberty to the defender to challenge leases or feu-rights on any ground not inferring warrandice against the disponer.

"The argument of the pursuers was that the defender could not challenge their right, because to do so would infer warrandice against his author.

"It may be doubted whether the pursuers have a title to state that argument, because they were not parties to the disposition, nor in any way privy to the contract between the defender and his author. But apart from that, it seems to me that a challenge of the pursuers' title on the part of the defender would not infer warrandice against the disponer. The pursuers' title is challengeable not on account of any defect in the disponer's title, or anything which he has done, but simply because the pursuers, or those in whose right they are, neglected to put their title upon record. In such a case I do not think that there could be any recourse under the clause of warrandice in the feu-disposition, because the defect in the title is entirely attributable to the grantees.

"The pursuers relied upon the case of *Wight* v. *Earl of Hopetoun* (M. 10,461). In that case, however, the ground of judgment was that Lord Hopetoun was barred *personali exceptione* from challenging the perpetual lease which was in question, it being expressly excepted in the clause of warrandice in the disposition. It appears to me that that decision has no application here, because there is no express mention of the pursuer's feu-right in the disposition, and, as I have said, it is not alleged that the defender had any notice of the existence of any right on the pursuers' part, or even knew of the existence of the school.

"I may add that I do not think that the pursuers derive any aid from the provisions of the Education Act, 1872. Section 38 provides for the transference of schools in the position of that in question to the school board. It is there enacted that the persons 'vested with the title to any such school,' may transfer 'such school, together with the site thereof, and any

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[1] Wight v. Earl of Hopetoun, 1763, M. 10,461.

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vested title to the subjects transferred, and this right was as valid as a feudalised title. Section 38 of the Education Act was to be distinguished from section 39. A formal conveyance, such as was referred to in section 39, was not required to vest the subjects transferred in the school board in terms of section 38.

Argued for the defender;—(1) The exception of "feu-rights" contained in the clause of warrandice in the disposition in the defender's favour did not include unfeudalised dispositions. The defender in purchasing was entitled to rely upon the records, and the pursuers had only themselves to blame if their title was challengeable because it was not recorded. The case of *Wight*[1] was not applicable, for there the perpetual lease which was challenged by the defender was expressly excepted in his title. (2) The provisions of section 38 of the Education Act did not give the pursuers a better title than was possessed by their authors.

Lord Adam.—So long ago as 1833 the pursuers' predecessors obtained a feu-disposition from the then proprietor of Craigrothie of a small piece of land, for the purpose of building a schoolhouse. The feu-disposition contained a clause of warrandice, and we are told no infeftment was taken on the disposition. In 1873 the successors of the original disponees, under terms of the Education Act, transferred the ground and school buildings to the pursuers, but neither were they infeft. Now, on the other hand, the property of Craigrothie estate had during this period changed hands several times without any mention being made in the dispositions of the feu given off it in 1833. Then, in 1883 Mr Frederick Honey sold it to the defender, and the dispositive clause in the disposition did not except the piece of ground occupied by the pursuers, but there was a clause of warrandice in the following terms:—(His Lordship here quoted the clause of warrandice). Now, it appears to me that this is simply a competition of titles. The defender

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land or teacher's house held and used in connection therewith to the school board,' and if the school board, with the sanction of the Board of Education, accept such transference, 'the school, with the site, and any land or teacher's house included in the transference, shall be vested in the school board.' By the 39th section it is provided that 'the transference may be effected by an ordinary disposition or other deed of conveyance by the persons vested with the title, recorded in the Register of Sasines.'

"If, as in this case, the trustees of a subscription school have only a personal title, I do not think that a transference carried out under the 38th section gives to the school board any better title than that of the trustees. I think that they only acquire right to the title as it stands in the person of the trustees. Further, the 39th section points out the way in which the school board may complete their title. It is to be by an ordinary disposition by the persons vested in the title. If the School Board had taken a disposition from the trustees in 1873, when the transference is said to have been made, and put it upon record, there would have been no question; but, as they neglected to do so, I am of opinion that they are in no better position than the trustees would have been in if the transference had not been made, and that their sole title, in a question with the defender, is the unfeudalised feu-disposition of 1833, of which the defender is not said to have had any knowledge or notice.

"I am therefore of opinion that the pursuers are not entitled to the decree which they seek."

[1] Wight v. Earl of Hopetoun, 1763, M. 10,461.

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is infeft in the land with a regular feudal title, and the proposal of the pursuers is to oust him from the land—for this is what their action comes to—on the ground that they have a personal title thereto. I certainly have never heard of the real title yielding to the personal in such a competition.

But the first argument advanced by the pursuers is on the clause of warrandice, and it is said that in the grant to the defender there were excepted "all feu-rights granted by me or my predecessors." Now, I think that by "feu-rights" are meant completed feu-rights capable of being brought into competition with those disponed, and not merely personal rights, and I agree with Mr Kennedy that the exception does not apply to a case where the defect in the disponee's title arises from his own neglect in not carrying out the plain duty to himself of making his title good by infeftment.

The only other argument is based upon sections 38 and 39 of the Education Act of 1872, but it does not appear to me that these sections make any difference. If there has been a conveyance to the School Board, that cannot give to them any better title than their authors had. If the latter had only a personal title the statutory transference cannot make it a real one. I am therefore of opinion that the Lord Ordinary's judgment is right.

LORD KINNEAR.—I agree. I must confess that I have some sympathy with the position of the pursuers in the case, because they and their predecessors have been in possession for many years of the land occupied by the schoolhouse. It was given to their predecessors in 1833 by a disposition by the then proprietor of Craigrothie for the *reddendo* of a penny Scots, and they have been in possession of it ever since. The estate of Craigrothie has passed by various gratuitous dispositions to disponees of the original proprietor, but in the year 1883 the lands were bought by the present defender, who is willing to allow the School Board to remain, but only on payment of a feu-duty of £5 a year. I am afraid that the position in which the School Board are placed must be ascribed to those who administered their affairs, because they might have made their right certain by taking infeftment from the superior, or after the alteration in our conveyancing procedure by putting their disposition on record. They took no such step, and accordingly their right was a personal one when the defender bought the estate of Craigrothie. The only ground which is suggested on which their right can prevail against the real right of the defender is that the clause of warrandice in the disposition in his favour must be held to except the grant in the pursuers' favour. I am unable to accept that construction of the clause of warrandice. I agree with Lord Adam that the "feu-rights" which are excepted in the clause must be rights which are capable of being brought into competition with the right granted to the disponee. If we were to take the opposite view the result would be that no buyer could contract in safety upon the faith of the records, but every buyer would run the risk of being evicted by parties holding latent personal rights not appearing upon record. We must assume, because there is no averment to the contrary, that the defender knew nothing of this right when he purchased the property. He therefore bought the estate in the

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faith that no rights existed except such as appeared on the record, and the question which has arisen is, as Lord Adam has said, whether in a competition of titles a personal right which is older in date can prevail against his real right. I am perfectly clear that that is not a question capable of discussion.

On the second point, as to the effect of the Statute of 1872, I also agree.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT adhered.

GRAY & KINNISON, S.S.C.—MARTIN & M'GLASHAN, S.S.C.—Agents.

No. 62.

Dec. 13, 1895. Sutherland v. Urquhart.

JOHN SUTHERLAND, Pursuer (Respondent).—*W. Brown.*
BEAUCHAMP C. URQUHART, Defender (Appellant).—*Johnston—Cullen.*

Lease—Claim by tenant under a separate contract—Counter claim by landlord under the lease—Liquid and Illiquid.—In an action by an outgoing tenant against his landlord for the price of the waygoing crop, which had been ascertained, as provided for by the lease, in a submission entered into between the parties at its termination, the defender, who had taken over the crop and admitted that the price was due, pleaded that he was entitled to set off against the pursuer's claim an illiquid counter claim under the lease for damages against the tenant for miscropping and for failing to upkeep buildings. *Held* that the landlord's illiquid counter claim under the lease was not a relevant defence to the tenant's claim for the sum found due to him by the decreet-arbitral.

Lovie v. *Baird's Trustees*, October 16, 1895, *supra*, p. 1, *distinguished.*

1ST DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

IN April 1895 John Sutherland, farmer, raised an action in the Sheriff Court at Aberdeen against Mr Beauchamp C. Urquhart, proprietor of the estate of Byth, concluding for payment of £68, 11s. 10d.

The pursuer averred that he had been tenant under a lease of the farm of Upper Tillymauld, belonging to the defender, up to Whitsunday 1894. At his removal the defender entered, along with him, into a submission to arbiters to fix the value of the waygoing corn crop. The arbiters fixed the value at £136, 7s. 7d., and the defender took over the crop. The pursuer was due to the defender certain sums, including £62, 6s. 7d. for rent, and the sum sued for was the balance, after deducting these sums, of the valuation price.

The defender admitted these averments, and that he refused to make payment of the balance claimed, "and explained that the pursuer has failed to implement the terms of the said lease as to the upkeep of buildings and the cropping of the land, and has rendered himself liable to the defender in the sum of £205, 13s. 7d., for which sum he has raised an action in this Court, together with the liquidate penalty of £72 as stipulated in the said lease."

The pursuer pleaded;—(2) No relevant defence.

The defender pleaded;—(1) The pursuer being due the defender a larger sum than that now sued for, the defender is entitled to compensate, and should be assoilzied, with expenses.

On 27th June 1895 the Sheriff-substitute (Robertson) sustained the pursuer's second plea in law, and decerned against the defender for the sum sued for.

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On appeal, the Sheriff (Crawford), on 16th August 1895, affirmed his Substitute's interlocutor.*

The defender appealed to the Court of Session, and argued;—The claim and the counter claim were both referable to the same contract. They both resulted from the relation of landlord and tenant, and arose in the course of determining, on the expiry of the lease, the pecuniary rights and liabilities of the parties *hinc inde*. The valuation of the grain crop was carried through because of the provisions of the lease.† The case of *Lovie* v. *Baird's Trustees*[1] was not distinguishable from the present, and should be followed.

The respondent argued;—This was not a case of mutual claims founded on the same contract. The submission to arbiters and the lease were distinct and separate agreements. *Lovie's* case was not in point. In any view, the person who had received the grain crop was bound to pay the ascertained price of it, and was not entitled to set off an illiquid and indefinite claim for damages extending over a course of years against a liquid claim of debt.[2]

At advising,—

LORD KINNEAR.—This is an appeal from a decision of the Sheriff of Aberdeen in an action at the instance of a tenant against his landlord, but the action is not founded on the contract of lease, but on a separate and distinct contract, which, so far as the record goes, has no necessary connec-

* "NOTE.—There is no doubt considerable force in the argument that it would be equitable and convenient that the pecuniary claims on either side, arising out of the relation of landlord and tenant of a farm at the expiry of a lease, should be considered and be disposed of together. I have therefore given very careful consideration to the numerous cases which have more or less bearing on this question, particularly to those which were cited at the hearing. I think it is the case that, in the question whether under any circumstances and in any form an illiquid claim can be presented as an answer to a liquid claim, the tendency of the Supreme Court for some time has been to relax the rigidity of the old rule. But even in the most favourable cases for the defender, such as *Stark* v. *Davie*, 18th July 1876, 3 R. 114, and *Munro* v. *M'Geogh*, 15th November 1888, 16 R. 1893, the illiquid claim against a demand for rent has been sustained, as entitling the defender to an abatement of the rent. In short, it has, in certain circumstances, been accepted as a direct answer to the claim for rent. Obviously the defender's claims for damage for miscropping are not in the same sense a direct answer to the pursuer's claim in this action, and they have not been so pleaded. They are pleaded on record in the form of compensation, but it is clear that the claims not being liquid that plea cannot be given effect to, and it was not insisted in at the hearing. What the defender did claim was the right of retention, which he asked should be given effect to, either by conjoining the actions or sisting the process. I think there is distinct authority against conjoining an action founded on an illiquid claim with one founded on a liquid claim, and no precedent or authority for a different course was cited to me. . . ."

† The lease (which was produced) provided that in August in the year of removal the quantity of the grain crop should be ascertained by arbiters, and that the proprietor or incoming tenant should then be at liberty to take possession thereof, the price to be according to the fiars' prices to be fixed in the following spring.

[1] Lovie v. Baird's Trustees, Oct. 16, 1895, *supra*, p. 1.

[2] Macrae v. Gordon, June 1, 1842, 4 D. 1310, 14 Scot. Jur. 423; M'Rae v. M'Pherson, Nov. 19, 1843, 6 D. 302, 16 Scot. Jur. 169.

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tion with the lease. The allegation is that when the tenant removed from the farm the defender entered into a submission with him to fix the value of the grain crop upon the farm, that upon the value being ascertained the landlord took the grain crop over at the fixed sum of £136, 7s. 7d., and that at the date of the valuation the pursuer was due to the defender a balance of rent amounting to £62, 6s. 7d. Then the pursuer says that he is willing to admit his liability for the rent, but that the defender refuses to pay him the balance that still remains of the valued price of the grain crop. I agree with the Sheriff that the only defence to this action, which is that the tenant is liable in damages for miscropping, and failure to upkeep buildings, is an attempt to set off an illiquid claim of damages against a liquid claim of debt. The case appears to me to afford a very simple instance of the rule that no such right of retention or claim to set off can be allowed. The landlord has bought and received the grain crop at a fixed price, and he then claims to set off, against the right of the seller to obtain payment of the price, an illiquid counter claim of damages. Such a defence cannot be sustained.

The Sheriff refers to a series of cases, in which it was held that a claim for rent might be compensated by a counter claim on the part of a tenant, though the amount of the rent due was fixed by the lease, and therefore was so far liquid. But these decisions have no application to the present case. They are all illustrations of the rule that one party to a mutual contract cannot enforce the obligations in his favour, while at the same time he refuses to implement the counter obligations to the other party. It does not affect that rule that the landlord's claim for rent is *ex facie* of the lease a liquid claim, because the case against him—in this class of cases—is that the full amount so fixed is not due, the tenant not having received the full consideration in respect that he has not been put in full possession of the subjects of the lease.

The case of *Lovie* v. *Baird's Trustees*,[1] on which the appellant founded, appears to me simply another illustration of the same rule. But I think that there was in that case another ground very clearly distinguishing it from the present. In that case the tenant was in arrear of rent, and the landlord had claims for rent against him extending over a considerable period. The tenant met these by counter claims, which were illiquid in themselves, but before the controversy was at an end the termination of the lease arrived, and as a consequence the tenant was required to give over to the landlord (or to the incoming tenant) certain houses, grass, fallow land, and dung, upon condition that he should be paid "according to the valuation of men mutually chosen as aforesaid, for the value of all sown grass, for the dung made upon the farm subsequent to the time of turnip sowing in the previous year, for the value of labour done to the break, for green crop or fallow land in that year." Now, upon that supposition the value of these things was fixed, and the tenant then brought an action against the landlord for the amount of the valuation irrespective altogether of the landlord's claims against him. It was held that the landlord was entitled to a proof of his claims, and to retain the amount of the valuation. But then the landlord's claim was just as liquid as the tenant's, for his claim was for arrears of rent, which

[1] Oct. 16, 1895, *supra*, p. 1.

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was a liquid sum—the tenant's was for the amount of the valuation. Both parties were claiming on counter obligations in a mutual contract. In this case the contract on which the tenant founds is separable if not separate from the lease. The landlord according to his own statement has received the entire consideration for the money which he is now asked to pay. Accordingly this case does not fall under the rule of the cases to which I have adverted.

It appears to me, therefore, that the judgment of the Sheriff in the action at the instance of the tenant must be affirmed.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT affirmed the interlocutors of the Sheriff-substitute and of the Sheriff.

HENRY & SCOTT, W.S.—AULD & MACDONALD, W.S.—Agents.

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Dec. 13, 1895.
Tayport Land Co., Limited, v. Dougall's Trustees.

THE TAYPORT LAND COMPANY, LIMITED, Pursuers (Reclaimers).—*Johnston—Cullen.*

MRS MAITLAND DOUGALL AND OTHERS (Dougall's Trustees) AND ANOTHER, Defenders (Respondents).—*D. Dundas—Craigie.*

Superior and Vassal—Ultra vires—Feu-charter—Title to sue—Reduction by vassal of the feu-contract in favour of his predecessor on the ground that it was ultra vires of the granter.—A feu granted by trustees in 1867 was sold by the vassal in 1888 to A, who recorded the disposition in his favour in the Register of Sasines, and thereby obtained an implied entry.

In 1895 A raised an action against the trustees for reduction of the feu-charter, on the ground that it was *ultra vires* of the trustees.

Held that the ground of reduction stated was not relevant, in respect (1) that the pursuer, if prejudiced, was not prejudiced by the feu-charter, but by the contract he had made with the original vassal, to which the trustees were not parties; (2) that the pursuer, being an entered vassal, was not entitled to reduce the feu-contract without clearing the record of the disposition in his favour.

Observed, that if the pursuer succeeded in reducing the disposition in his favour, he would then have no title or interest to reduce the feu-charter.

Prescription.—Question, whether a feu-charter granted by trustees in 1867, and bearing to be granted in the exercise of powers conferred by a private Act of Parliament (which was mentioned), and only in so far as consistent with the Act, could be validated by prescriptive possession, so as to exclude the plea that it was *ultra vires* of the trustees in respect that the conditions of the Act had not been complied with.

1ST DIVISION.
Ld. Moncreiff.

MRS ELIZABETH MAITLAND DOUGALL AND OTHERS being infeft as trustees in the estate of Scotscraig under a trust-disposition which conferred no power to feu, obtained an Act, entitled the Scotscraig Estate Act, 1857, whereby they were authorised to feu part of the estate, subject to certain conditions.

In 1867 the Scotscraig trustees feued two portions of the estate to David Stewart Littlejohn and James Henderson by separate feu-charters.

Littlejohn and Henderson continued to possess the pieces of ground feued to them until the year 1888, when they sold and disponed their feus to the Tayport Land Company for £1000.

In 1895 the Tayport Land Company brought an action against the Scotscraig trustees, and against Mrs Elizabeth Maitland Dougall, as the liferentrix in possession of that estate, for reduction of the two feu-charters granted by the Scotscraig trustees in 1867, with all that

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had followed or might follow thereon; and further, whether the feu-charters should be reduced or not, for declarator that the granting of the feu-charters was *ultra vires* of the granters thereof under the Scotscraig Estate Act, 1857, and that the feu-charters did not constitute valid feu-rights, and that the defenders were not entitled to require from the pursuers implement of the obligations which bore to be prestable from the vassals thereunder.

The pursuers set forth the disposition by Littlejohn and Henderson in their favour, dated 28th November and recorded in the General Register of Sasines 4th December 1888. (Cond. 2) "The title of the said David Stewart Littlejohn and James Henderson to the said two pieces of ground purported to consist of two feu-charters granted in their favour by Mrs Elizabeth Kinnear Heriot Maitland Dougall of Scotscraig, . . . and others, trustees under the trust-disposition and deed of assumption therein mentioned, as authorised by an Act of Parliament, 20 and 21 Vict. cap. 50, styled the Scotscraig Estate Act, 1857, . . . dated both of said feu-charters the 14th and 19th February, and both recorded in the Particular Register of Sasines, &c., for the shire of Fife on 5th March 1867. . . . By each of said feu-charters there bears to be feued a piece of ground, part of the farm of Garpit, on the estate of Scotscraig, consisting of 1 acre 3 roods 6 poles and 7 yards or thereby imperial measure, being the two pieces of ground more particularly described in the summons. Each of the feu-charters contains a clause declaring that the same is granted 'only in so far as consistent with the Scotscraig Estate Act.'" (Cond. 3) " . . . In the course of last year the pursuer ascertained that the said feu-charters are inept and invalid, in respect that the granting thereof was *ultra vires* of the Scotscraig trustees under the said Scotscraig Estate Act. By the said Act, under the authority of which the charters bear to be granted, power is conferred on the said trustees to feu a certain portion of the estate, but it is by section 2 of the Act provided, *inter alia*, that the lands which may be sold and disponed in feu under the authority of the Act shall only be feued 'in parcels to an extent not greater than one imperial acre and a-half or thereby for each feu.' As above set forth, each of the said feu-charters bears to feu a piece of ground extending to 1 acre 3 roods 6 poles and 7 yards imperial measure."

The pursuers pleaded;—(1) In respect the said feu-charters were made *ultra vires* of the granters thereof under the Act of Parliament, they are invalid and ineffectual to constitute feu-rights of the pieces of ground in question, and ought to be reduced. (2) In respect the said feu-charters do not constitute valid feu-rights, the defenders are not entitled to require from the pursuer performance of the obligations of vassal thereunder.

The defenders pleaded;—(2) No relevant case. (3) On a sound construction of the Scotscraig Estate Act, 1857, the said charters being unchallengeable, the defenders should be assoilzied from the conclusions of the action, with expenses. (4) The pursuer and the pursuer's authors having possessed the ground contained in said charters on *ex facie* valid irredeemable titles, recorded in the appropriate Register of Sasines, for the space of more than twenty years continually and together, peaceably and without any lawful interruption made, and *separatim*, they having accepted said charters from the defenders, the pursuer is barred from insisting in the present action of reduction and declarator.

On 17th July 1895 the Lord Ordinary (Moncreiff) assoilzied the defenders.*

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* "OPINION.— . . . The pursuers now seek to reduce those feu-charters, on the ground that it was *ultra vires* of the Scotscraig trustees to grant feus to the extent of one acre and three-quarters, as the private Act only gave them power to feu in parcels not greater than one acre and a half or thereby. Put baldly, the question is, Whether, when trustees are empowered to grant feus of an acre and a half or thereby the grant is to be set aside, after an interval of twenty years, because the extent of the feu granted was an acre and three-quarters, and this not at the instance of a beneficiary, but because the feuar wishes to be quit of his bargain? When a purchaser having, equally with the seller, means of forming an opinion as to the powers of the seller, accepts a feu, there is much force in the plea that he is personally barred from raising such an action. But passing from that, the words 'or thereby' are usually somewhat narrowly construed, as for instance the case of *Yeaman* v. *Gilruth*, 1792, Hume's Dec. 783. In that case the Court, in confining the expression to 'minute errors or fractional deficiency,' may have been partly influenced by the consideration that, in their opinion, the gross rent was fixed with reference to the particular number of acres specified. Here there is not the same necessity for such a rigid construction; and there may have been reasons, which at this distance of time it may not be easy to establish, such as the position and shape of the ground, which led to and justified feus of that exceptional extent being granted. Still, an addition equal to one sixth of the whole extent permitted by the Act is somewhat liberal, and I prefer to rest my judgment on other grounds. I am of opinion that the pursuers' case is excluded by prescription, which operates in more ways than one. The pursuers' authors and themselves have possessed the ground in question for more than twenty years upon *ex facie* valid titles, and therefore, by force of the Acts, 1617, c. 12, and the Conveyancing Act of 1874 (37 and 38 Vict. c. 94), sec. 34, the titles to their feus are unchallengeable.

"Therefore, the sole ground of reduction, viz., that the feu-charters are invalid, entirely fails; and the pursuers have no valid excuse for refusing to pay the feu-duties stipulated for in their titles, to which feu-duties again the defenders have prescriptive right.

"The pursuers' counsel argued that the feu-charters are not *ex facie* valid, in respect that they bear to be granted under the authority of the Scotscraig Estate Act, 1857; and that, when that Act is examined, it is seen that the feus exceed the dimensions permitted by the Act. This contention, in my opinion, is unsound, and there is ample authority against it. On the face of the deeds there is nothing to shew that they are inconsistent with the powers conferred by the Scotscraig Estate Act. The object of the positive prescription is to prevent inquiry into the validity of the warrants on which a grant of lands proceeds; and there is no authority for importing by reference into a feu-charter the terms of an Act of Parliament in virtue of which it bears to have been granted. To cite one authority, the case of the *Duke of Buccleuch* v. *Cunynghame*, 5 Sh. 57, is directly in point. In that case the defender's titles bore that the Crown had right to the superiority of the lands disponed by virtue of the Act of Annexation, 1587, c. 29. After the lands had been possessed for upwards of forty years the right of the holder was challenged, on the ground that, in the Act of Annexation, there is an express exception of the right of the Crown to lay patronages; that therefore the titles were inept, being derived *a non habente potestatem*; and that, as the Act of Annexation was a public statute, and reference was expressly made to it in the charter, the defender must be held to have known that his titles were derived *a non habente potestatem*. But the case for the pursuer was held to be untenable. The judgment proceeded on the ground that, the title being *ex facie* valid, it was not permissible to

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The pursuers reclaimed, and argued;—(1) The charters were *ultra vires* of the trustees. The words "or thereby" were not intended to enable the trustees deliberately to grant feus in excess of the size specified in the Act, but only to cover slight errors in measurement.[1] They were to be all the more strictly construed as they occurred in an Act of Parliament. (2) The defect in the charters was patent, as each was granted only in so far as consistent with, and subject to, the conditions in the Act. The defect, therefore, could not be cured by prescription. In the cases of the *Duke of Buccleuch*[2] and *Macdonald*[2] the defect was not apparent on the face of the titles, but required extrinsic evidence to disclose it.

Argued for the defenders;—(1) The words "or thereby" were evidently intended to give the trustees a discretion. They should, therefore, be liberally construed, and the trustees could not be held to have exceeded the limits of the discretion given them. (2) Assuming, however, that the charters were *ultra vires*, the limitation in the trustees' power was not set forth in the deed, and the defect was therefore latent.[2] Prior to 1874 conditions could not be validly imported into a deed by reference, and after that date only by reference to a recorded deed.[3] The case was, therefore, similar to that of a grant *a non habente potestatem*, and the object of the law of prescription was to bar inquiry into such defects after the prescriptive period.[4] (3) Further, as the condition had not been validly imported into the charters, and did not appear on record, the pursuers, being singular successors of the original vassal, could not be bound thereby.[5] (4) But if the defect were held to be patent, then the pursuers, having accepted a conveyance in knowledge of the defect, could not found upon it as a ground for repudiating the charters.

At advising,—

LORD KINNEAR.—I think the Lord Ordinary's interlocutor is well

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read into it the terms of the Act of Annexation which, if read in, would have shewn that the grant was *ultra vires*. . . .

"It was also maintained that prescription cannot validate a breach of trust. That, again, is not a plea which is open to the pursuers. If their right to their feus has been validated by prescription running against the trustees, it does not matter to them what claims of damages the beneficiaries may have against the trustees. Prescription will not protect trustees from the consequences of a breach of trust against a claim at the instance of a beneficiary, and they will not be entitled to retain trust property or profit for their own benefit so obtained. But it does not follow that the party in whose favour a charter of part of the trust-estate has in breach of trust been granted, and whose right has been fortified against all concerned by the running of prescription, is entitled to found upon the breach of trust for the purpose of getting rid of his bargain when his right is not challenged either by the trustees or by the beneficiaries.

"On the whole, I am of opinion that the defenders should be assoilzied."

[1] Yeaman v. Gilruth, 1792, Hume's Dec. 783.

[2] The Duke of Buccleuch v. Cunynghame, Nov. 30, 1826, 5 S. 57; Macdonald v. Lockhart, Dec. 22, 1842, 5 D. 372, 15 Scot. Jur. 169.

[3] Conveyancing Act, 1874 (37 and 38 Vict. cap. 94), sec. 32.

[4] Lord Advocate v. Graham, Dec. 10, 1867, 7 D. 183, *per* Lord Moncreiff, p. 205, 17 Scot. Jur. 90.

[5] Tailors of Aberdeen v. Coutts, Aug. 3, 1840, 1 Robinson, 296, *per* Lord Gillies, &c., at p. 313.

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founded, although I am not prepared to assent to all the reasons which his Lordship has given in support of it.

The pursuers seek for reduction of two feu-charters dated in 1867, as having been "made and executed to their great hurt and prejudice." But they were not parties to the contract in performance of which the charters were granted; they do not represent either of the parties, and they do not allege any antecedent right or interest in the lands. Their case is that, in 1888, twenty-one years after the execution of the charters, they purchased the lands from the original feuars for a sum of £1000, and accepted a disposition which they recorded in the Register of Sasines. It follows that if they have been prejudiced it is not by the making and execution of the charters, but by a subsequent contract of purchase and sale to which the granters of the charters were no parties. But they do not complain of the transaction by which they have been brought into the position of vassals. They do not propose to reduce the contract or the disposition by which it was carried into effect. If they obtained decree, therefore, the original charters which form the foundation of their title would be reduced, but they would still continue to hold the lands of and under the defenders as superiors by virtue of charters by progress, because the registration of the disposition in their favour is equivalent to infeftment and entry by confirmation, and neither the infeftment nor the entry would be touched by the decree. This would be a fatal objection to the present action if the pursuers' case were otherwise well founded. They cannot obtain a decree which would impugn the validity of the feu-right without effectually clearing the record, and it is unnecessary to say that a general conclusion for the reduction of all that may have followed upon the charters would be totally unavailing to strike a recorded deed out of the Register of Sasines. But it is evident from the condescendence that this is not only a technical defect in the structure of the summons. The objection goes to the very foundation of the pursuers' case on the merits. For they have alleged no ground in fact or law on which they could pretend a right to set aside their contract with the sellers, or to reject the title which has been given to them in fulfilment of it, and which they have in fact accepted. The Lord Ordinary suggests that the pursuers are practically the same persons as the sellers. But the facts to which his Lordship refers are not before us, and in a discussion on relevancy we must take their own account of themselves and their relation to the other parties to be correct. Now, they represent themselves to be perfectly independent purchasers from the original vassals. Their complaint is that the defenders, who hold the estate of Scotscraig in trust, have exceeded the power to feu conferred upon them by a private Act of Parliament—the Scotscraig Estate Act—inasmuch as the Act authorises them to feu "in parcels to an extent not greater than one imperial acre and a-half or thereby"; whereas each of the feu-charters in question bears to feu a piece of ground extending to an acre and three-quarters. The defenders answer that the deviation of a quarter of an acre from the fixed standard does not exceed the reasonable latitude allowed by the qualifying words "or thereby," and they point out that such decisions as that referred to by the Lord Ordinary, where these words were used with reference to a specific area which had been actually measured, and were intended

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to allow for errors of measurement and nothing else, can have no bearing on their construction when they are used to regulate the discretion of trustees in the administration of a feuing estate. This answer is at least plausible, but I express no opinion as to its validity on the one hand or the merits of the objection on the other, because the persons who would have a title to impugn the charter on this ground are not now before us, and would not be bound by a decision in this action if they are not bound by the actings of the trustees. I assume, therefore, for the present purpose, although I am by no means satisfied, that the charters may be challengeable at the instance of the fiar to whom the estate of Scotscraig may open on the expiry of the liferent. But this infirmity of the pursuers' title, if it exists, does not arise from any failure or breach of contract on the part of their vendors. It is a quality of the right which formed the subject of the contract of sale; and on their own shewing it is a quality which is patent on the face of the charters, and was perfectly well known to them when they made the purchase. For they aver, and it is the fact, that each of the feu-charters contains a clause "Declaring that these presents are granted only in so far as consistent with the Scotscraig Estate Act, and subject to all the conditions of the said Act," and therefore the original vassals and purchasers who may acquire right from them are duly certiorated that the authority of the granters is defined by the Act of Parliament, and further, that they do not undertake to warrant the validity of the grant except in so far as it may be consistent with the Act. The purchaser of a feu-right so constituted cannot set aside his contract on the ground that he has discovered an inconsistency between the Act of Parliament and the grant, because the bargain is that he shall take the title subject to that inconvenience. The pursuers do not allege that the Act of Parliament was withheld from them, or that there was any material error or any concealment or misrepresentation which would enable them to avoid the contract. They do not even aver explicitly that they were not perfectly well aware before the contract was completed of the alleged discrepancy between the charter and the Act of Parliament. What they say is that in the course of last year they ascertained that, and that may perhaps imply that they did not know it before. But we must assume that the charters and the Act of Parliament were both before them. They either read the Act or took the risk of what it might contain, and they cannot be allowed to say, after they have accepted a conveyance, that anything the Act contains is a new discovery to them. Accordingly, they do not attempt to set aside the contract of sale, and they do not allege any ground on which they would be entitled to do so. The assumption of the action is that the sale is perfectly valid and binding, and consequently that they were required to accept and record a conveyance, and so take over the land with its liabilities, and enter with the superior in place of the disponers, because otherwise they would have no title or interest to complain of the charters. They have no contract with the superior except that which they have made by entering to the lands in accordance with their obligation to the original vassal. But they cannot be bound to the vassal disponing to accept the title as it stands, and at the same time entitled to reject it as insufficient, and set it aside as against the superior, because they have no right against

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the superior except that which they derive from the disponers, and that is only the right to enter in room and place of the disponers under the charter as it stands. There is no suggestion on record that the original vassals could have set aside the charters. It appears that they continued to possess for twenty years without raising any question whatever as to their liability as vassals, and we are bound to assume in the first place that their title expresses exactly the terms of the contract on which they agreed to take the lands, and secondly, that they were perfectly well aware when they accepted it of everything that is contained in the Act of Parliament, and therefore that they had no right to complain of the defect which the pursuers allege. But if that be so, the original vassals cannot get rid of their liability except by finding a disponee to take their place. But the disponee can have no other right as against the superior but that of the disponer in whose place he stands, and therefore it seems to me to be out of the question to maintain that he can reduce a feu-charter which was unimpeachable at the instance of the disponer, and so extinguish the feu-right and relieve the disponer as well as himself of all liabilities of the contract of feu. But I do not think their case would be better if we were to assume, contrary to the fair implication of their own statement, that they were entitled to get rid of their contract as against the original vassals. They appear to me to be in this dilemma. If the contract with the original vassals is unimpeachable they have no ground of complaint, because they have obtained exactly the right which they contracted to purchase. If, on the other hand, they are entitled to get rid of the contract of sale and its consequences, their remedy is to reduce the disposition on which they are entered, and in that case they have no concern with the lands, and no title or interest to object to the charters.

On the whole, therefore, I am unable to see any tenable ground on which the action can be supported.

In the view I have taken the question whether the pursuers' right has been validated by the positive prescription does not arise, and I think we should not consider it, both because it is not necessary to the decision of the case and also because it cannot, in my opinion, be well raised or effectually decided between the parties to this action. It can only arise on the assumption that the defenders have, in the first place, exceeded their powers by including too large an area in one feu, and, in the second place, failed to protect the trust-estate by importing the conditions of the statute into the title which they granted to the pursuers' authors in such a way as to make them binding upon singular successors, because it is obvious that the vassal cannot prescribe against his own title, and therefore cannot acquire a right inconsistent with the conditions of the Act of Parliament, if these have been well expressed in the title. Accordingly, to enable the defenders to maintain their plea of prescription, they found it necessary to argue that the conditions of the Act of Parliament have not been made to affect the title, because they have not been so expressed as to satisfy the requirements either of the Act itself, which prescribes the method by which its conditions are to be made effectual, or of the general law established by the Conveyancing Statute. I doubt whether the trustees have any title to state that plea. The assumption of the argument is that the pursuers' title

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may be challenged as *ultra vires* of the trustees at the instance of some future beneficiary who will not be bound by their actings, or by the concurrence of all the existing beneficiaries in the defence stated in this action. But if such a hypothetical beneficiary, at whose instance the title might be challenged, is not bound by the acts of the trustees, he will not be bound by a judgment pronounced upon a plea stated by the trustees to support their acts. I should therefore have thought that, if the trustees were otherwise entitled to insist in their argument founded upon prescription, this is not a competent action for its disposal, because the judgment would not afford a conclusive answer to the beneficiary whose challenge is assumed as the ground of the trustees' title to maintain the argument in question.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT adhered.

JAMES S. STURROCK, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

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Gibson v. Clark.

ALEXANDER GIBSON, Pursuer (Reclaimer).—*Salvesen—W. Thomson.*
JOHN GILCHRIST CLARK AND ANOTHER, Defenders (Respondents).—*Dickson—Clyde.*

Landlord and Tenant—Desertion of farm—Appointment of manager—Sheriff—Jurisdiction—Judicial Factor—Reduction.—Where a tenant has deserted a farm without making proper provision for its management, it is competent for the Sheriff, on the petition of the landlord, to appoint an interim manager.

A landlord, on 31st August 1894, presented a petition in the Sheriff Court for the appointment of a manager upon a farm, alleging that the tenant had almost entirely displenished the farm, had left it without appointing any manager, and was believed to have gone to America without the intention of returning. No appearance was entered for the tenant, who had left for America on 24th August, and the Sheriff, without inquiry, made the appointment craved, and by an interlocutor dated 10th October, pronounced a fortnight after the tenant had returned to his farm, approved the manager's report of his management, and granted him a discharge.

Thereafter the tenant raised an action against the landlord concluding for reduction of the decree appointing the manager, and of the subsequent interlocutors, on the ground that the application to the Sheriff was incompetent, and that, in any view, the Sheriff was not entitled to grant the petition without making inquiry. He averred that he had not deserted the farm, but had been merely temporarily absent from it. He made no claim for damages in the action, and did not aver that he had suffered pecuniary loss by the defender's proceedings. He stated, however, that he reserved his claim for damages in respect thereof.

After a proof the Court (*diss.* Lord M'Laren, *aff.* judgment of Lord Kincairney) *assoilzied* the defender, *holding* that in the absence of any claim for damages the only ground of action which fell to be considered was the competency of the proceedings in the Sheriff Court, and that as it had been proved that the landlord had reasonable grounds for believing that the tenant had deserted his farm without making any proper provision for its management, these proceedings were competent.

Opinion (*per* Lord M'Laren) (1) that the tenant had done nothing of which the landlord had a right to complain; (2) that the *ex parte* statement

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of fact upon which the landlord had obtained the decree depriving the tenant of the management of his farm having been disproved, the landlord was responsible therefor, upon the principle recognised in cases where interdict had been obtained upon an erroneous *ex parte* statement, and that the landlord's *bona fides* was no relevant defence; and (3) that the tenant's action of reduction, at all events in so far as regarded the Sheriff's interlocutor approving the manager's report and discharging him, was competent.

Observed by Lord Kinnear, that the pursuer was not entitled to reduce, as a decree in absence, the interlocutor approving the manager's account of his intromissions and discharging him, as he had not averred that the interlocutor was wrong.

Opinion on the question whether the analogy of an action for wrongous use of interdict was applicable to such a proceeding as the petition *reserved, per* Lord Kinnear.

Brock v. *Buchanan*, 13 D. 1069, *followed; Affleck* v. *Affleck*, 24 D. 291, *commented on.*

Process—Citation—Edictal Citation—Sheriff Court Act, 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 9.—The Sheriff Court Act, 1876, sec. 9, enacts that "the Sheriff Clerk shall, in all warrants to cite or charge persons furth of Scotland, insert a warrant to cité or charge edictally." A landlord presented a petition in the Sheriff Court for the appointment of a manager upon a farm, alleging that the tenant had deserted the farm and gone to America. The warrant of citation contained no warrant to cite the respondent edictally, and the petition was served by leaving a copy at the farmhouse, where his family continued to reside. No appearance having been entered for the tenant, the petition was granted. The tenant, who returned to this country within a month, brought an action of reduction of the appointment of the manager on the ground, *inter alia*, that there had been no edictal citation. In the action he averred that he had been only temporarily absent from the farm. The Court (*aff.* judgment of Lord Kincairney) *repelled* the plea, on the ground that if the defender's absence was temporary edictal citation was not necessary.

Process—Citation—Execution of Citation.—In a Sheriff Court petition the service copy of the petition bore a citation dated 1st September, requiring the defender to lodge a notice of appearance "within forty-eight hours after the date of this my citation"; the execution returned upon the petition bore that it was served upon the 31st August; and the Sheriff pronounced decree in absence on 3d September.

In a reduction of the execution, *held* (*aff.* judgment of Lord Kincairney) that in the absence of other contradictory evidence than the service copy of the petition, with the citation thereon, the date of the execution fell to be taken as the date of service, and that the *inducice* fell to be reckoned therefrom.

1ST DIVISION. Lord Kincairney.

THIS was an action brought by Alexander Gibson, tenant, under a fifteen years' lease, of the farm of Birkbush, against his landlord, John Gilchrist Clark, of Speddoch, and also against Alexander Smith, gardener, Speddoch, to have certain proceedings taken by the landlord in the Sheriff Court during the tenant's absence reduced.

The proceedings in question were as follows:—

On 31st August 1894, when three years of Mr Gibson's lease had still to run, Mr Clark presented a petition against him in the Sheriff Court at Kirkcudbright, in which the prayer was:—"To appoint a fit and proper person to take charge of the lands and farm of Birkbush, in the parish of Irongray and stewartry of Kirkcudbright, and stock and effects thereon, presently tenanted by the said Alexander Gibson, and to labour and cultivate the whole lands requiring to be laboured and cultivated for the year ending at Whitsunday, and separation of crop 1895, and to reap the crops presently growing on the said farm, in

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order that the pursuer's rights may not be prejudiced; also to purchase all seeds and manures that may be required for the proper cultivation of the land, and generally to do everything necessary in order that the present crop may be suitably reaped, and the crop of 1895 suitably and seasonably sown, and to deal with the crops, stock, and effects thereon, including the selling and disposing thereof, in such way as he may consider best, and to report to your Lordship an account of his outlays and intromissions and management foresaid, and to decern against the defender for whatever balance may become due thereon, with expenses of management and process, reserving to the pursuer all claims competent to him for rent, interest, and expenses, and for damages or otherwise."

The petitioner, Mr Clark, averred,—"The defender is in insolvent circumstances, and diligence has recently been used against him at the instance of certain creditors. He has recently removed the most of his stock from the farm to the extent of almost entirely displenishing the same, and he has left the farm without instructing any proper person to take charge thereof. It is believed that he has gone to America without any intention of returning. The corn crop and the meadow hay crop of the current year are ripe for cutting, and require to be immediately cut and stacked, and, unless immediately attended to, are in danger of being lost, to the prejudice of the pursuer as proprietor and his legal rights, unless an immediate remedy be obtained in the premises as herein prayed for. The pursuer respectfully suggests Mr Alexander Smith, gardener, Speddoch, parish of Holywood, as a suitable person to act as manager."

The petitioner pleaded, *inter alia*;—(1) The defender having left the farm without making suitable arrangements for the reaping of this year's crops, involving not only the loss of said crops but also the deterioration of the land to the prejudice of the pursuer and the defender's creditors, a manager should be appointed in terms of the prayer of the petition.

Upon 31st August 1894 Honorary Sheriff-substitute Williamson granted warrant "to cite the defender upon forty-eight hours' warning."

The formal execution of this citation bore that the petition had been served upon Mr Gibson by leaving a copy in the hands of a servant at Birkbush "upon the 31st August 1894."

The service copy of the petition bore this citation:—

"I, . . . sheriff-officer, do hereby lawfully serve the foregoing copy petition, . . . and deliverance thereon, upon you, . . . and require you, if you intend to shew cause why the prayer of the petition should not be granted, to lodge . . . a notice of appearance within forty-eight hours after the date of this my citation, . . . all in terms of the [Citation Amendment Act, 1882.] said deliverance.

J. M. S. 3 September

"This I do upon the [Thirty] first day of ^[August] Eighteen hundred and [eighty] 94 years." *

On 3d September 1894 the Honorary Sheriff-substitute, "in respect the defender has not entered appearance," appointed Mr Smith to take charge of the farm, with all the powers craved.

Mr Smith thereafter entered upon his duties, and sold the whole corn, hay, and potatoes, and a portion of the turnip crop on the ground by public roup. Upon 9th October 1894 the Sheriff-substitute (Lyell) remitted Mr Smith's account of expenses to the Auditor,

* The words within brackets were deleted in the citation.

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and on 10th October 1894 he approved of the Auditor's report upon the pursuer's account of expenses, and also of the manager's report of his management produced, found that there was no balance in the hands of the manager, and discharged the manager of his intromissions.

Mr Gibson raised the present action of reduction on 16th October 1894 against Mr Clark, and also against Mr Smith, concluding for reduction of (first) the warrant of citation in the petition, dated 31st August 1894; (second) "a pretended service of said petition," dated 1st September 1894; (third) the interlocutor of 3d September 1894; (fourth) the interlocutor of 9th October 1894; and (fifth) the interlocutor of 10th October 1894.

The pursuer, *inter alia*, averred that the statements made by the defender in the petition in the Sheriff Court were not true; that he had left the farm on 24th August 1894 to visit Canada and the United States, partly on business and partly on pleasure; that he had made arrangements for the management of the farm during his absence; and that he had returned on 22d September 1894.

The pursuer further averred;—"No warrant to cite the defender edictally was craved, and none was granted. On the first day of September following, a service copy of the petition with citation thereon, herewith produced and herein held repeated *brevitatis causa*, was left for the pursuer at his residence of Birkbush aforesaid, which he did not receive until his return home. On 3d September 1894, before the expiry of the *induciæ*, and on the motion of the agent for the petitioner, the Sheriff-substitute pronounced a pretended interlocutor or decree appointing the said Alexander Smith manager. . . ." "The pursuer reserves his claim of damages in respect of said illegal and oppressive proceedings."

The pursuer pleaded;—1. The said pretended decrees or interlocutors having been pronounced irregularly, and incompetently, ought to be reduced in terms of the conclusions of the summons. 2. The said pretended decrees or interlocutors are reducible in respect they were pronounced (1) in a petition which was incompetent in the Sheriff Court; (2) in a petition at the instance of a person who had no title or interest to insist in the same; (3) the warrant for service being irregular and incompetent; (4) the service following thereon being irregular and incompetent; (5) the procedure in said petition was incompetent and contrary to the provisions of the Sheriff Courts (Scotland) Act, 1876; and (6) the granting of the prayer of the petition, without inquiry into the facts was incompetent and *ultra vires*; and (7) the interlocutor making the said appointment was void from uncertainty and ambiguity. 3. In the circumstances condescended on, the pretended decrees or interlocutors ought to be reduced, and the defender, John Gilchrist Clark, found liable in expenses, and also the defender Alexander Smith, in the event of his entering appearance to defend this action.

The defender pleaded;—1. The pursuer's averments being irrelevant and insufficient at law to support the conclusions of the summons the defender is entitled to absolvitor. 4. The whole proceedings in said petition having been regularly and orderly taken, the same ought not to be reduced. 5. The said petition having been presented in the circumstances condescended on, and the proceedings thereunder having all been taken and carried out in good faith, and without infringement of the pursuer's rights and interests, the defender should be assoilzied.

On 21st February 1895 the Lord Ordinary (Kincairney) repelled

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the pursuer's plea that the warrant for service was irregular and incompetent; *quoad ultra* before further answer allowed parties a proof.*

At the proof the pursuer led the following evidence:—Alexander Gibson, pursuer (47), deponed,—" . . . Birkbush is mostly pastoral land, and it can carry from six to seven score of sheep. My experience of it is that it is more fit for a sheep farm than for anything else. . . . I first had it as a sheep farm, and then finding that the fences were not very good I thought I would try it as a dairy farm, and I made the change about Martinmas 1892. . . ." Witness then deponed that he obtained twelve cows, and let them on a bowing contract to a man Mackenzie. "He was my bower for half a year only. The next bower was Thomas Kirk, and he paid me £8 a cow per annum, and £7 each for three queys. I found all along that the place was evidently not suitable for a dairy farm. I had difficulty with Mackenzie as well as Kirk, and they were always making complaints. They complained about a weed called a leek, which was on the farm at a certain season of the year, and which made the milk bitter. Kirk also complained about there being no proper milk-house in which to make his cheeses; the usual place was too near the midden, and he had to make his cheeses in the straw-house. I made up my mind to change the farm back again into a sheep farm, and with that object in view I arranged with Kirk, whose contract was hardly out, that I should sell the cows. The sale of the cows took place about 22d August 1894, but I arranged with Kirk before, that, under the circumstances, that was as good a time as I could get to sell the cows. . . . I was intending when I came back to put sheep upon the farm, and it would do the grass good in the meantime to be cleaned so as to be ready for the sheep. After I returned from America I bought 116 sheep for the purpose at the first market for ewes. . . . I went to America to see the country and the land, and I went along with a Mr Green. The date when I left the farm was about the 24th August, and I sailed from Liverpool. The defenders aver on record that I left a young family without means of support, but that is not true. My family consists of John, twenty-two years of age, who is a butcher in Maxwelltown, Maggie, nineteen, James, fifteen, Annie, thirteen, Alexandrina, ten, Jessie, nine, and Thomas, seven. I am a widower, and my daughter Maggie acts as my housekeeper. When I left for America I left £35 with my daughter. . . . I told my family that I intended going to America. (Q.) Did you tell them that you were just

* "OPINION.— . . . The pursuer objects to the warrant of citation. This objection is founded on section 9 of the Sheriff Court Act (39 and 40 Vict. cap. 70), which enacts that 'the Sheriff-clerk shall, in all warrants to cite or charge persons furth of Scotland, insert a warrant to cite or charge edictally.' There is no warrant to cite edictally in the warrant in this case, and it is said that there should have been such a warrant, because the petitioner, in the Sheriff Court petition, states his belief that the present pursuer had gone to America without intention to return. But the pursuer cannot maintain the plea, because he denies that he had left the country without intention to return. I think that the clause does not require edictal citation whenever a defender happens to be temporarily abroad, but means only that when the circumstances are such as to necessitate edictal citation, according to ordinary practice in the Court of Session, a special warrant for it shall be issued by the Sheriff-clerk. I think that I am in a position to repel the plea that the warrant for service was incompetent."

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going for a visit? (A.) Yes. (Q.) And that you would be back in a few weeks? (A.) Yes. I also told Mr Edgar of Killyleoch where I was going, and I also told my son John. . . . I arranged with Thomas Kirk, the bower, that he was to look after my harvest, and that in return for that he should get £6, 10s. and his own food. Kirk had a servant girl, about seventeen or eighteen years of age, who used to do the milking, and I arranged that she should get £4, 10s. for helping with the harvest. There was also a man called Peter Thomson, who had taken the cutting of my hay, and I arranged with him that he should help with the reaper, and I would pay him when I returned. . . . About ten days before I left I also arranged with two women, who had been in the custom of working to me at different times, to help with the harvest. . . . I went to America with Mr Green, whom I had known for twenty years, and he was going there at that time at anyrate. My object in going to America was to look at land there, with a view to possibly returning there at some future date. I went down through Canada to America. . . . I returned home from America on Saturday morning about 22d September last. . . . There were from twelve to fourteen acres of corn to cut. I had left quite sufficient hands to do all that was required, and with the reaping machine which belonged to me they would have cut the corn in six or seven days. . . . Before leaving I had sold twelve cows and about two score of ewes, mostly fat. That was the proper time to sell the ewes. I left on the farm two horses and a pony, three cows, and the usual farm poultry. At the time I left there were also on the farm, summering, seventy sheep, for which I received 4d. a week of rent. It is quite the usual thing for farmers down in my district to let out their pasture in that way. I have as cautioner for my rent a lady who is a landed proprietrix. . . . At the date of these proceedings there was no rent due by me. The statements in the petition as to my being in insolvent circumstances, leaving the farm without proper care, and going to America without any intention of returning, are all untrue. Cross.—The extent of my farm will be something like 297 acres. About 125 acres of that is hill pasture, and the balance is arable and open wood. The open wood will extend to possibly ten acres. I kept it as a sheep farm down till 1889, and since then it has been mostly a dairy farm. (Q.) When you had sheep on the farm down till 1889, what did you do with the arable land? (A.) I let the sheep come down from the hill. The three cows that were left were part of those let to Kirk. . . . I know what became of these cows. Two of them had been got from Mr Brown, and he came and took them back as they had not been paid for. I kept the remaining cow for about three months and sold her. . . . I had no servant on the farm except Kirk, who was engaged for the harvest. The horses were looked after by Kirk and my son, who was about fifteen years of age. (Q.) Did you give any instructions to anybody as to who was to manage the farm when you left? (A.) Kirk was to manage the harvest and the hay, and that was all there was to manage until I returned. . . . From May last year onwards I had one or two summonses served upon me. . . . (Q.) Is it not the case that there were so many summonses against you last year that you cannot remember them all or the dates of them? (A.) I paid every one that was a just debt. . . . Being referred to these summonses, depones,—I still say that I was not in pecuniary difficulties last year. I allowed so many summonses to be raised against me because a

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good many of the claimants were wanting a third more than I owed them. I believe that there was a cessio raised against me, but that was behind my back, while I was in America. (Q.) Was there anybody to look after your affairs while you were away in America? (A.) My daughter could do anything that was wanted. She is a girl of nineteen. . . . I saw Mrs Kirk on the evening of Friday, 24th August. . . . She asked me where I was going, and I said that I might be at America before I returned. It was not uncertain to me where I was going, but I did not want everyone to know where I went. . . . Re-examined.—(Q.) Did you find that the proceedings to appoint Smith manager of your farm had got known all over the neighbourhood? (A.) Yes. (Q.) Had people imagined from these proceedings that you were bankrupt? (A.) I quite understood that. (Q.) Had the knowledge of these proceedings caused a great many people to raise actions? (A.) Yes." [Witness then deponed that he had inserted a notice in the *Dumfries and Galloway Courier* of 26th September 1894, requesting persons having claims against him to lodge them with his agent.] "My creditors put in claims, and I have settled with them all."

Peter Thomson (56), deponed,—"I was engaged by pursuer to cut his meadow hay. . . . Pursuer made an arrangement with me about helping to cut his corn. . . . I made a road through the corn field for the machine after pursuer went away. . . . I remember when Smith came as manager, and I had cut the roads then. The corn was not ripe then. . . . I remember that we were stopped in our work sometime after pursuer went away. Word came that Symons [solicitor, Dumfries, the landlord's agent] was going to take possession of the crop on the farm. We sent the dairyman's wife down to Symons to see who was to pay us after that, because we thought that if Symons was taking possession of the crop the pursuer had no business to pay us. Symons wanted us to go on, but he refused to give us a line to go on, and we refused to go on any further until we got a line. The result was that we did not go on any further. I remember of Smith coming and taking possession. At the time we stopped work the corn was not quite ripe."

Margaret Gibson (19), deponed,—"I remember of my father going away to America on 24th August last year. He told me that he was going about a week before he left. He said that he was going to look at some land, and that he might be away for three weeks or a month, but he did not know exactly. He told me that he was going with a Mr Green. My father is a dealer and moves about a good deal, and I was not surprised at his going away. Before he left, I got £35 from him to use in the house and to pay workers at the harvest, if there were any. He told me that he had engaged for the harvest two workers from Dunscore, and also Peter Thomson, Thomas Kirk, and Kirk's girl. My immediately younger brother is in the habit of working on the farm and looking after the horses, and he had driven the reaping machine the year before last. . . . I remember that the day after my father left, Mr Symons, solicitor, Dumfries, who acted for the landlord, called. He asked me if the cowman was about, referring to Kirk. I think that would be between five and six o'clock in the evening, but I am not sure. He asked nothing more at me. He did not ask where my father was. He did not ask if I knew anything about where my father had gone, nor did he ask if my father had left me any money. I do not remember exactly when Smith, the manager, first came to the farm. Smith was at the farm before the paper No. 25 [the service copy of the petition

for the appointment of a manager] was handed in. He came and took a note of the implements on the farm, and also a note of the furniture before No. 25 was handed in. . . . Smith asked me once if I knew where my father was, and I said I had not had a letter from him and did not know where he was then, meaning at the time he was speaking to me. (Q.) Did you let Mr Smith know that your father would be back in a few weeks? (A.) I do not remember whether I said that or not. I know that my father wrote two letters to my elder brother. My brother told me two or three days after he got the letters, and I saw the letters and read them. . . . Cross.— . . . Besides telling me that he was going away, I know that my father told my brother James and my sister Annie, but I don't know whether he told the others or not. He told my brother and sister the same day as he told me, but not at the same time. That was a week before he left. He told me the day he meant to leave, and I knew that he was going on Friday the 24th August. He told me he was going away on the Friday about a week before that. . . . Between the time my father told me and the time he actually went on the Friday I did not tell anybody he was going away. He told me that he did not wish people to know much about his going away, because they were always saying plenty about things. My father did not give me any reason for not wanting people to know that he was going, and he merely said that he did not wish me to speak about it. . . . The £35 was in notes, and my father got back £22, 10s. of the money on his return. In point of fact I did not pay anything to any of the harvesters at all. . . . Mr Symons and Mr Smith asked me several times where my father was, but I never had a letter from my father until the Thursday before he came home, and he came home on the Saturday. Mr Symons and Mr Smith asked me repeatedly where my father was, but I don't think they asked me where he had gone. When they asked me where my father was, I said I did not know, because I had not heard from him. It did not occur to me to tell them that my father had gone to America, because I did not think it was any of their business. That was partly because my father had asked me not to tell people where he was going to. I know Mr Smith who had the management of the farm. I remember the first time he came up to the farm and asked about my father. He saw me at that time, and I remember of his asking where my father was, my answer to him being that I did not know. . . . Re-examined.—I don't remember whether it was before or after the petition, No. 25, was served that Mr Symons and Mr Smith made the inquiries which I have referred to. Neither Mr Symons nor Mr Smith asked me if my father was away for good or if he was coming back. I never said anything to anybody to lead them to believe that my father had gone to America without any intention of returning, and I knew that was untrue. The people in our neighbourhood gossip a good deal, and I suppose that was the reason why my father did not want me to say anything about his going away. . . . The people were saying that they heard that my father was not going to come back. (Shewn No. 45.) [This was a petition presented by the landlord to the Sheriff on 8th September 1894 for declarator that the lease was at an end, and for removing at Martinmas 1894. It set forth that the tenant had deserted his farm.] That is the petition of removing which was left with me. I read that petition when I got it. (Q.) Were you frightened after reading it

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that you would be put out of the house? (A.) We knew we would be."

Thomas Kirk (37). Examined.—" . . . In August 1894 the pursuer proposed to me to sell the cows, and I consented to his doing so. . . . He gave me instructions as to looking after the harvest in his absence. It was agreed between us that I was to get a wage of £6 or £6, 10s. for reaping the harvest. At that time I had a girl servant for the milking of the cows, and pursuer said that he would give her £3, 10s. for helping with the harvest. . . . Pursuer also informed me that he had spoken to two women belonging to Dunscore as to helping with the harvest. There was also a man called Peter Thomson, who had been hired for the harvest at another place, but he was to assist us till he went away there. With that staff I think we might have managed to reap the whole harvest, as there was not very much to do. A good deal of the hay had been cut before that time, and the pursuer and his son James had also cut a little of the corn before he went away. Peter Thomson and I cut part of the corn on the top of the field afterwards. As near as I remember, the pursuer left on the Thursday night, and on the following Sunday I had a call from Mr Symons, the solicitor. At that time the stock on the farm consisted of three horses, three cows, seven sheep, and a ewe and lamb; and to the best of my knowledge all the implements were on the place also. Mr Symons came and asked me about the pursuer being away, and he also asked me if I was left in charge of the farm or the crop, and I said I was engaged for the harvest—for the cutting of the crop. I also said that I had heard that morning that the pursuer was going to America, and I asked Mr Symons who would pay us for the cutting of the crop in case the pursuer did not return. Mr Symons replied that if the pursuer returned he would pay us, and if not, somebody would pay us. I was led to speak to Mr Symons about the possibility of the pursuer not returning by the rumour that got up in the country. The pursuer had given me to understand that he was coming back; but after he left a rumour got up that he was not coming back, and that is what caused me to speak to Mr Symons as I did. The pursuer did not tell me a week before he went away that he was going to America. I don't remember of the pursuer telling me he was going to America until about the time the cows went away. . . . Mr Symons told me that I was not to let the corn go to waste. He was on horseback at the meeting I have been referring to, and he never got off his horse. I told Miss Gibson what had taken place. On the Monday after the meeting I have referred to Peter Thomson spoke to me about the rumour he had heard. He said that he had heard that the pursuer was going to America and was not going to return, and he wanted to know who would pay him. He also wished me to send my wife down to Mr Symons to see if his wages would be right, and in consequence of that I sent my wife down to Dumfries. Mr Symons did not agree to pay the wages; he sent back word to say that he was not responsible for paying wages, but that there would be a manager appointed over the farm, and most likely it would be Mr Smith, the gardener of Speddoch. I received a letter about the same time—I think that same night—from Mr Symons, saying that Mr Smith had been appointed manager of the farm of Birkbush. In consequence of that Thomson stopped working. He had been working at the harvest up till that time. I think we cut for half a day, but I am not sure if

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there was any more done. I lifted, as the girl could not get out, and the rest of us were working at the hay in the afternoon. . . . After the roup I cut one lot that had been bought by a tailor near Dumfries, and I also cut some for another party. The corn was quite ready for cutting at that time, and there was none of it wasted. The roup was on Saturday, 8th September, and it was on the Friday following that I cut the corn for the tailor. I could not give the date when I cut the other lot that I have mentioned, but it was after that again. The whole of the corn was in quite good condition while I was cutting it. . . . These proceedings alarmed me as to my claim on the pursuer, and I consulted an agent and instructed a petition to be served. I claimed £30 for breach of contract. That matter was remitted to arbitration, after the pursuer came home, and the result of the arbiter's award was that I had to pay £28 instead of getting £30. The pursuer came home on a Saturday night, and I saw him on Sunday morning. (Q.) Would you ever have instructed your agent at all if the pursuer had been at home? (A.) No, I would not have required. When he did come home I agreed to withdraw my action, and to leave the question between us to arbiters. . . . Cross.— . . . The pursuer did not tell me at that time that he was compelled to dispose of the cows because of money difficulties, but he said he was bound to dispose of them because one was bothering him and another was bothering him, or something to that effect. He did *not* say that the people who were bothering him were wanting money, but I took it up in that way. . . . (Q.) After he had gone, did you begin to think that he did not mean to come back at all? (A.) I did, after the rumour got up in the country, and they began to hypothecate. . . . Re-examined.—I was engaged by the pursuer to attend to the harvest and put up the hay-ricks, and there was nothing else to do on the farm at that time. (Q.) I suppose that as a matter of course you would look after the horses and the stock on the farm? (A.) Yes; there were only three horses, and they were out at the grass. Miss Gibson looked after her own cow. . . . At the time pursuer left I was due him the whole rent for the year. If it had not been for the proceedings of the manager, the corn could all have been cut by the time I started to cut for the tailor, if the machine had gone on all right. There were about thirteen acres of corn, and it would not take more than three days to cut that with the machine. Of course after it was cut there would be a good deal of other work in connection with it, and the getting of it in would depend on the weather."

"John Gibson. Examined.—I am a flesher in Maxwelltown, and a son of the pursuer. . . . I remember of my father going off to America in August 1894. He told me before he went that he was going, and he said that he might be away for two or three weeks, but he did not know exactly. He told me the gentleman he was going with. I think that would be a week or so before he actually left. I did not understand from what he said that he was leaving for good. I understood that he was away on a visit to see what the place was like, and to see if it was a place suitable for farming purposes, as his lease was near at an end, and that he was coming back after a few weeks. I remember of Mr Symons, the writer, calling upon me on Monday or Tuesday, 27th or 28th August. That interview did not last above a couple of minutes, and the conversation consisted merely of a word or two. Mr Symons looked in at the door, and said,—'I suppose your father has gone; do you know where he has gone'; and

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I said,—'No, not exactly.' Mr Symons then said,—'I suppose he will only be away for a week or two, but the strange thing is he has disposed of most of the stock,' and I said, 'Yes,' that I expected that he would not be away for more than a week or so. . . . I received a letter from my father after he had arrived in America. . . . A short time afterwards I received another letter, and he told me in that letter that he was returning shortly. I could not give the date when I got the first letter, but I think it would be a week or so before I got the second, or it might be more. I got the second letter about three days before my father returned. . . . Cross.—He did not give me any instructions as to what I was to do when he was away. He did not say anything to me about telling people where he was. I daresay I told one or two people who asked where my father was. I did not tell Mr Symons, because he just merely asked in passing, and I did not exactly know the route my father was to take, although I knew he was going to America. Mr Symons asked me where my father was, and I said I did not know exactly. That was true. I used the word 'exactly.' . . . (Q.) Did you want Mr Symons to know where your father was? (A.) Well, it was of no importance to me; I was not taking an interest in my father's affairs at all, and I had enough to do with my own business. I saw that Mr Symons was seemingly taking an interest in my father's affairs, and I knew that he was the agent for the proprietor of the farm. (Q.) Did you not know that he was coming to inquire about the farm, because your father had gone away and the stock was off it? (A.) Well, the stock was not all off it, I believe. (Q.) Do you not know quite well that the reason for Mr Symons' call on you was because he was anxious about the farm as your father was away, and nearly all the stock off? (A.) Well, it seemed as if he was anxious about it. His anxiety was seemingly because my father was away, the stock nearly all gone, and nobody in charge. . . . (Q.) Why did you not say,—'Don't trouble yourself, my father will be back in two or three weeks'? (A.) I don't know. (Q.) Was it not because you did not want Mr Symons to know your father would be back or where he was? (A.) No, I was not particular whether he knew or not. (Q.) He was particular about asking you, and you could have told him if you had liked? (A.) I did not see that he had any reason to be anxious, because there was no rent due at the time. I believe that people were left to cultivate the farm. . . . I could not give the date when my father wrote to me first, but I would receive the letter about a fortnight or so before he came home. I got the second letter within about three days of his return. I let my sister see the letters I got from my father, and she read them both. I kept the letters for a time, and I destroyed them about the time my father came home, or shortly before. Re-examined.—Birkbush is about eight miles from Maxwelltown. . . . By the Court.—I did not at any time suspect that my father had absconded. . . ."

Joseph Edgar (53), deponed,—"I am a farmer at Killyleoch, Dunscore, and I have been farming all my life. I know the pursuer well. I remember when he went away to America. I saw him that morning, and he said to me that he was going away for a holiday. He was in my dining-room, and he said to my wife, in my presence, that he was going to America. I think pursuer said that Peter Thomson and the dairyman were to put in his harvest, but I did not pay much attention."

The defender led no evidence.

On 27th June 1895 the Lord Ordinary (Kincairney) assoilzied the defender.*

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* "OPINION.—In this case, evidence has been led by the pursuer under the proof allowed by the interlocutor of 21st February, and the defender having stated that he had no evidence to lead, the case falls to be decided on the evidence so led by the pursuer. I think it presents very considerable difficulty, which is much enhanced by the want of evidence by the defender, in consequence of which various points are left insufficiently and unsatisfactorily explained.

"I certainly cannot commend the proceedings adopted by the defender, which seem to have been hasty and ill advised. But the question is whether the pursuer is entitled to the remedy which he demands on the grounds which he has pleaded.

"The pursuer and defender are tenant and landlord, and the proceedings from which the pursuer, the tenant, seeks redress, were commenced by a petition by the defender, as landlord, presented on 31st August 1894, to the Sheriff at Kirkcudbright, which prayed for the appointment of a person to take charge of the pursuer's farm and stock, to cultivate the farm and reap the crop, and to 'deal with the stock and crop and effects thereon, including the selling and disposing thereof in such a way as he may consider meet' and to report.

"The prayer was founded on the averments that the tenant was insolvent, that diligence had been used against him, that he had almost displenished his farm, and had left it without instructing any proper party to take charge of it, and had, it was believed, gone to America without intending to return, and that the corn crop and meadow hay were ripe and in danger of being lost.

"The Sheriff-substitute, on 30th August, ordered citation of the defender on 48 hours' warning. On 3d September, he, in respect the respondent, the tenant, had not entered appearance, appointed one Mr Smith (the landlord's gardener) to manage the farm with the powers craved. On 9th October he remitted the landlord's account of expenses to the auditor, and on 10th October, he approved of the auditor's report and of the manager's report, and found that there was no balance in the hands of the manager.

"The conclusions of the action are for reduction of the warrant of citation, the service of the petition, and of these interlocutors. There is no conclusion for damages, and there is no averment that the proceedings complained of have occasioned any pecuniary loss to the pursuer. All that is said about damages is that the pursuer reserves his claim of damages in respect of said illegal and oppressive proceedings.

"The defender has not pleaded that the action is incompetent. The pursuer's objection to the warrant of citation was repelled by the interlocutor of 21st February, and therefore the first conclusion for reduction must be rejected. The action otherwise remains now to be disposed of.

"The document sought to be reduced secondly is said to be the service of the petition, stated to be 'dated 1st September 1894.' The only document which has that date is the service copy of the petition; and defender contends that the document so described must needs be the service copy, and that there is no conclusion for reduction of the sheriff-officer's execution which bears date 31st August 1894. If this contention be sound, this conclusion for reduction must also be rejected, because it would be an absurd, meaningless, and wholly ineffectual proceeding to reduce a mere service copy leaving the execution unimpeached. But if this conclusion be directed against the sheriff-officer's execution which bears date 31st August, as I suppose was intended, then I am of opinion that no sufficient ground has been shewn for reducing it. I now understand that the defender stands by it, and maintains that unless it is reduced it must bear faith, and establish the service of the petition on 31st August.

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The pursuer reclaimed, and argued;—(1) The present action was relevant and competent.[1] It was not necessary to conclude for damages as well as reduction. The first step was to get the proceedings complained of set aside and when that had been done an action for damages would be raised. (2) The pursuer was entitled to have the proceedings in the Sheriff Court set aside. The petition was not competent in the Sheriff Court. It practically amounted to a prayer for sequestration of the farm, and for the appointment of a judicial factor. Such a proceeding was competent only in the Supreme Court. In *Brock's*[2] case the order of the Sheriff was of a much less sweeping description. At the most a landlord was entitled to have someone appointed to preserve the *status quo*,[3] but here the order went far beyond that. (3) In any view it was *ultra vires* of the Sheriff to make such an appointment without inquiry of some sort. (4) The warrant of citation was bad, and fell to be reduced, for it contained no warrant to cite edictally, as it ought to have done in terms of the Sheriff Court Act, 1876, sec. 9. (5) The interlocutor of 3d September was incompetent. It was pronounced before the *inducia* had expired,

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It is a suspicious looking document certainly, and I should not have been surprised had evidence been led that its date was erroneous. But there is, properly speaking, no such evidence. The pursuer did not examine the sheriff-officer, and the pursuer's daughter was unable to say on what day of the week the service was made. The improbation of the sheriff-officer's execution is left to depend on the service copy alone. The pursuer referred to the case of *Dunlop* v. *Nicholson*, 10th July 1827, 5 S. 915, in which, in special circumstances, it was held competent to refer to a service copy in contradiction to an execution; but the report bears that the case was to be regarded as of a special nature, and not to affect the general rule that a formal execution could not be contradicted by the service copy. And there is no doubt that that is the settled general rule, *Stair*, iv. 42, 12; *Erskine*, iv. 2, 5; *M'Donald* v. *M'Leod*, 11th January 1726, M. 3765; A. S., 10th July 1839, sec. 91. In this case there is no reason whatever for preferring the service copy to the execution. They bear different dates, and one of them must bear a wrong date. But there is no reason for saying that it is the execution which is misdated. Therefore, I think that on the evidence which has been led, the execution cannot be reduced. The point raised, it will be observed, is entirely technical. It is not suggested that the pursuer suffered any prejudice from any defect in the citation.

"Now, when the petition was brought before the Sheriff on the 3d September, the sheriff-officer's execution appended to the petition proved to him, and must now be held to prove, that the time for entering appearance had expired, and that the petition might be competently proceeded with as in absence. I say competently proceeded with, for I do not mean to say that some preliminary inquiry might not have been desirable and prudent in the circumstances. The pursuer founded on the case of *Mackenzie* v. *Munro*, 10th November 1894, 32 S. L. R. 43. But that case was different because the decree reduced was not a decree in absence but a decree by default for failure to lodge defences; and it was held that there had been no default, because the defender had right to lodge defences during the whole of that day. Here the Sheriff proceeded in absence, and not on default.

"There remain for consideration the conclusions for reduction of the three interlocutors. Now, the reasons of reduction of these three inter-

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[1] M'Lachlan v. Rutherford, June 10, 1854, 16 D. 937, 26 Scot. Jur. 48[illegible]
[2] Brock v. Buchanan, June 7, 1851, 13 D. 1069, 23 Scot. Jur. 496.
[3] Drysdale v. Lawson, March 11, 1842, 4 D. 1061.

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for the citation which the pursuer had received was a document dated 1st September, summoning him to enter appearance within forty-eight hours.[1] It did not affect the pursuer that the execution bore a different date. He knew nothing about that, and was bound to assume that the citation on the service copy was correct. There might have been a mistake, but the service copy had remained in the pursuer's hands uncorrected, and its faith had not been impugned. The pursuer was entitled to found on it to shew that the citation was erroneous.[2] (6) On the merits, the evidence shewed that there was no justification whatever for the course followed by the landlord. The pursuer had merely left his farm temporarily. He was in no way bound to reside on his farm, or even to keep it plenished. He would have been within his legal right if he had sold every animal on the place, or left his crops unreaped. The landlord had no title to interfere so long as the rent was duly paid. The rent had been duly paid, and besides the pursuer had a responsible cautioner. The person asking so extraordinary a remedy as the defender had asked here was responsible for the truth of the statements made in order to obtain it, and these hav-

locutors are specifically set forth in the pursuer's second plea. Seven reasons of reduction are there stated, and I am not prepared to sustain any of these specific reasons.

"They are as follows:—(1) That the petition was incompetent in the Sheriff Court. No authority was quoted in support of this reason, and I think it is sufficiently met by the case of *Brock* v. *Buchanan*, 7th June 1851, 13 D. 1069. (2) That the landlord had no title or interest. This was maintained on the ground that the Whitsunday rent had been paid. But I have no doubt that the landlord had a title and interest to see that his land was properly cultivated, and the rent falling due at Martinmas properly secured. (3) That the warrant was irregular and incompetent. That reason has already been repelled for reasons which have been stated. (4) That the service was irregular and incompetent. I think the regularity of the service is proved by the undisproved execution of the sheriff-officer. (5) That the procedure was incompetent and contrary to the Sheriff Courts Act, 1876. If this reason refers to the contention that the Sheriff's interlocutor was pronounced before the term of citation was expired, I think that reason fails on the grounds explained, and if that be not what is referred to I do not know what the reference is. (6) That it was incompetent and *ultra vires* to grant the prayer of the petition without inquiry. I think it was not so, the petition being competently before the Sheriff, and no one appearing to oppose it, although it might have been not unreasonable to have made some preliminary inquiry. (7) That the interlocutor making the appointment was void from uncertainty and ambiguity. I think this reason was not maintained, and I see no ground for it.

"I think, therefore, that the first and second pleas for the pursuer fall to be repelled, and I understand the defenders to maintain that, because no other grounds of reduction are specified, it follows immediately that they are entitled to absolvitor.

"There remains, however, the third plea, which, although quite general, might be sufficient, if it appeared from the proof that the Court had been imposed on by the averments in the petition, or that substantial injustice had been done.

"Struck with the apparent haste of the defender's proceedings and with

[1] Mackenzie v. Munro, Nov. 10, 1894, 22 R. 45.

[2] Dunlop v. Nicolson, July 10, 1827, 5 S. 915; Hamilton v. Monkland Iron and Steel Co., March 19, 1863, 1 Macph. 672, 35 Scot. Jur. 387.

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ing in this case been proved to be unfounded, the pursuer was entitled to have the whole proceedings set aside.

Argued for the defender;—(1) The action was irrelevant. The pursuer's case was that he had left a manager in his absence. If that was so, and assuming that the citation was good, then appearance might have been entered and the petition opposed. Then again on the pursuer's return he took no steps, but allowed the interlocutors of 9th and 10th October to be pronounced. It was only after the management had come to an end that the pursuer asked the Court to reduce the appointment of the manager. *Restitutio in integrum* was not possible, and there was no conclusion for damages. (2) The petition in the Sheriff Court was competent.[1] The averment being that the farm was derelict, the landlord was entitled to take steps to protect his interests in the subjects. (3) It was within the discretion of the Sheriff to order an inquiry or not. (4) There was no necessity in the circumstances for a warrant to cite edictally; no prejudice had been suffered by the pursuer because of the want of it. (5) The forty-eight hours' *inducice* of the citation had expired before the interlocutor

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the wide character of the prayer of his petition, I thought it possible that the proof might disclose some such case, in which case I am not prepared to say that these interlocutors might not have been open to reduction. But considering that it is not said that any loss has been caused to the pursuer by the proceedings complained of, and that the circumstances warranted the statements in the petition, I do not think that a case of this sort is made out; although I have the impression that the defender and his agent ought to have acted with more consideration and caution, and made more inquiry before adopting such very summary and trenchant proceedings, an impression which might possibly have been removed had the defender, or his agent, or the manager, given evidence.

"The main facts proved may be stated very shortly:—

"The pursuer had been working his farm as a dairy farm and had a number of cows on it which he had let out to the witness Kirk under a bowing contract. Pending that contract he, on or about 22d August, sold all his sheep and all his cows but three. He drove the cattle to Lockerbie at night. He left the farm on 24th August. Although he seems to have told his family and one or two friends where he was going he made a secret of his destination, and told his daughter that he did not wish people to know it, and he left them uncertain as to the period of his return. He does not appear to have had any money then until he sold his cattle and sheep, and there were apparently several creditors who were becoming urgent, although the proof on that point is not wholly satisfactory. Even without the evidence of the defender or Mr Symons, his agent, or the manager, one can conclude that the farm must have appeared displenished. It was just on the eve of harvest, almost all his stock had been sold, and he himself had disappeared. No circumstances could have tended more to excite suspicion, and it appears from the pursuer's proof that the defender's agent inquired several times before taking action about the pursuer's absence; and it is clear that the only answer which he got from the members of the pursuer's family was that they did not know where he had gone, or when he would return. In the meantime the rumour arose that the pursuer had absconded, and it appears from the proof, in particular from the evidence of Kirk, that this rumour existed before the defender had taken any action. Now, unfortunately, the evidence of Symons is withheld; but it seems

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[1] Brock v. Buchanan, June 7, 1851, 13 D. 1069; Affleck v. Affleck Jan. 14, 1862, 24 D. 291, 34 Scot. Jur. 144; Hunter's Landlord and Tenant ii. 450.

of 3d September was pronounced. The execution was dated 31st August. There was no conclusion for reduction of the execution, and there was no evidence to shew that its date was erroneous. It was not competent to contradict the formal execution by the service copy. *Dunlop's* case was very special.[1] If the citation was good then none of the interlocutors was open to objection. (6) On the merits, it was clear that the landlord was justified in proceeding as he had done. The farm had to all appearance been displenished and deserted. If the defender had fallen into an error, that had been induced by the conduct of the pursuer. The defender had acted in good faith, and there was no analogy between cases of the wrongous use of interdict and such a proceeding as the petition in question.

At advising,—

LORD ADAM.—The pursuer in this case is tenant of the farm of Birkbush, in the parish of Irongray and stewartry of Kirkcudbright, and the defender, Mr Clark, is proprietor of that farm. On 31st August 1894 the landlord

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proved that he was not told of any arrangements made by the pursuer for the cultivation of his farm, or of any money left by him for payment of labour. Now these were the circumstances under which the defender, in the fear, I suppose, that the crops would go to waste, and that his November rent might be endangered, and that the farm would get into disorder, presented the petition. I think it cannot be said, in the circumstances, that the averments in it were unwarrantable, or overstated the case. The pursuer no doubt puts a different colour on the facts. I do not feel certain that his disclosures have been complete, but he is entitled to say that his actual return on 22d September refutes the idea that he had absconded. He accounts for the sale of his stock by stating that he had found his farm unsuitable as a dairy farm and intended to recur to the use of it as a sheep farm, and that for that reason he sold his cows, with the consent of Kirk, the bower; and he says that his visit to America was merely to see whether land was to be got there on favourable terms with the view to going there at the close of his lease. All this may be true, although the reason given for going to America seems a lame one, and may remove some of the suspicion which his conduct was so much calculated to excite, although I hesitate to say that the pursuer's explanations are wholly satisfactory. But whether it was so or not I think the combination of circumstances was extremely questionable, and that there is no wonder that they aroused the suspicion that he had absconded, a suspicion which the members of his family, apparently, came also to entertain.

"After the petition was served no objection of any kind was stated to it; and if the pursuer left his farm under the conditions mentioned without leaving anyone who was in a position to meet such averments as are made in the petition, it seems his own fault if proceedings thereafter passed in absence.

"It seems to be true that the interference of the defender was regrettable, for it certainly did no good. Neither, however, is it said to have done any material harm; at least the interlocutors are not challenged on any ground of that kind. It is not averred or proved that the pursuer's property was sold at a sacrifice, or that the expenses of process were excessive. I do not express any opinion whether relief might not have been given had either of these things been averred and proved; but as they are not in the case, and as, in my opinion, the technical objections are untenable, I have come, not without difficulty, to the conclusion that the pursuer's action fails, and that the defender is entitled to absolvitor."

[1] Macqueen v. Clyne's Trustees, May 20, 1834, 12 S. 610; M'Donald v. M'Leod, 1726, M. 3765; Ersk. Inst. iv. 2, 5; Campbell on Citation, 62.

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applied for the appointment of a person to take charge of that farm, and the first question is whether that application was competent. The grounds upon which the application was made are set forth in the second article of the condescendence, and the averments are that he (*i.e.*, the tenant) "has recently removed the most of his stock from the farm to the extent of almost entirely displenishing the same, and he has left the farm without instructing any proper person to take charge thereof. It is believed that he has gone to America without any intention of returning. The corn crop and the meadow hay crop of the current year are ripe for cutting, and require to be immediately cut and stacked," and so on. There are other preliminary statements, but these are the principal.

Now, that just means that the application was made upon the ground that the pursuer was proceeding to displenish the farm, and that he had deserted it, and the question is—assuming these facts to be true for the purposes of this question, is the application competent? In my opinion it is quite a competent application. The farm belonged to the landlord, the defender, who was entitled to have it properly managed and looked after, and if he was right in assuming that it had been deserted by his tenant, who had left no one to look after it, then I think he had a right and title to have somebody appointed to look after it. I do not think it is necessary to go further into that matter, because I agree with the Lord Ordinary that the case of *Brock* v. *Buchanan*[1] is conclusive of this case. It is also said that the prayer of the petition is much too wide, but I think it is just an enumeration of the acts which anyone in charge of the farm would be bound to carry out, and in my opinion there is no incompetency in that. Well, then, if the application was competent, the next question which arises is with regard to the procedure which took place therein. The first document which is sought to be reduced is a warrant of citation pronounced upon the 31st of August 1894, by which the Court had granted warrant to cite the defender upon forty-eight hours' warning, and ordained him, if he intended to shew cause why the prayer of the petition should not be granted, to lodge a notice of appearance within the *inducie* of citation. The ground of reduction of that warrant is that it did not contain a warrant to cite edictally. I cannot see how that warrant can be objected to on that ground. If, in point of fact, the tenant was resident furth of Scotland, the warrant could not possibly do him any harm. If the tenant was, as he says he was, not resident furth of Scotland, but was only temporarily absent, then it was a perfectly good warrant. Therefore I can see no ground whatever why the warrant should be set aside.

The next document that is sought to be reduced is an execution of service of the petition, dated 1st September 1894, following upon the warrant. The Lord Ordinary has pointed out that the only document which bears that date is not the execution of service but the service copy, and as he says, and says truly, that cannot be the document meant to be set aside, because to set it aside would be just to leave the execution of service unchallenged in every respect. Therefore the Lord Ordinary treats it as if the document meant to be reduced and set aside was the execution of ser-

[1] 13 D. 1069.

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vice which is dated the 31st of August 1894. Now, the question which arises upon that is this. It will be observed that the warrant for service was dated 31st August 1894, that it granted warrant to cite the defender on forty-eight hours' notice, and that the Sheriff-substitute appointed a manager on the 3d September 1894. If the true date of the service was that set forth in the service copy of the execution, then the forty-eight hours had not expired when this appointment was made upon 3d September. If, on the other hand, the true date of service was the 31st August 1894, as set out in the execution of service itself, then the forty-eight hours had expired on the 3d September when the appointment was made. The date of service is a question of fact. There is no evidence whatever in this case as to what was the true date of the service of this warrant—whether it was the 31s August, as set forth in the execution of service, or whether it was the 1st September, as set forth in the service copy. In that state of matters the only proof on record of any sort to challenge the 31st August, the date set forth in the execution of service, is production of the service copy; and I hold with the Lord Ordinary that that is not sufficient to set aside the execution of service. That being so, until the execution of service is set aside, that date must be held by the Court to be the true date of service. Therefore I think there is nothing whatever in this second challenge.

Then, if that be so, the question arises as to the next document sought to be reduced, namely, the appointment of the manager upon 3d September to take charge of the farm. If, as I think, this petition was duly served, and if it was duly and properly brought before the Sheriff on the 3d September, the position of matters was this. Here was a petition duly served, and no appearance made to answer the statements contained in it; and the question is, what was the Sheriff to do with it? What he did do is set forth in the interlocutor of 3d September:—"In respect the defender has not entered appearance, appoints Mr Alexander Smith, before designed, to take charge of the lands and farm," &c. It is said that the Sheriff was bound to make inquiry. I do not say that it might or might not have been judicious for the Sheriff to have made some further inquiry into the matter; but I am bound to say that the Sheriff was entitled to act as he did here, for there was no appearance made by the respondent to dispute the statements in the petition, or to dispute the appointment, or any other matter. I think he was entitled to treat this as an undefended cause, which it was, and to appoint a manager in these circumstances. Therefore, I think there is no ground for setting aside the interlocutor or judgment of the 3d September 1894.

The other documents challenged are the subsequent interlocutors of the 9th and 10th October. With reference to these, I have only to say that their competency depends upon the prior proceedings. If the petition was competent, there is nothing whatever said against the proceedings of the manager in the way he carried out his commission. Therefore, I see no ground whatever why these two judgments should be set aside unless the petition was bad.

Now, if that be so, the question remains on the merits, that is to say, whether the facts and circumstances of the case entitled the landlord to

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make the application which he did. Now, I think, that question depends upon this, whether, on the facts and circumstances existing at the time, the landlord had reasonable ground, induced by the acts of the respondent, the farmer, himself, to think that he had abandoned the farm, and that it was necessary that some person should be put in charge of it. If the landlord had reasonable ground for believing that this farm was abandoned, then I cannot say that there was anything wrong in applying for this appointment. That depends upon facts as proved in the evidence, and I again agree with the Lord Ordinary on these facts. I shall not read what he says, but the facts are just these: That this tenant on the 22d August sold the cattle on his farm with the exception of three. The farm had been occupied as a bowing farm, but notwithstanding that, he, on the 22d August, drove all the cattle away, breaking his contract with the bower, under which he had let the grazing. So to that extent he displenished the farm of all the cattle which had been left on it but three, two of which did not belong to the tenant, and were shortly afterwards removed, after his going away. Those two were taken away by their owner, so that the farm was left with only one cow. Very shortly before he sold off the cattle he drove away and sold all the sheep on the farm. The result was that the landlord had reason to believe that the farm was displenished with the exception of one cow and two old horses. Now, the tenant not only so displenished the farm, but when he went away he left instructions with his daughter that she should not say where he had gone. He says himself that he did not wish anyone to know where he was, and that he left instructions to that effect with his daughter. Accordingly, when the landlord's representative, with a view to ascertain his whereabouts, made inquiry as to where the tenant was, he was told by the daughter that they did not know. I think that was a most suspicious circumstance, very well entitling the landlord to have the impression that the farm was abandoned. Before he went away the tenant made no arrangement for the working of the farm. He did not leave any money in the hands of anybody to pay the harvesting wages or anything. Now, I say again that the landlord had very reasonable grounds for believing that this almost displenished farm had been deserted by the tenant, who left instructions that nobody was to be told where he had gone. It is in these circumstances that the application was made. I do not see any reasonable ground on the part of the tenant for objecting to the competency of the application. I therefore concur with the Lord Ordinary that this defender ought to be assoilzied.

Lord Kinnear.—I agree with Lord Adam. The action is rested upon the objections to the regularity and competency of the proceedings alone. It is not averred that the pursuer suffered any loss or injury from these proceedings. His action is based upon objections to competency, and nothing more. Now, in so far as regards the technical objections to the warrant for service and the execution of service, I agree entirely with Lord Adam and the Lord Ordinary that these objections are untenable upon the grounds which his Lordship has stated. I do not think it necessary to add a single word upon these minor questions at all. But the substantial complaint of incompetency was not based upon the executory proceedings, but upon a plea that the petition

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was in substance incompetent. I agree with Lord Adam that that plea is not well founded. I think that the landlord had reasonable grounds for believing that the pursuer had deserted his farm without making any proper provision for its management. I do not repeat the grounds in fact upon which I come to that conclusion, because they have been fully stated by Lord Adam; but I add that it appears to me to be a very material fact, in considering the reasonableness of the pursuer's conduct, that the pursuer's family not only withheld from the landlord all the information that might have satisfied him that his tenant had not deserted the farm, or that he had left it in competent hands; but that the persons who are now said to have been entrusted with the management, the daughter and the witness Kirk, abstained, when the petition was presented to the Sheriff, from making any opposition whatever to its being granted. There was nothing to suggest to the landlord, and certainly there was nothing before the Sheriff to suggest, that the tenant, in leaving his farm had left the management in competent hands. These considerations, however, are hardly relevant to the real question which we have to consider, because the question, as I look upon it, is not whether the application was reasonable, but only whether it was competent, assuming that the pursuer had sufficient grounds for presenting it. Now, as to the competency, I think there can be no doubt. The case to which the Lord Ordinary refers is an authority; and in Mr Hunter's book, and in a subsequent case, the practice seems to be taken for granted that where a tenant has not provided for the management, an application for judicial management may be made to the Judge Ordinary. That does not in any sense involve any forfeiture of the farm. In the case of *Affleck* v. *Affleck*,[1] Lord Colonsay pointed out that it had no resemblance to a sequestration of land. The only effect of it is to provide for the interim management for the benefit of all concerned, including the tenant; and that it is exceedingly reasonable and convenient that such interim management should be provided, I think there can be hardly any question. If it be the case, as the defender alleges to have been the case here, that the tenant has left the country, leaving his crops going to waste and exposing the farm to fall into disorder, then it is to the interest of everybody—and not only of the landlord to whom the farm belongs, subject to his tenant's right—that some interim management should be provided. Therefore, it appears to me there can be no question that this proceeding was perfectly competent.

I am disposed to agree with the Lord Ordinary that it might have been well had the Sheriff made some further inquiry into the circumstances before giving effect to the prayer of the petition, but I agree with Lord Adam that he was not bound to do so if he thought it unnecessary. The circumstances which should induce the Judge Ordinary to make further inquiry in such cases may vary; and that he is entitled to proceed upon the assumption that, if there were any answer to the complaint which is made to him, it would have been brought before him by the tenant, or on his behalf, I do not think can be open to doubt. Whether proceedings of this kind might found an action of damages at the instance of the tenant,

[1] 24 D. 291.

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if he had suffered wrong, is another question. It was argued that, if it turned out that the application upon which the landlord had obtained the appointment of an interim manager was altogether unfounded in fact, then the tenant would have a right to damages for the wrongful use of a summary proceeding upon the same principle upon which it has been held that an applicant who obtains interim interdict upon a wrong ground must be answerable for the consequences. Whether that is so or not I express no opinion. There is no authority—at least we were referred to none—for holding that the analogy of actions for wrongous interdict is applicable to such a proceeding as this. It may be so, but I prefer to reserve my opinion until the case arises in which that question is really argued. It is enough in the present instance to say that this is not an action of damages. The pursuer does not allege that he has suffered any prejudice whatever. It is said that he reserves his claim for damages, and it was indicated in the course of the discussion that the proceeding now before us was a preliminary action, which, if it were successful, was to be followed up by a second action of damages. Now, if that was the object of the pursuer in putting the action in its present shape, it appears to me to involve an unnecessary and oppressive multiplication of actions. I do not think it reasonable that the defender should be subjected to the expense of a long proof first in an action of reduction and then separately in an action of damages. In the second action the proof, I presume, or at all events it is very probable, would be much the same, and therefore the same facts would have to be proved twice over. That appears to me to be a kind of procedure which ought not to be encouraged. But at all events the pursuer cannot complain if the action which he has brought is disposed of solely upon the grounds which alone he has brought forward in support of it, and not upon other and different grounds which he tells us he holds in reserve to support another and different action. I therefore do not take into account any suggestion which may have been made at the bar as to possible injury which the pursuer in this case has sustained, because he has alleged none, and makes no claim for damages. That appears to me to be the single ground for assoilzieing the defender in so far as the action concludes for reduction of all the proceedings and interlocutors, except, perhaps, the interlocuters of the 9th and 10th October 1894. These stand in a different position so far as the form, and also in so far as the practical operation of them is concerned, from the interlocutor making the appointment, because there stands a judgment, the practical result of which is that the interim manager's accounts of intromissions have been formally approved of, so that the pursuer might have no claim of accounting against him. It appears to me that these interlocutors might, upon different grounds from any which I have hitherto considered, be held as decrees in absence which the pursuer was entitled to reduce on the ground that they were pronounced in his absence, so that the questions which they have decided might be retried upon their merits by a judgment resulting in a decree *de foro*. But then in the first place, it is to be observed that the right to reduce decrees in absence is not absolute, but is subject to qualification, and I think it is a material ground of objection to a reduction of those two interlocutors on that ground that at the time

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when they were pronounced the pursuer had returned to this country. He knew all about the proceedings, but abstained from taking the step which was quite competent, and would have been the proper step for bringing the interim management to an end, and having the manager's accounts duly audited, by appearing in the process and asking that the appointment should be recalled. It was quite open to him to appear at this stage, and if he had done so all the questions which could have been raised as between him and the manager would have been raised at the right time, and might have been disposed of by a judgment *in foro*. That is merely one consideration that occurs to my mind, but there is a more conclusive ground, and it is this, that a decree in absence cannot be set aside upon that ground merely, unless the pursuer in the reduction is prepared to shew that it is wrong, and to point out the decree which ought to be substituted for it. If this action had been an action to set aside these two interlocutors as in absence, and thereafter to proceed to determine as between the pursuer and the interim manager the true state of accounts between them, I do not say that there might not have been ground for sustaining that objection. But then the pursuer does not say that there was anything wrong in substance in the interlocutors in question. The result is that a report of the interim manager's management and the pursuer's account of expenses have been approved of, with the result of leaving nothing for the tenant from the sale of his crops. But the tenant does not say that more could have been made of the sale; he does not say that he has suffered from the sale of his crops, and he does not enable us to say that the findings in question are in any respect wrong, or that if they were reduced as in absence, they ought not to be repeated *in foro*.

Upon the whole matter, I think that this is an action rested upon an allegation of incompetency of procedure alone, and I think this allegation is unfounded, and therefore I agree with Lord Adam and the Lord Ordinary as to the result.

LORD M'LAREN.—I regret that in this case my opinion can be of no benefit to the pursuer, but it is proper that I should state the grounds of my difference from your Lordship's opinion. The pursuer is tenant under a lease for fifteen years, whereof at the time when he was dispossessed there were three years unexpired. He was not in arrear of rent, and it has not been shewn to my satisfaction that he had committed any breach of obligation towards his landlord. In the month of August 1894, having made all the necessary arrangements for carrying on his farm during his absence, the pursuer went with a friend on a voyage to North America, in order, as he says, to see whether he would be likely to better himself by settling there at some future time. He returned to Scotland within a month, as he had intended, to find that his farm had been put under judicial management, his crop sold uncut, and the entire proceeds absorbed in expenses. The petition to the Sheriff for the appointment of a judicial manager set forth that the tenant (the present pursuer) was in insolvent circumstances, that he had recently removed the greater part of his stock from the farm to the extent of almost entirely displenishing the same; that he had left the farm without instructing any proper person to take charge

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thereof, and that it was believed that he had gone to America without any intention of returning. As I read the evidence in this case those statements are completely disproved. The pursuer was not insolvent; he had sold a part of his stock of cattle, but only with the intention of stocking the farm with sheep, as he was entitled to do; there was not a shadow of foundation for the statement that he had abandoned his farm, and so far from his having left it without care, he had left the house and farm in charge of his daughter, who was sufficiently supplied with money, and he had engaged the services of labourers for harvesting the crop.

To this it may be added that the landlord had as cautioner for his rent a lady who is the owner of a small landed property, and the sufficiency of whose security is not impugned. The petition was presented within a few days after the pursuer had left his farm—as I think, without any adequate inquiry into the facts—and in the pursuer's absence an appointment of a judicial manager was obtained from a gentleman holding the position of Honorary Sheriff-substitute. As the appointment of the judicial manager has fallen, reduction is perhaps not a very appropriate remedy for the original wrong. But the Sheriff-substitute thereafter approved of the manager's actings and discharged him, and I think that as regards this interlocutor at all events, there is no objection to the competency of the reduction.

If I rightly follow the Lord Ordinary's judgment in favour of the defender, it proceeds on the view that the circumstances attending the pursuer's voyage to America were suspicious, and that the application to the Sheriff was made in good faith. But neither the defender nor the agent who presented the petition tendered themselves for examination before the Lord Ordinary; in fact the defender offered no evidence, and if the case depends on his good faith, this circumstance alone is, in my opinion, sufficient to put him out of Court. But I demur altogether to this ground of judgment. I conceive it to be a perfectly settled general rule of law that where an inhibitory order is obtained from a Judge on an *ex parte* statement of the facts, the applicant is responsible for the truth of the statements on which he obtains the order. He cannot defend himself by alleging that he acted in good faith, or that the circumstances made his story reasonable or probable. I think that the cases relating to wrongous interdict establish this doctrine; and if this be the criterion of responsibility where a party is merely interdicted from making a particular use of his property, it must in principle apply to proceedings for taking the possession out of his hands altogether. To say that a tenant is liable to be deprived of his farm because he takes a month's holiday in the autumn, is a proposition that carries absurdity on the face of it; and I do not think the proposition is much improved by the averment that the landlord or his agent thought that the tenant was going to abscond. The tenant's right of possession cannot, as I think, be determined or interfered with upon a mere opinion of the landlord, and, as a matter of fact, the pursuer had done nothing of which the defender was entitled to complain.

I cannot help thinking that the pursuer has been unfortunate in his choice of a remedy for the wrong which was done to him; for, if he had gone to

a jury on an issue of damages, he might have avoided the legal difficulties which have caused the failure of his case. No. 64. Dec. 13, 1895. Gibson v. Clark.

The LORD PRESIDENT was absent.

THE COURT adhered.

THOMAS M'NAUGHT, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

GEORGE RUSSELL AND OTHERS (Lord and Lady Charles Innes Ker's Marriage-contract Trustees), First Parties.—*Rankine—Don Wauchope.* No. 65. Dec. 13, 1895. Ker's Trustees v. Ker.

LADY CHARLES INNES KER AND SPOUSE, Second Parties.—*D.-F. Asher—Fleming.*

CHARLES JAMES INNES KER AND ANOTHER, Third Parties.—*D.-F. Asher—Fleming.*

Marriage-contract—Trust—Denuding—Annuity to wife—Power to discharge stante matrimonio—Purchase of annuity in lieu of that provided in marriage-contract.—By antenuptial contract dated in 1866, the father of the intended husband bound himself to pay £40,000 to the marriage-contract trustees for the purpose, *inter alia*, of payment to the wife, in the event of her surviving her husband, of a free yearly annuity of £800 during her lifetime. This annuity was not declared to be alimentary.

In 1895 the spouses and the children of the marriage (who were *sui juris*) called on the trustees to denude of the £40,000, alleging that the whole fund had vested in the children absolutely, subject to the annuity contingently provided to the wife, and that she had agreed to discharge that annuity.

Held (following *Menzies* v. *Murray*, March 5, 1875, 2 R. 507) that the trustees were not entitled to denude of the £40,000, in respect that the annuity was a marriage-contract provision which the wife was not entitled *stante matrimonio* either to alienate or to discharge.

Held, further, that the trustees were not entitled to purchase with the trust funds an annuity in their names, payable to the wife contingently on her surviving her husband, and, *quoad ultra*, to denude of the trust funds, in respect (1) that the security of the trust funds was greater than that of a purchased annuity, and (2) that a purchased annuity, not being protected by the marriage-contract trust, could be alienated by the wife.

2D DIVISION.

LORD CHARLES JOHN INNES KER, son of James, sixth Duke of Roxburghe, was married to Miss Blanche Mary Williams, daughter of Thomas Peers Williams, of Temple House, Berkshire, on 15th January 1866. In contemplation of the marriage two deeds of settlement—one in the English and the other in the Scots form—were executed, dealing with the funds settled by, or on behalf of, Miss Williams and Lord Charles respectively. By the Scots marriage-contract the Duke of Roxburghe, the father of Lord Charles, bound himself to pay a sum of £40,000 to the trustees named in the deed for behoof of the spouses and the issue of the marriage, according to the trusts set forth, including the following:—"(*Secundo*) In the event of the dissolution of the said intended marriage by the predecease of the said Lord Charles John Innes Ker . . . and of there being a child or children, or the issue of a child or children, of the marriage . . . the said trustees or trustee shall pay to the said Miss Blanche Mary Williams during all the remaining days of her life a free yearly annuity of £800 sterling, and that at the terms of Martinmas and Whitsunday by equal portions, beginning the first payment thereof at the first term of Martinmas or Whitsunday which

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shall happen after the death of the said Lord Charles John Innes Ker, for the period from the date of his death to the said term . . . and so forth half-yearly, termly, and continually thereafter during the lifetime of the said Miss Blanche Mary Williams, and so long as she shall remain unmarried . . . Declaring always, that in the event of her entering into a second marriage the said annuity shall be and is hereby restricted to the sum of £400 sterling per annum, and the balance of £400 shall thereafter be applied to the other purposes of this trust." This annuity was not declared to be alimentary.

In November 1895 a special case was presented for determination of the question whether the trustees were in safety to denude of the £40,000 settled by the Duke of Roxburghe.

The second parties, Lady Charles Ker with consent of her husband and Lord Charles for any interest he might have, and the third parties, Charles J. Innes Ker and Bertram H. Innes Ker, the only children of the marriage, who were both *sui juris*, maintained that the trustees, the first parties, were bound to denude, on the ground that under the marriage-contract, and in virtue of certain deeds and other procedure, Lord Charles was divested of all interest in the trust-estate, and his sons were absolutely vested in the whole interest therein, subject to the contingent annuity provided to Lady Charles, and that Lady Charles had agreed to discharge the trustees and the trust-estate under their charge of her annuity.

The case further stated;—"Lady Charles and her sons, the third parties, are willing that the sum required to purchase from a well-established assurance company, or from Government, the annuity of £800 yearly (restrictable as aforesaid), to which Lady Charles will be entitled in the event of her surviving Lord Charles, should be retained by the first parties, and applied in purchasing said annuity in the names of the first parties, for the benefit of Lady Charles."

The trustees, the first parties, stated that they did not feel in safety to comply with the demand of the second and third parties without the sanction of the Court.

The questions of law were—omitting a reference to certain other funds not derived from the Duke of Roxburghe, and held by the trustees upon other trusts than those upon which the £40,000 from his Grace was settled, as to which other funds there was no dispute,—"(1) Are the first parties bound or entitled, upon receiving discharges from Lady Charles and the third parties, to make over to Lady Charles and the third parties the whole trust-estate . . .? (2) Are the first parties bound or entitled, after purchasing an annuity of £800 yearly (restrictable as aforesaid), payable to Lady Charles contingently upon her surviving Lord Charles, and upon receiving discharges from Lady Charles and the third parties, to make over to the third parties the whole trust-estate, with the exception of the said annuity purchased as aforesaid . . .?"

At the hearing, argument was directed to the question whether the fund had vested in the third parties subject to the annuity provided to Lady Charles; but the questions mainly debated were whether Lady Charles was entitled *stante matrimonio* to discharge her annuity,[1] and alternatively whether the trustees were entitled to purchase an annuity in the manner explained in the case.

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[1] *Authorities cited.*—Anderson v. Buchanan, June 2, 1837, 15 S. 1073, 9 Scot. Jur. 509; Pringle v. Anderson, July 3, 1868, 6 Macph. 982, 40

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LORD TRAYNER.—The condition on which the first question in this case could alone be answered in the affirmative is that Lady Charles Ker and her two sons should discharge their respective rights under the marriage-contract. It is perhaps open to argument whether the sons could do so, on the ground that no right under the marriage-contract has yet vested in them. But, assuming that such rights have vested, and could now be validly discharged, I am of opinion that no such discharge can validly be granted by Lady Charles. Her right of liferent is a marriage-contract provision, which, *stante matrimonio*, she can neither alienate nor discharge. I think that was conclusively settled in the case of *Menzies* v. *Murray*,[1] a decision which, in my opinion, rules the determination of the first question now put to us.

The second question presents a distinction between the present case and the case I have just referred to. There is practically here an offer to purchase for Lady Charles an annuity equal in amount to that provided to her under the marriage-contract; in *Menzies'* case[1] there was no such offer. This, however, does not affect my opinion that the second question also should be negatived. Such an annuity as is offered to be purchased for Lady Charles would not secure her provision to her as the marriage-contract does. In the first place, the value or security of a purchased annuity depends on the stability of the office or insurance company which grants it; its insolvency would render the annuity valueless. This, I admit, is a very remote contingency to provide against, but so long as the trustees hold the marriage-contract fund no such contingency could arise. The security of the trust funds held by the trustees is therefore greater than that afforded by a purchased annuity. But granting them to be equal as regards the security for the full and regular payment of the annuity, they are very unequal in security in another and more important respect. A purchased annuity could be disposed of by Lady Charles,—which would just be another way of alienating her marriage-contract provision. I think she has by the marriage-contract placed herself in a position which protects her, as Lord Deas said in *Menzies'* case,[1] "against marital influence on the one hand, and self-sacrifice on the other," and that that protection cannot now be surrendered or impaired by her.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the questions in the negative.

TODS, MURRAY, & JAMIESON, W.S., Agents.

Scot. Jur. 563; Menzies v. Murray, March 5, 1875, 2 R. 507; Ramsay v. Ramsay's Trustees, Nov. 24, 1871, 10 Macph. 120, 44 Scot. Jur. 77; Laidlaw v. Newlands, Feb. 1, 1884, 11 R. 481.

[1] 2 R. 507.

No. 66. GEORGE WHYTE, Petitioner (Respondent).—*Watt—A. S. D. Thomson.*
FANNY WHYTE, Respondent (Appellant).—*Cooper.*

Dec. 17, 1895.
Whyte v. Whyte.

Process—Denial that interlocutor bearing to proceed upon consent of party had been consented to—Power of Court to order inquiry.—A decree by a Sheriff-substitute appointing a petitioner executor-dative proceeded on the statement that the respondent had withdrawn her opposition.

In an appeal by the respondent, the appellant stated that the Sheriff-substitute was mistaken in supposing that she had withdrawn her opposition, and asked for a proof on that point.

The Court proposed in the first instance to remit to the Sheriff-substitute for a report, and the appellant having objected to this course, *refused* the appeal.

1ST DIVISION. GEORGE WHYTE presented a petition in the Sheriff Court at Dumbarton craving to be decerned executor-dative *qua* one of the next of kin to his deceased sister, Mary Logan Whyte.

Answers were lodged by Fanny Whyte, a sister of the petitioner, who claimed to be an executor-nominate under a mutual settlement.

The Sheriff-substitute (Gebbie) found that the settlement had been revoked, and an appeal against this judgment having been dismissed, the petitioner lodged a minute craving to be appointed executor-dative.

On 15th October the Sheriff-substitute pronounced this interlocutor:—"The agent of the respondent having stated at the bar that he now withdraws his opposition to the minute for the petitioner, the Sheriff-substitute decerns the petitioner executor-dative," &c.

The respondent appealed to the First Division, and argued;—The Sheriff was in error in supposing that the respondent had withdrawn her opposition to the petitioner's application. All that her agent had stated was that she did not intend to lodge a competing petition for appointment as executor-dative. No concession was made as to her claim to be the executrix-nominate of her sister, but the Sheriff had already decided against her on that claim, and the question could not be reopened before him. All that she wished, therefore, was a final interlocutor against which she might appeal. The Sheriff having been in error in supposing that the respondent had withdrawn her opposition, his judgment was open to review on the merits, and the respondent desired to be heard on the merits of the case. If the Court thought that the question whether or not the appellant had withdrawn her opposition in the Sheriff Court should first be cleared up, the inquiry should be by proof, and not by remit to the Sheriff.

Argued for the appellant;—The statement upon which the Sheriff's interlocutor bore to proceed had in fact been made, and the interlocutor had therefore not been pronounced under any error. The interlocutor bearing to be of consent, it was not open to review.

At advising,—

LORD ADAM.—The interlocutor of the Sheriff-substitute appealed against is as follows:—"The agent of the respondent having stated at the bar that he now withdraws his opposition to the minute for the petitioner, the Sheriff-substitute decerns the petitioner executor-dative in terms of his petition." The minute referred to, after alluding to the appellant's previous unsuccessful appeal, goes on,—"The petitioner respectfully craves the Court to appoint him executor-dative in terms of his petition." It is clear, therefore, upon the face of this interlocutor, that the opposition to the minute having been withdrawn, the Sheriff appointed the respondent in

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this appeal executor-dative in terms of his prayer. It will be observed that this interlocutor does not proceed upon any minute signed by the party withdrawing opposition, but it proceeds upon a statement of what is alleged to have taken place at the bar, namely, that the agent for the respondent in the original petition withdrew his opposition to the minute for the petitioner. Now, we were informed by the counsel for the appellant that that was not true in point of fact, that in reality the agent for the respondent in the Court below had not withdrawn the opposition to the appointment of Mr Whyte as executor-dative. On the other hand, it was distinctly denied by the respondent in this appeal that that was so, and he told us that the interlocutor truly represented what had taken place in the Court below, and that, in point of fact, the agent for Miss Fanny Whyte had intimated the withdrawal of opposition to the petition. I should not regard the statement of fact as to what is alleged to have passed at the bar, even though embodied in an interlocutor, as conclusive of the fact. We all know that misapprehension and mistake sometimes take place in such matters, and I think it would not be right that a party should be barred from all redress simply because such a statement was set forth in an interlocutor. But it appears to me that, if the question should be settled what, in point of fact, took place before the Sheriff, the first thing to do would be to remit the case to the Sheriff to report to us whether or not the interlocutor truly set forth what took place before him, and whether there might not have been the possibility of a mistake. On receiving a report from the Sheriff, we should have an opportunity of considering its terms, and having so considered it, we should be in a position to say what other steps should be taken in the matter.

Now, I should have been quite ready in this case to follow that course and to remit to the Sheriff to report, but we were very distinctly informed at the bar that the appellant did not desire any such course, and that being so, it appears to me that we are left in this position, that the appellant not wishing that inquiry be made, we must assume that what took place before the Sheriff is properly recorded in this interlocutor, and that being so, it is impossible for us to review this judgment on the merits, because it proceeds on consent. Consequently, I think we should dismiss the appeal.

LORD M'LAREN.—I agree with all that Lord Adam has said, and I am anxious that it should be understood that, in my opinion, where a judgment or interlocutor bears to proceed upon a consent or concession of the other party, and it is represented to us that the concession was not in fact given, the Court has full power to deal with the representation upon equitable principles, not being tied down to any particular mode of procedure. When a judgment is to be passed upon a consent, the proper mode of recording that consent would be by a minute signed by the procurator of the party granting it, but when the matter at stake is of no great value or importance, and especially when it only relates to procedure, we know that it is common both in the inferior Courts and in this Court to state in the interlocutor that it is granted of consent. I should not think it consistent with sound principle to hold that the statement of the

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Sheriff or inferior Judge, to the effect that the defender had consented to a decree, was conclusive, or that we were in any way limited in our mode of correcting what is made to appear to us a mistake. In the present case no pecuniary interests are involved, but only a question of the right to administer a small estate, and the history of the case makes it not at all unlikely that the consent which the Sheriff says was given would be given. There has been no proposal to refer the matter to the Sheriff, and I agree that the appeal should be dismissed.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

THE COURT dismissed the appeal.

CUMMING & DUFF, S.S.C.—WELSH & FORBES, S.S.C.—Agents.

No. 67. Dec. 17, 1895. Inland Revenue v. Scottish Provident Institution.

R. S. FORBES (Surveyor of Taxes), Appellant.—*Lord-Adv. Sir Charles Pearson—Sol.-Gen. Murray—Young.*

THE SCOTTISH PROVIDENT INSTITUTION, Respondents.—*Balfour—Maconochie.*

Revenue—Income-tax—Interest on colonial investments—Income-Tax Act, 1842 (5 *and* 6 *Vict. cap.* 35)—*Schedule D, Case* 4, *sec.* 102—*Customs and Inland Revenue Act*, 1893 (56 *and* 57 *Vict. cap.* 7), *sec.* 5.—The Customs and Inland Revenue Act, 1893, imposed income-tax for the year 1893-94 upon income chargeable under Schedules A, B, C, D, and E of the Income-Tax Act, 1853, and enacted that provisions in any Income-Tax Act in force in the previous year should have full force and effect "with respect to the duties of income-tax hereby granted."

An insurance society was assessed for income-tax for the year 1893-94 on the interest of colonial investments not received in Great Britain, but received and re-invested in the colonies, on the ground that it was subject to assessment under sec. 102 of the Income-Tax Act, 1842.

Held (1) that if and in so far as sec. 102 of the Act of 1842 subjected to assessment income not covered by the lettered schedules, it was not in force for the year 1893-94; and (2) that sec. 102 did not impose duties, but merely contained provisions as to the duties granted in the schedules.

Revenue—Income-tax—Interest on colonial investments—Constructive remittance—Income-Tax Act, 1842 (5 *and* 6 *Vict. cap.* 35), *Schedule D, Case* 4.—Where interest derived from the colonial investments of a society for mutual insurance was not remitted home, but was re-invested abroad, *held* that, by being entered in the society's accounts, it was not constructively remitted to this country so as to be chargeable with duty under Case 4 of Schedule D of the Income-Tax Act, 1842.

1ST DIVISION. Exchequer Cause.

THE SCOTTISH PROVIDENT INSTITUTION appealed to the Commissioners of Income-Tax for the county of Midlothian against an assessment for the year 1893-94 on the sum of £90,359, being the amount of interests accrued upon investments abroad for the year ending 31st December 1892, which, according to the contention of the institution, were not received in this country.

The Commissioners sustained the appeal on the grounds (1) that the interests in question had not been remitted to this country *in forma specifica*; and (2) that the facts were not sufficient to establish constructive remittance.

The Surveyor of Taxes obtained a case.

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The following facts were set forth in the case:—The Scottish Provident Institution was established in 1837, and was incorporated by private Act in 1848. Its head office was in Edinburgh, and its ordinary management and administration were wholly vested in a board of directors established there.

The institution had no shareholders to whom dividends were payable, and there was no discrimination between its capital and income. According to the laws of the institution an investigation was appointed to be made at the end of every seventh year into its affairs, and the surplus (being the excess of receipts on account of premiums, interests, &c., over the amount of claims paid and other expenses) fell to be disposed of according to the following laws:—Law 27 provided that the surplus, "under deduction of such proportion as the directors shall consider necessary and proper in the circumstances to be retained as a guarantee, shall be made available to the members entitled thereto as after provided, and that by additions to the capital sums that will certainly—unless the policies be forfeited or surrendered—become payable on the death of the members or others on whose lives the assurances were effected . . . Members may have their shares of surplus applied in diminution of their annual contributions, or in periodical or annual additions to their policies; or they may at any time surrender their vested additions for cash."

Law 28 provided that "the surplus shall eventually belong to those policies only on which there has been paid into the common fund, either by single payment or annual contributions, a sum which, when accumulated with interest at the rate of 4 per cent per annum, shall be equal in amount to the sum originally assured."

At the beginning of the year 1892 the institution's common fund amounted to £7,801,431, 8s. 2d., and at the end of that year it had increased to £8,126,375, 8s. 9d., shewing an excess of receipts over claims and expenses amounting to £324,944, 0s. 7d.

The directors had lent out considerable sums in Australia and elsewhere out of the United Kingdom. The interest derived from these loans in the year 1892 amounted to £90,359, 8s. 9d. That interest was wholly deposited with the company's bankers in the country where it was collected, and, not being required to meet charges against the common fund in the United Kingdom, it was not remitted to this country *in forma specifica*, but in terms of the institution's powers it was lent out as opportunity offered in the name of the corporation. It formed part of the "interests" entered in the revenue account of the institution for the year ending 31st December 1892, as given up to the Board of Trade in terms of the Life Assurance Companies Act, 1870 (33 and 34 Vict. c. 61), sec. 5.

No distribution of surplus took place in the year 1892, the last septennial investigation into the affairs of the institution having taken place in 1887, when out of a surplus amounting to £1,051,035, 8s. £350,345 had been retained, and £700,690 apportioned among the participating members.

"In support of the assessment, the Surveyor maintained that the interest in question did not fall to be dealt with under the 4th case of Schedule D, but was chargeable under Case 1, in section 100 of the Act, as profits, or as 'yearly interest,' under section 102, seeing that the institution was resident in the United Kingdom, having its registered office here, and the whole of its business being directed

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from this country; further, that the whole amount of the institution's interests necessarily entered into its published accounts, and was liable to meet all claims, wheresoever arising; and that the mere fact of any portion not having been remitted *in forma specifica* did not entitle the institution to claim to be brought under Case 4, and even under that case there was constructive remittance."

The questions of law for the decision of the Court were:—"1. Whether the institution is liable to pay income-tax upon the full amount of the interest from investments, either under Case 1 of Schedule D in section 100 of the Income-Tax Act, 1842, or under section 102 of the same Act? 2. Whether if, on the other hand, the institution is assessable under the 4th Case of Schedule D, the facts amount to constructive remittance?"

The clauses of the Income-Tax Acts referred to in the discussion are quoted below.*

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* Section 5 of the Customs and Inland Revenue Act, 1893 (56 and 57 Vict. cap. 7), enacted—(1) that there shall be charged for the year 1893-94, "in respect of all property, profits, and gains mentioned or described as chargeable in the Income-tax Act, 1853, the following duties of income-tax (that is to say):—For every twenty shillings of the annual value or amount of property, profits, and gains chargeable under Schedules A, C, D, or E of the said Act, the duty of sevenpence: And for every twenty shillings of the annual value of the occupation of lands, tenements, hereditaments, and heritages chargeable under Schedule B of the said Act—In England the duty of threepence-halfpenny: In Scotland and Ireland respectively the duty of twopence-halfpenny." "(2) All such provisions contained in any Act relating to income-tax as were in force on the fifth day of April 1893 (except section 4 of the Customs and Inland Revenue Act, 1892), shall have full force and effect with respect to the duties of income-tax hereby granted so far as the same are consistent with this Act."

Section 2 of the Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), enacted that the duties granted by that Act "shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively A, B, C, D, and E, and to be charged under such respective schedules."

Section 5 enacted that the said duties shall be assessed and raised under the regulations and provisions of 5 and 6 Vict. cap. 35, and the Acts therein mentioned, and also of any Acts subsequently passed explaining, altering, amending, or continuing that Act, and that for this purpose all these Acts shall be revived.

The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 1, enacted that, from and after 5th April 1842, there should be charged, during the time thereinafter limited, "the several rates and duties mentioned in the several schedules contained in this Act, and marked respectively A, B, C, D, and E."

Section 100 enacted,—"And be it enacted that the duties hereby granted contained in the schedule marked D, shall be assessed under the following rules . . . :—Rules for ascertaining the said last mentioned duties in the particular cases herein mentioned. . . .

"Third Case.—The duty to be charged in respect of profits of an uncertain annual value not charged in Schedule A.

"First.—The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, ending as in the first case, to b

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Argued for the Surveyor of Taxes;—The Crown had an option to tax either profits or interests accruing on investments.[1] The statements of facts in the cases were insufficient to enable the Court to determine the amount of profits earned by the institutions, and the Crown accordingly, for that reason, did not press their claims under Case 1 of Schedule D of the Income-Tax Act of 1842, but maintained that the interests in question were taxable under section 102 of that Act. Under that section all "yearly interest" was chargeable without any limitation, and it made special reference to interest on foreign investments. The section had never been repealed. The meaning of the reference to Case 3 of Schedule D was that the duty levied under section 102 was to be levied in accordance with the rules of Case 3, and the rule applicable to the present case was Rule 1. The fact that Case 3 contained rules not applicable to interest on investments could not prevent that section from applying to interest which its terms

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paid on the actual amount of such profits or gains, without any deduction. . . .

"Fourth Case.—The duty to be charged in respect of interest arising from securities . . . in the British Plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign securities, except such annuities, dividends, and shares as are directed to be charged under Schedule C of this Act.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year, without any deduction or abatement."

Section 102 enacts,—"And be it enacted that upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly, or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of sevenpence, without deduction, according to and under and subject to the provisions by which the duty in the third case of Schedule D may be charged; provided that in every case where the same shall be payable out of profits and gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, and the person so liable to make such annual payment . . . shall be authorised to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof . . . but in every case where any annual payment as aforesaid shall, by reason of the same being charged on any property or security in the British Plantations, or in any other of Her Majesty's dominions, or on any foreign property or security, or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act . . . then and in every such case there shall be charged upon such interest, annuity, or other annual payment as aforesaid, the duty before mentioned, according to and under and subject to the several and respective privileges by which the duty in the third case of Schedule D may be charged. . . ."

[1] Clerical, Medical, and General Life Assurance Society v. Carter, 1889, L. R., 22 Q. B. D. 444; Scottish Mortgage Co. of New Mexico v. Inland Revenue, Nov. 19, 1886, 14 R. 98.

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clearly covered. If it were held that the interests in question were to be charged under Case 4, they were still chargeable, on the ground that they had been constructively remitted to this country. The interests being taken into account in making up the accounts of the institutions, and therefore in estimating the divisible surplus, must be held to be constructively remitted.[1]

Argued for the Scottish Provident Institution;—The Crown claimed an option to charge either under section 102 or Schedule D, Case 4. It might be that a sum fell into two categories, with an option to the Crown to select under which it would charge, but that was not the nature of the right claimed here, which was a right to charge under section 102 what was excepted from the charge under Case 4. That was clearly an untenable position, for if section 102 applied the Crown would be bound to charge under it, and could have no right to let the interest escape taxation by charging under Case 4. Further, if the power to charge contended for was given by section 102, that was contrary to the scheme of the Income-Tax Acts from the beginning. The schedules had always contained the subjects upon which duty was leviable, and the Act[2] under which income-tax was now leviable imposed the duty only upon the subjects mentioned in the schedules of the Act of 1853. The contention now put forward by the Crown was seriously asserted for the first time. It had been suggested in the case of the *Clerical, &c. Insurance Company*, and had been emphatically rejected.[3] Section 102 was really a rule applicable to the duties chargeable under Schedule D. Its real function was to be found in its provisos. It was supposed to have been framed to meet the case of such bodies as parochial boards, which had debts to pay but no assessable profits.[4] Cases 4 and 5 of the Act of 1842 dealt exhaustively with income derived from money or property abroad, and in both cases the tax was only laid on money received in this country. The words "received or receivable," in section 102, must be read in consistency with Case 4, and meant received or receivable in this country. It was only by asserting section 102 to be a charging section, that the Crown's contention could be maintained, and the reference to Case 3 made it unworkable in practice. If such interests as were here in question had been intended to be taxed there would have been a direction in Schedule G of the Act of 1842 with regard to the return to be made. In the absence of such a direction the penalty for making a false return by the omission of such interest could not be enforced. The alternative claim of the Crown under Case 4 failed, for there had been no constructive remittance. It was not sufficient to constitute constructive remittance that the interest was included in the statement of accounts. It must be used for the purposes of the concern, and that was the ground of decision in the case of the *Scottish Mortgage Company*.[1]

At advising,—

LORD PRESIDENT.—The learned counsel for the Crown stated that they

[1] Scottish Mortgage Co. of New Mexico v. Inland Revenue, Nov. 19, 1886, 14 R. 98.

[2] Customs and Inland Revenue Act, 1893.

[3] Clerical, Medical, and General Life Assurance Co. v. Carter, 1889, L. R., 21 Q. B. D. 339, *per* Charles, J., p. 347.

[4] Bell v. Bunny, 1 Kay and Johnston, 216, *per* V. C. Sir W. Page Wood, p. 219.

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considered that the facts stated in the case were not sufficient to raise their claim under Case 1 of Schedule D. They were anxious, however, to explain that it was solely on the ground of deficient statement of the facts relating to the institution which is respondent in this appeal that they did not on the present occasion advance this claim against this mutual society.

The claim of the Crown was accordingly rested alternatively on section 102 of the Income-Tax Act, 1842, and the 4th Case of Schedule D.

The argument under section 102 is admittedly novel, and it involves surprising consequences.

Case 4 of Schedule D purports to state the duty to be charged on interest arising on colonial and foreign securities, and it limits, by the terms of the rule, the taxable amount to the sums received in the United Kingdom. This reads as if it were, and has hitherto been supposed to be, an exhaustive statement of the liability to duty of this class of securities. The present argument is that section 102 subjects to duty the whole of such interests, disregarding the distinction drawn in Case 4 between what is yielded in the country of the security and what is received in the United Kingdom. If this view be sound section 102 subjects to duty a class of property, profits, and gains not included in Schedules A, B, C, D, or E, to wit, interest arising from colonial or foreign securities, but not received in the United Kingdom.

The answer to this argument is twofold. First, the statute under which, primarily, the Crown claims duty from the respondent company is the Customs and Inland Revenue Act, 1893, and the operative section is the fifth. Now, the things on which duty is charged by that section are the property, profits, and gains chargeable under Schedules A, C, D, and E of the Income-Tax Act, 1853, and the occupation of lands (and so on) under Schedule B of that Act. These schedules, therefore, state the limits of the income-tax granted by the Act of 1893. The same section (5) goes on to provide that all such provisions contained in any Income-Tax Act as were in force during the preceding year, should have full force and effect, "with respect to the duties of income-tax hereby granted."

If, then, and in so far as section 102 of the Act of 1842 subjected to tax things not covered by the lettered schedules, it was not in force during the year 1893-94. This seems to me to be a sound answer to the argument for the Crown, and, if sound, it is conclusive.

It would appear, however, that section 102 never had the effect now sought to be ascribed to it. An examination of the Act of 1842 shews that the first section sets forth the schedules as defining the subjects of the tax, and that the group of sections, of which section 102 is one, are merely executive or administrative directions for carrying out the schedules and rules. Section 102 certainly is so expressed as in terms to charge with duty; but the general words used are in truth introductory to the provisos, and they are general, because they are introductory, and therefore do not rehearse the limitations which have been already expressed.

Accordingly I am against the Crown on section 102.

On the alternative argument on Case 4 of Schedule D I think the facts fail the Crown. There is nothing, as far as appears, done with the

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colonial interests in question, except to leave them where they are. The phrase "constructive remittance" in the second query in these cases is one which, if used at all, requires to be carefully guarded. As employed in the present argument, it would practically obliterate the limitation in the rule of Case 4. Every man, and every company, having foreign or colonial investments of course knows of the interest arising from them, takes note of it, and enters it in any statement of affairs which may require to be made up. But this will never make the interest "received in the United Kingdom." The *New Mexican* case[1] was totally different. The money there could only be said not to have been received if money sent home by bill is not received in this country, or if no colonial interests are received in the United Kingdom which do not reach it in specific form.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT affirmed the determination of the Commissioners.

THE SOLICITOR OF INLAND REVENUE—G. M. PAUL, W.S.—Agents.

No. 68.

Dec. 18, 1895. Bartsch v. Poole & Co.

GUSTAV HERMAN BARTSCH AND ANOTHER, Complainers (Reclaimers).—*Sym*—*T. B. Morison.*

POOLE & COMPANY, Respondents.—*Cook.*

Bill of Exchange—Protest for non-payment—Bill payable at drawer's office—Form of protest where acceptor fails to appear or provide funds—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 51, *subsec.* (7).—Subsection 7 of section 51 of the Bills of Exchange Act of 1882 provides that a protest must specify, *inter alia*, "the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found."

A bill payable on demand at the drawer's office was protested for non-payment. The protest bore that the notary "presented the said bill at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly."

Held that the drawer could not be regarded as agent of the acceptor for payment to himself, and therefore that the protest was invalid, as it failed to state that the acceptor could not be found.

Bill of Exchange—Protest for non-payment—Demand for payment.—*Held* by Lord Kincairney that an extract registered protest was not invalid because it did not state expressly that a demand for payment had been made, but merely stated that the bill had been presented and that payment had been refused.

Bill of Exchange—Protest for non-payment—Demand for payment when sum already paid to account.—*Held* by Lord Kincairney that an extract registered protest which set forth that a bill had been presented, and that payment had been refused, and that the notary protested the bill against the acceptor, but always under deduction of a sum paid to account, was not invalid because it did not state that the demand on presentation was limited to the balance due on the bill.

1ST DIVISION. Lord Kincairney.

ON 14th May 1895 Gustav Herman Bartsch, hotel-keeper, Edinburgh, and R. M. Douglas, S.S.C., accepted a bill for £350, bearing to be for value received, drawn by Poole & Company, corporate accountants, Edinburgh, and payable on demand within Poole & Company's office in Edinburgh.

[1] 14 R. 98.

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On the same date, by a separate writing, the acceptors obliged themselves to pay the amount of the bill by weekly instalments of £10, and stated,—"In the event of our failing to call upon you and pay said instalments, you are to be entitled to recover from us, at any time thereafter, the whole sum or balance due on the said bill."

Upon 14th June the weekly instalments having fallen into arrear, the bill was protested by Poole & Company for non-payment. The protest, after reciting the bill, bore, *inter alia*, that the notary "presented the said bill at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly. Wherefore, I, at request foresaid, do hereby protest the said bill against Gustav Herman Bartsch, 25 Hanover Street, and R. M. Douglas, 5 Annandale Street, all Edinburgh, conjunctly and severally, the acceptors thereof, for non-payment of the contents, and for all interest, damages, and expenses, as accords, but always under deduction of the sum of £19, 19s. sterling paid to account."

On 20th June the protest was recorded by Poole & Company, and the acceptors were charged thereon.

A suspension of the charge was brought by Bartsch and Douglas, who stated that the bill "was not presented to either of the complainers, or at their dwelling-places, or places of business, and payment was never asked by the notary-public who purports to have protested said bill from either of said complainers before protesting it for non-payment. The said Poole & Company knew the addresses of both of the complainers, and that they would have paid the bill if it had been presented to them, as the said Poole & Company were bound to do. Said protest is null and void in respect it does not comply with the provisions of section 51, subsection 7, of the Bills of Exchange Act, 1882."*

On 30th November the Lord Ordinary (Kincairney) refused the prayer of the note.†

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* Subsection 7 of section 51 of the Bills of Exchange Act, 1882, enacts,—"A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify (*a*) the person at whose request the bill is protested; (*b*) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found."

† "OPINION.— . . . It was argued that the protest on which the charge proceeded was irregular in two particulars,—first, because it did not state the demand made on presentation; and secondly, because if it did it stated that the demand was made for more than was due.

"The first of these objections is founded on section 51, subsection 7, of the Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), which provides, *inter alia*, that a protest must specify 'the demand made.' The protest in this case bears that the bill was 'presented,' and it does not say expressly what demand was made, if any. The bill is copied at the beginning of the protest in the usual way, and appears *ex facie* of the copy to be an accepted bill, and I think it is a legitimate inference that, when it was presented, it was presented for payment. Section 45 of the Act provides that 'a bill is duly presented for payment which is presented in accordance with the following rules': None of these rules requires the making of any demand other than what is implied by the presentment. I am of opinion that a presentment for payment is a demand for payment, and that the protest in

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The complainers reclaimed, and argued;—A protest being a step in summary diligence must be construed strictly.[1] In this case the protest was invalid. In the first place, because it did not set forth that a demand for payment had been made. A demand for payment could not be implied from presentation to a clerk of the drawers.[2] In the second place, if the protest was to be read as implying that the bill was presented for payment, the demand was for more than was due, being for the whole amount of the bill, without deduction of the sums paid to account.

Argued for the respondents;—Trifling errors would not be held to vitiate a protest.[3] Here the protest complied with the requisites of the statute. It clearly implied that a demand for payment had been made. Further, the protest must be read as a whole, and so read it clearly bore that the demand was for the amount of the bill, less the sums paid to account. On the analogy of procedure in adjudications it would not vitiate the proceedings if too much was claimed, provided that the protest was only for non-payment of the amount due.[4] It was, perhaps, unwise for the acceptors to agree that the bill should be payable on demand at the drawer's office, but such a stipulation was perfectly valid, and was analogous to the common case where a bank was named as the place for payment in a bill drawn by the bank upon one of its customers.

Lord President.—The objections to this protest which are discussed by the Lord Ordinary in detail are of a critical character, and, should they arise again, I do not know that anything we have occasion to decide in this case will prejudice these questions. But it appears to me that this protest, against which it is pleaded that it is irregular and inept, discloses a more radical objection than those discussed by the Lord Ordinary. The bill provides that payment is to be made to Poole & Company, on demand within their own office. Now, that is an undertaking on the part of the debtors to be there at the office with the money and pay it to Poole. If they had paid it to Poole, the protest would plainly have been incom-

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stating that the bill was presented sufficiently complies with the requirement of the statute that the protest shall state the demand made.

"But, in the second place, it is objected that, if this was so, then the demand must have been for more than was due, namely, for the whole sum in the bill, whereas at the time £20 or £19, 19s. had been paid to account, and I think that this is so. But then I have not been able to find any authority for the position that a protest is invalid, and not a ground for diligence, which states that the demand made was in excess, if the protest itself is (as in this case) only for the sum in the bill, crediting payments to account. There is no provision in the Bills of Exchange Act to that effect. No decision on the point was quoted, and I was not informed that there was any settled practice in the matter. I confess to some doubt and difficulty on this point, but I have come to think that the bill was dishonoured when payment of what was due on it was not provided or made, and that being dishonoured, it might be protested. . . ."

[1] M'Pherson v. Wright, May 19, 1885, 12 R. 942.

[2] Bon v. Rollo, July 20, 1850, 12 D. 1310, *per* Lord Wood, p. 1311, 18 Scot. Jur. 265.

[3] Crichton v. Watt, November 25, 1830, 9 S. 68, 3 Scot. Jur. 38; Gordon v. Sloss, June 3, 1848, 10 D. 1129, 20 Scot. Jur. 415.

[4] Maxwell v. Riddell, 1743, M. 110; MacKinnell, 1797, M. 312.

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petent, and what is set out on the face of this protest is that Poole & Company make a demand upon themselves, because they say that the notary presented the bill to a clerk there, who made answer that no funds had been provided to meet said bill, &c. Payment, therefore, was refused by the creditor to the creditor. Now, according to the fair reading of the bill, the debtor was bound to come to Poole's office and be there with the money, and the Act of Parliament provides that if the debtor fails to come that is to be noted in the protest; the statute contemplates as alternatives either that the debtor or some one authorised by him is there, or that the debtor may not be found at all. In the present case no one was there but the creditor, the debtor was absent, and accordingly the proper form of protest was to record the fact that the drawee or acceptor could not be found. It is quite familiar practice that bills are sometimes made payable at a bank, and there of course the banker and his clerks are the agents of the debtor. There is no occasion to look round for the personal presence of the debtor when he has accredited the bank to represent him and pay; and in that case I have no doubt that the common form of protest would rightly record the fact. But, in this case, it is preposterous to say that the creditor is accredited by the debtor to pay himself, and what is recorded on the face of this protest is, that the wholly inept proceeding of demanding payment from the creditor was all that was done. Upon that ground, and that ground only, I think the diligence must be suspended.

LORD M'LAREN.—It is a familiar provision in bills of exchange that they should be payable at a bank, or, in the case of a foreign debtor, that they should be payable at the office of an agent in the country where payment is to be made. In all such cases the reasonable presumption is that the person, whose place of business is prescribed as the place of payment, is the debtor's agent for payment. In this case, as has been pointed out, the proper form of protest is that the notary should state that the bill was presented at the proper place to some party authorised to act as the debtor's representatives, and that payment was refused. But where the bill is made payable at the debtor's residence or at a public place, such as the Stock Exchange or the like, and there is no agent indicated, it is equally clear that the debtor must attend at the place prescribed in the bill with his money, and be ready to make payment. That is the duty of the debtor, and accordingly if he does not come the creditor can protest the bill under the words of the code to which your Lordship has referred, the protest in that case containing the statement that the debtor could not be found. A stipulation for payment at the creditor's office is not very usual, but according to my opinion it falls under the second of the categories to which I have referred, because I am unable to understand how the creditor in a bill can be the agent of the debtor for payment to himself. The duty of the debtor is to attend with the money. It is not a matter of technicality, but the fair meaning of the words of the bill is that the debtor undertakes to come and make payment. On this view of the case I agree that the diligence must fall, because the protest does not state that the debtor was not found at the place of payment.

LORD KINNEAR concurred.

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THE COURT recalled the interlocutor of the Lord Ordinary, and suspended the charge.

GEORGE F. WELSH—JOHN A. ROBERTSON—Agents.

No. 69. DAVID LOGAN AND OTHERS (Byres' Trustees), Pursuers, Real Raisers, and Claimants (Respondents).—*M'Lennan—Wilton.*
MRS GEMMELL AND ANOTHER, Claimants (Reclaimers).—*Lord-Adv. Sir Charles Pearson—Guy.*
MRS M'CHLERY AND OTHERS, Claimants (Respondents).—*Kennedy.*

Dec. 20, 1895. Byres' Trustees v. Gemmell.

Trust—Universal trust-disposition—Power to revoke.—A trust-disposition was executed in the following terms:—"I . . . appoint" A and B, "my trustees and managers of my affairs, and that absolutely, and for that purpose I assign, dispone, and make over to them . . . my whole heritable and moveable property . . . And I direct my trustees as follows:—(First) My said trustees shall take possession of my estates foresaid, as I hereby authorise them to do, for the purposes after mentioned; (Second) My said trustees will give me the free income of my estate during my lifetime, and I undertake not to interfere with them in any manner of way; (Third) At my death I direct my said trustees to dispose of my estates after making payment of the legacies after mentioned." Directions then followed as to the disposal of the truster's estate at her death, and the payment of legacies, and the deed concluded with a clause recalling and cancelling all prior settlements executed by the truster.

Held (rev. judgment of Lord Kincairney) that the deed was to be construed as creating a trust for administration only, that it did not divest the granter of her right to the estate conveyed, and that it was revocable.

Murray v. *Macfarlane's Trustees*, 22 R. 927, *distinguished.*

1ST DIVISION. Lord Kincairney.

ON 14th February 1894 Mrs Byres executed a trust-disposition in the following terms:—"I . . . do hereby appoint . . . my trustees and managers of my affairs, and that absolutely: And for that purpose I assign, dispone, and make over to them, and the acceptors and survivors of them, my whole heritable and moveable property, of whatever nature and description the same may be, wheresoever situated, together with all the title-deeds, vouchers, evidences, and instructions thereof, and all as more particularly described in the title-deeds and documents in regard thereto: And I direct my said trustees as follows:—(First) My said trustees shall take possession of my estates foresaid, as I hereby authorise them to do, for the purposes after mentioned; (Second) My said trustees will give me the free income of my said estates during my lifetime, and I undertake not to interfere with them in any manner of way; (Third) At my death I direct my said trustees to dispose of my estates after making payment of the legacies after mentioned; (Fourth) In the event of Mrs Catherine Byres or Gemmell, wife of John Dick Gemmell, veterinary surgeon, Ayr, surviving me and having lawful issue, two-thirds of my estates, and of the free income of said estates, will be given to her and to her children equally, share and share alike, thereafter; but in the event of no issue of the marriage, she, the said Catherine Byres or Gemmell, will have her liferent use allenarly of the said two-thirds of the free income of my estates . . . (Sixth) The remaining one-third of my estates I direct to be divided, in the discretion of my said trustees, among my relatives, viz., the family of the late William Henry, crofter, Broadstone, Stranraer; (Seventh)

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Failing any issue of the marriage of the said Catherine Byres or Gemmell . . . the whole of my estates will be equally divided among the family of the said William Henry." After directing the trustees to pay certain legacies the deed proceeded,—"(Tenth) My said trustees are hereby authorised to recover all documents pertaining to my said estates, with full powers; (Eleventh) An inventory and valuation will then be made up, including all accounts, to enable my said trustees to see the state of my affairs; (Twelfth) My trustees shall employ James Stewart Carnochan, writer, Stranraer, to be their law-agent and factor in my estates: I recall and cancel all prior settlements made and executed by me."

On 23d April Mrs Byres executed a deed of revocation of the above trust-disposition.

Mrs Byres died on 27th May 1894, leaving a disposition and settlement, dated 23d April 1894, by which she bequeathed to her daughter, Mrs Gemmell, the whole estate and effects, real and personal, then belonging to her, or which should belong to her at her death, and appointed Mrs Gemmell her sole executrix.

A question having arisen, *inter alia*, as to whether Mrs Byres had validly revoked her trust-disposition and settlement of 14th February 1894, the trustees appointed by that deed brought an action of multiplepoinding against Mrs Gemmell and the other beneficiaries named in the trust-disposition.

Claims were lodged by (1) Mrs Gemmell, with consent of her husband; (2) Mrs M'Chlery and others, the children of the deceased William Henry; and (3) the trustees nominated by the trust-disposition and settlement of Mrs Byres.

Mrs Gemmell denied that the trust-disposition had been delivered, *et separatim*, maintained that it had been validly revoked by Mrs Byres, and claimed the whole fund *in medio* under the disposition and settlement in her favour.

Mrs M'Chlery and the other children of William Henry (Mrs Gemmell having issue), claimed under the sixth purpose of the trust-disposition and settlement of Mrs Byres. They and the trustees appointed by that deed averred that it had been delivered, and maintained that it was irrevocable.

On 3d December the Lord Ordinary (Kincairney) pronounced an interlocutor, in which, *inter alia*, he found that the trust-disposition executed by Mrs Byres on 14th February 1894 was irrevocable, if duly delivered, and that it had not, if delivered, been effectually revoked; allowed a proof on the question of delivery; and granted leave to reclaim.*

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* "OPINION.— . . . . . It is maintained, on the one hand, that Mrs Byres revoked her earlier deed; and, on the other hand, that that deed was irrevocable.

"That, however, is not the sole question raised, for Mrs Gemmell now avers distinctly that the first trust-disposition was never delivered, while the other claimants aver that it was. Further, Mrs Gemmell avers that the first trust-deed was fraudulently impetrated from Mrs Byres while she was physically weak and unable to understand what she was doing. Conversely, the claimants Mrs M'Chlery and others aver that she was of sound mind when she executed the first deed, but that the revocation and second trust-deed were fraudulently impetrated from her when she was weak and facile.

"It appears to me that there is nothing which I have hitherto decided

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Mrs Gemmell and her husband reclaimed, and argued;—The Lord Ordinary was wrong in holding that the trust-disposition was irrevocable. Its declared object was to transfer the management of the granter's estates to the trustees; the undertaking in the second purpose not to interfere with the trustees was inconsistent with an intention to operate an irrevocable divestiture, and the revocation of prior settlements indicated that in the view of the granter she was making a settlement. Further, the deed dealt with the *universitas* of the estate of the granter. The Lord Ordinary was wrong in thinking that it would not carry *acquirenda*, and the probabilities were all against an intention on the part of the granter to divest herself irrevocably of her whole estate. This quality of the deed distinguished it from those under consideration in the cases of *Mackie*, *Robertson*, and *Murray*,[1] which all dealt with partial conveyances. A further distinction existed in the case of *Murray*,[1] where the deeds were expressly declared to be irrevocable. The purposes of the deed were also purely testamentary. Apart from the liferent reserved to the granter there were no provisions intended to take effect during her

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which can prevent me from entertaining and deciding all these pleas, but I think that it is not in accordance with our ordinary practice to try the questions raised as to the validity of the deeds except in actions of reduction. At the same time I reserve my opinion as to the competency of trying these issues in this multiplepoinding, and, at all events, the consent of parties might obviate the necessity of raising reductions.

"In these circumstances all the parties pressed me to decide *in limine* the question as to the revocability of the first trust-disposition on the footing that it was competently executed, and on the footing that it was delivered. No one disputed that it might be revoked if it had never been delivered. The pleading might take this form, that the averment that the deed was delivered was irrelevant, seeing that it was revocable and revoked. All parties were of opinion that it would be convenient to take this course, and though I am by no means clear as to the convenience of that course, yet, as the question was carefully argued, and as the authorities were fully discussed, I have come to think that I may comply with the wishes of the parties, in the hope that elsewhere the same course may be followed.

"The trust-deed is short and simple enough, but a good deal depends on the precise phraseology. It proceeds as follows:—(His Lordship recited the provisions of the deed.)

"Now, the question put is, whether this deed was entirely revoked. There is no question about its partial revocation. Nobody but the Henrys and the trustees have pleaded that it is irrevocable. In particular, neither Archibald Drummond nor any of the other legatees have appeared to state that plea. The trustees represent that they consider it their duty to take that plea, in order to protect the interest of Mrs Gemmell's child, a pupil born after Mrs Byres' death, seeing that the interests of the pupil and of Mrs Gemmell are antagonistic. I understand that no child of Mrs Gemmell was alive when Mrs Byres executed the trust-deeds now in question.

"I have found the question whether Mrs Byres' deed was revocable or no, supposing it was delivered, a very difficult one; for I am much impressed with certain features in the deed of a character apparently testamentary. It bestows 'legacies'; it revokes all 'previous settlements'; and, but for previous decisions, I might have leaned to the view that the deed

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[1] Mackie v. Gloag's Trustees, March 6, 1884, 11 R. (H. L.) 10; Robertson v. Robertson's Trustees, June 7, 1892, 19 R. 849; Murray v. Macfarlane's Trustees, July 17, 1895, 22 R. 927.

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lifetime, and there was no immediate vesting of the fee. The deed was therefore revocable.[1] The case was distinguished from *Smitton* and *Robertson*,[2] for in both these cases there were provisions which took immediate effect, and from *Turnbulls*,[3] *Mackie*,[3] and the recent case of *Shedden*,[3] because in each of these cases there was immediate vesting of the fee. In *Spalding's*[4] case the decision did not turn upon the question of the revocability of the deed under consideration, and upon that question Lord Deas and Lord Mure expressed the view that the deed was revocable. The balance of opinion was therefore against the view of the Lord President in that case, as Lord Ardmillan expressed no certain opinion on the point.

Argued for the claimants Mrs M'Chlery and others and Mrs Byres' trustees;—The deed divested the granter absolutely. It was no answer to say that no immediate beneficial interest was given, for the deed contained a *de præsenti* conveyance, and the object of that conveyance was that the trustees should hold for the fiars, though the date of payment was necessarily after the death of the liferentrix.

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was testamentary; but I think that the previous cases point too decidedly in the opposite direction, and that on the decisions I am obliged to hold that the deed was irrevocable if delivered.

"The description of the estates conveyed is very wide, yet it does not include *acquirenda*. It is not a conveyance of the estate as it might exist at the date of the granter's death. It is a conveyance *de presenti; prima facie* it divests the granter, and it may be doubtful whether she could have been reinvested except by a conveyance from the trustees. The trustees are directed and empowered to take possession of the estates. It was to have immediate operation. The trustees were to pay the liferent of it to the granter, but that seems the only effect which it was to have during her life, and, if there had been no provision in the deed but that, I think she might have revoked it, notwithstanding her somewhat singular undertaking not to interfere. I would have had difficulty in holding that the fourth purpose, by which two-thirds of her estate is directed to be given to Mrs Gemmell and her children, would prevent revocation, seeing that Mrs Gemmell is not maintaining that it does, and seeing, as I understand to be the fact, that she had no children alive at its date. If the deed had conferred no other right, I think that the principle of the cases of *Murison* v. *Dick*, 10th February 1854, 16 D. 529, and *Mackenzie* v. *Mackenzie's Trustees*, 10th July 1878, 5 R. 1027, in which it was held that where a deed conveyed no interest to any living person it was not beyond the granter's power to recall, would apply, but by the sixth clause a clear right is conferred on the family of the truster's brother, William Henry. It is not to be payable until after the truster's death, but it is a right conferred by a deed assumed to be delivered during life, and in such a case I consider that the decision compels the conclusion that the trustees, when they received the estate, held it for these beneficiaries.

"In that view I must hold that the present case is of the same nature as the cases in which a delivered deed conferring a right, whether accruing

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[1] Murison v. Dick, Feb. 10, 1854, 16 D. 529, 26 Scot. Jur. 239; Fernie v. Colquhoun's Trustees, Dec. 20, 1854, 17 D. 232, 27 Scot. Jur. 86; Mackenzie v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027.

[2] Smitton v. Tod, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241; Robertson v. Robertson's Trustees, June 7, 1892, 19 R. 849.

[3] Turnbulls v. Tawse, April 15, 1828, 1 W. and S. 80; Mackie v. Gloag's Trustees, 11 R. (H. L.) 10; Shedden v. Shedden's Trustees, Nov. 29, 1895, *supra*, p. 228.

[4] Spalding v. Spalding's Trustees, Dec. 18, 1874, 2 R. 237.

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Such a deed could not be recalled by the granter.[1] It was not correct to say that there was immediate vesting of the fee in the case of *Turnbulls*.[1] In *Spalding's*[1] case the conveyance was granted in consideration of the "full trust and confidence" which the granter had in the trustees appointed, and there was revocation of prior settlements. The opinion expressed by the Lord President in that case was referred to by Lord Rutherfurd Clark in *Mackie*[2] as correctly summing up the result of the previous cases. *Fernie*[3] was a case of *donatio inter virum et uxorem*, and was quite distinct from the present, and in *Mackenzie's*[4] case there was no person having an interest in the fee of the estate conveyed in existence at the date of revocation.

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immediately or in the future, whether vested or contingent, has been held to be irrevocable. The more important and most closely applicable of these cases seem to be these: *Turnbull* v. *Tawse*, 15th April 1828, 1 W. and S. 80; *Smitton* v. *Tod*, 12th December 1839, 2 D. 225; *Spalding* v. *Spalding's Trustees*, 18th December 1874, 2 R. 237; *Mackie* v. *Gloag's Trustees*, 9th March 1883, 10 R. 746; *Robertson* v. *Robertson's Trustees*, 7th June 1892, 19 R. 849; and *Downie's Curator Bonis* v. *Macfarlane's Trustees*, 20th July 1895, 32 S. L. R. 715. The case of *Spalding's Trustees* is especially valuable for the exposition of the law by the late Lord President. His Lordship was, indeed, in the minority, but it is to be remarked the case was not decided on the ground that the deed was revocable, but on the ground that the posthumous child, to which the case related, was a prior creditor. As to the irrevocability of the deed, the Court seem to have been equally divided. I would refer, in particular, to the opinion of Lord Rutherfurd Clark in the case of *Mackie* v. *Gloag's Trustees*. Many other cases were quoted, but I think that they, or some of them, relate to different categories of law, and I regard as inapplicable cases in which deeds were held irrevocable because granted by a married woman for her own protection, or because they partook of the character of marriage-contracts; and, on the other hand, cases where deeds were held to be revocable as donations *inter virum et uxorem*. Counsel for Mrs Gemmell relied somewhat specially on *Costine's Trustees* v. *Costine*, 19th March 1878, 5 R. 782, aff. *Wightman* v. *Costine*, 20th March 1879, 6 R. (H. L.) 13, but I am not able to see that that case applies.

"It may not be impossible to regard a deed as in part revocable and in part irrevocable, as was done in the case of *Leckie* v. *Leckie's Trustees*, 22d November 1776, M. Presumption, No. 1. But there the decision turned on delivery, and it was held that the deed was delivered as a disposition of heritage, and not delivered as regards moveables,—apparently rather a difficult position. I think, however, that in this case I cannot distinguish between the various parts of the deed; nor really does the question arise whether a partial revocation would have been effectual. My judgment, in any view, can only affect the parties who have appeared. I cannot, however, do more than find that the deed, if delivered, was irrevocable and has not been revoked, and it will be necessary to ascertain whether there was delivery or not."

[1] Smitton v. Tod, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241; Turnbulls v. Tawse, April 15, 1828, 1 W. and S. 80; Murray v. Macfarlane's Trustees, July 17, 1895, 22 R. 927; Spalding v. Spalding's Trustees, Dec. 18, 1874, 2 R. 237, opinion of the Lord President; Robertson v. Robertson's Trustees, June 7, 1892, 19 R. 849.

[2] Mackie v. Gloag's Trustees, March 9, 1883, 10 R. 746, *per* Lord Rutherfurd Clark, at p. 759.

[3] Fernie v. Colquhoun's Trustees, Dec. 20, 1854, 17 D. 232, 27 Scot. Jur. 86.

[4] Mackenzie v. Mackenzie's Trustees July 10, 1878, 5 R. 1027.

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LORD M'LAREN.—It is a very well-settled rule of law that a trust for the administration of the granter's affairs in his lifetime, including the payment of his debts, does not divest the granter. Notwithstanding the execution of such a deed, he retains the radical beneficial interest in his estate. He may revoke the deed at pleasure, or may even without noticing the trust make an effectual destination of his property to heirs or legatees. When the trust as originally constituted contains words of disposal of the fee or reversion, then it is a question of construction whether an irrevocable right is intended to be given to the beneficiaries, or whether the beneficial provisions are properly and in substance testamentary.

In general, if the beneficial provisions are expressed in the form of a direction to trustees to divide the surplus estate at the granter's death, and if there is nothing in the deed establishing an intention on the part of the granter to renounce the power to revoke which, as I have said, always remains to him when the trust is for administration, then I should say the trust is one for administration first and for testamentary purposes afterwards, but that no right is given to anyone in the truster's lifetime. But of course an owner of property may divest himself in his lifetime of all his rights, including the right to revoke the deed by which he divests himself. There is no difficulty in framing such a deed as when delivered will give an indefeasible interest to the beneficiaries named in it. If the primary purpose of the trust is administration for the granter's benefit, then I think the presumption with reference to any further declaration of purposes is, that the granter does not part with the power of future disposal. But this presumption may be displaced by a clear expression of the intention to constitute an immediate beneficial interest in the persons favoured.

There are two modes of doing this which have been very much considered in the decisions. That is to say, if the deed either directs the trustees to hold or stand possessed of the estate for certain persons in fee, subject to the granter's life interest, or if the right given to the beneficiaries is declared to be irrevocable, in either case it is perfectly clear that the granter has divested himself of all future interest in or control over his estate excepting as to the liferent, or whatever right he reserves to himself. The case of a trust to hold receives illustration in *Turnbulls* v. *Tawse*,[1] where the trust-deed narrates that it was intended that the residue should be "effectually secured" to the spouses in liferent and their children in fee; also in the cases of *Spalding*[2] and *Mackie* v. *Gloag's Trustees*,[3] and, I think, in nearly all the cases that were cited. In the most recent decision bearing on this point, *Murray* v. *Macfarlane's Trustees*,[4] decided in this Division, I do not find in the report that the truster had used words expressing the wish that the trustees should immediately hold for the beneficiaries, but there does occur that very important provision in a question of this kind,—that the deed was declared to be irrevocable. That of course means that the deed was to be irrevocable in all its provisions, that the interest given to the fiars was irrevocable, and therefore that the estate was put beyond the granter's control.

Now, in the present case, I find neither a direction to the trustees to hold

[1] 1 W. and S. 80.
[2] 2 R. 237.
[3] 10 R. 746.
[4] 22 R. 927.

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for the persons who are to take at this lady's death, nor a renunciation of her power to revoke. Indeed I do not think that any clause indicative of intention to pass an immediate interest to the beneficiaries can be pointed out in this deed. It is purely a trust for the management of the truster's affairs in her lifetime, with certain testamentary purposes superadded, beginning with the expression "I direct my trustees to divide." In these circumstances it appears to me that Mrs Byres did not intend to part with her control over her estate, and that she was entitled to revoke the trust. It follows, in my opinion, that the deed under consideration if not effectually revoked (for we are told that there is some extrinsic objection to the revoking instrument) was at least subject to revocation, and reserving the effect of extrinsic objections, that it was well revoked by the deed granted a month before the truster's death.

LORD KINNEAR.—I have come to the same conclusion. I think the question is one of intention which depends upon the construction of the particular instrument before the Court, and also upon the effect of delivery being made during the lifetime of the granter, for we are to assume that the deed was delivered. There can be no question that delivery of a deed, which operates a divestiture of the granter, is in general a very conclusive proof of the granter's intention that the deed should have immediate effect against him, because delivery of a deed to take immediate effect can in general have no other meaning than that it is intended to put the instrument beyond the power of the granter. But the question of the effect of delivery must always be one of intention, and in order to ascertain the intention with which it has been made we must go in the first place to the deed itself. If it appears that the only or the main purpose of delivery is that trustees to whom it is delivered should hold for donees named in the deed against the donor, the granter of the deed, there can be no doubt that the deed is irrevocable. But that is not a necessary inference in the present case, because delivery was indispensable for the primary purpose of the deed, which is not donation but the management of the truster's estate during her lifetime. It is, I think, clear, both from the terms of the inductive clause and of the directions given to the trustees, that that is the primary purpose of the deed, for what this lady says is, "I do hereby appoint" certain parties named, "my trustees and managers of my affairs"—that is of her own affairs, not those of her donees —"and for that purpose I assign and make over to them my whole estate," and then she goes on to say that the trustees are to take possession of the estate, and to give the free income to her during her lifetime, and she undertakes not to interfere with them in any way,—that is to say, with their management of the estate on her behalf,—a clear indication to my mind that she had put her estate into the hands of the trustees for purposes of management. The granter then goes on further to make certain provisions which are purely testamentary in their nature. I agree with Lord M'Laren that there is no difficulty in engrafting testamentary provisions upon a conveyance in trust for purposes of management, and it appears to me that that is all this lady has done.

I do not think it is necessary to consider the series of cases which were

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quoted to us, because I think the question is one of construction, and in construing one deed very little assistance is to be derived from the construction put upon other deeds conceived in different language. There is, however, one point which was discussed, and which I think it not immaterial to notice. It appears to me that besides the other distinctions which Lord M'Laren has pointed out between this case and *Murray* v. *Macfarlane's Trustees*,[1] it is a material difference that there was in that case a direct expression in terms of the granter's intention that the deed should not be revocable. When a deed remains in the custody and control of the granter it matters very little whether it is declared to be revocable or irrevocable, because that question must depend upon the substance of the deed; but where a deed is delivered to third parties, or to trustees for third parties, and the only question is whether or not it is the intention of the truster to make an absolute gift of the subjects conveyed, such a declaration may be a material element for consideration on the construction of the deed, and tends to shew, if it does not shew conclusively, that delivery was made for the purpose of divesting the granter and enabling the trustees to hold against him. The reservation of a liferent, or the provision that the trustees shall pay a liferent to the granter, does not appear to me to create any difficulty in arriving at the conclusion that delivery was intended to operate absolute divestiture of the granter, because the effect of the conveyance to trustees in such terms is to limit the right of the granter, and, if he does nothing more than to give the fee to other parties, and direct the trustees to pay him the liferent, the deed discloses no reason for immediate delivery except an intention to give an immediate interest in fee to the persons whom he desires to favour. But when the granter makes it clear that his main purpose is to provide for the management of the estate during his lifetime for his own behoof, that is a sufficient reason to account for delivery of the deed, and displaces the inference that it was made for the purpose of enabling the trustees to hold the estate for the donees and against the granter.

LORD ADAM.—I am of the same opinion. I agree that the question is one of construction, namely, what was the intention of the granter? Now, I think that this is a deed of a compound nature. It is granted in the first place for the purpose of giving trustees the management of the truster's estate, and the remaining purposes are purely testamentary. I see no inconsistency in these two objects being combined. It has been assumed throughout the discussion that the deed was a delivered deed, and in the view I take it necessarily was so, because delivery was necessary to put the trustees in possession and enable them to enter upon the management of the granter's estate. The object and intention of the deed was not to protect any right contingent or vested on the part of beneficiaries, but purely to vest the trustees with the management of the estate. If so it follows that the trustees held during the granter's life for her and no one else, and I agree that a party who appoints trustees to manage his estate for him can put an end to the arrangement when he likes. No doubt the granter undertakes in this case not to interfere with the trustees, but that is a mere promise which she might keep or not, just as she liked. Accordingly, the

[1] 22 R. 927.

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possession which the trustees had was, in my view, entirely for her and not for the benefit of any of the parties named in the testamentary parts of the deed. I need not go over these, but I may point out that the granter winds up by recalling "all prior settlements made or executed by me," which appears to me to suggest in so many words that this is a settlement. I think it is. I think it gave no right, vested or contingent, to beneficiaries, and that the deed was delivered only for the purpose of the temporary management of the estate by trustees.

The LORD PRESIDENT was absent.

THE COURT recalled the interlocutor of the Lord Ordinary in so far as it found that the trust-disposition was irrevocable if duly delivered, and had not, if delivered, been revoked; found that the said trust-disposition was revocable, and also recalled said interlocutor in so far as it allowed a proof in regard to the delivery of the trust-deed.

PETER PEARSON, S.S.C.—HENDERSON & CLARK, W.S.—MARTIN & M'GLASHAN, S.S.C.—Agents.

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JAMES OGSTON, Complainer (Reclaimer).—*D.-F. Asher—Dickson—Abel.*

THE ABERDEEN DISTRICT TRAMWAYS COMPANY, Respondents.—*Sol.-Gen. Murray—Ure—Dove Wilson.*

Burgh—Street—Obstruction of street—Nuisance—Interdict.—A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. The town-council, which was the Local Authority, approved of these operations.

In a suspension and interdict brought by an inhabitant to have the tramway company interdicted from continuing this practice, *held* (*aff.* judgment of Lord Low) that as the Local Authority were entrusted with the duty of seeing that the streets were cleared in such emergencies as a heavy snowstorm, and as they approved of the methods employed by the tramway company, the note of suspension and interdict fell to be refused.

2D DIVISION. Lord Low.

JAMES OGSTON of Norwood, manufacturer in Aberdeen, presented a note of suspension and interdict against the Aberdeen District Tramways Company, incorporated by Act of Parliament. The prayer of the note was in these terms:—"To interdict the respondents (1) from removing the snow, hail, slush, or other matter of a like kind, from the lines of tramway running through the public streets or thoroughfares of Aberdeen, on to or upon the sides of the said streets or thoroughfares between the said lines of tramway and the foot-pavements, and in particular from doing so in" certain streets, "or otherwise from so removing said snow, hail, slush, or other like matter, as in any way to interfere with, interrupt, or impede the traffic along the said streets and thoroughfares, and in particular along" the streets mentioned; and "(2) from putting or scattering upon the said streets and thoroughfares and lines of tramways, or any part thereof, and in particular upon any part of the" streets mentioned, "or the lines of tramways therein, salt, or any other similar substance, or otherwise from doing so in time of frost, or when there is snow or slush on the ground, or to do otherwise," &c.

The complainer averred;—(Stat. 3) "For some years the respon

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dents have been in the habit during the winter months, when snow falls, of shifting the snow from off the tramway lines on to the part of the street unoccupied by them, between the tramway lines and the foot-pavement, piling it up in heaps on the streets along the sides of the lines, and thus causing accumulations of considerable depth. They are also invariably in the habit, whenever there is frost or snow or slush on the streets of throwing down salt, all along the tramway lines and on the whole streets between the said lines and for some distance outside the same, for the purpose of thawing the frost and melting the snow and slush. . . ." (Stat. 4) "These operations for clearing their line of rails and rendering them passable for the tramway cars are a source of great inconvenience and danger to the public and horses using the streets. . . . About Christmas 1894 a severe snowstorm commenced in Aberdeen, and thereafter there was snow in Aberdeen on the ground almost constantly for several weeks . . . and the respondents carried on their operations as described . . . In consequence, there was frequently a freezing mixture of salt and snow, made by the respondents as aforesaid, lying on the streets as deep as the horses' knees. As a result of this, serious injury was repeatedly caused to horses passing along the streets belonging to the complainer and others. . . ."

The complainer pleaded;—(1) The respondents having no right to carry on the operations complained of, and the same being illegal, the prayer of the note should be granted. (2) The complainer having suffered, and being likely to suffer, serious loss, injury, and damage, by the actings of the respondents, he is entitled to interdict as craved, with expenses.

The respondents stated;—"It is the duty of the Town-council, and not of the respondents, to remove the snow from the streets. The respondents have a statutory right to run their cars. . . ."

The respondents pleaded;—(1) All parties not called. (2) The statements of the complainer are irrelevant and insufficient to support the prayer of the note. (4) The operations of the respondents in clearing and keeping clear their lines being within their statutory rights, interdict ought to be refused.

A proof was allowed. The import of the evidence is given in the Lord Ordinary's opinion.

On 28th November 1895 the Lord Ordinary (Low) refused the prayer of the note.*

* "OPINION.— . . . There is no dispute as to what the respondents actually do. When there is a considerable fall of snow (and it is only in the case of a considerable fall of snow that the alleged nuisance arises), they send a snow-plough along the tramway lines, which, to a great extent, clears the snow off the lines, and also off a space from a foot to 18 inches on either side of the lines. The snow so cleared from the lines is, of course, heaped up by the action of the snow-plough upon either side of the street. Although the snow-plough removes the bulk of the snow from the part of the street operated upon, it does not entirely remove it, and in particular it does not remove it from the grooves in the rails. In order, therefore, to remove the snow from the grooves so that the tramway traffic may be carried on, and to remove the remainder of the snow upon the part of the street occupied by the tramway lines so that fresh snow may not be thrown by the traffic into the grooves, and also that the horses dragging the tramway cars may not slip, the snow-plough is followed by a cart of salt, which is sprinkled upon the lines, and the remaining snow thereby melted.

"It is proved that if the snow was not removed from the grooves tram-

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The complainer reclaimed, and argued;—If the acts of the respondents were injurious to the complainer they constituted a nuisance, and it was no matter if the result of interdict was to stop the cars, for the company had no higher rights in the streets than the complainer. They were in the same position as any commercial company in Aberdeen, except in so far as favoured by the General Tramways Act of 1870, section 62. In point of fact the complainer had suffered injury. The Lord Ordinary thought that the heaps of snow were dangerous, and that the brine was injurious to horses. But the Lord Ordinary thought that the practice which produced these results was demanded by the public interest, and was common in other towns. But the system pursued in other towns was different. As little salt was used as possible, and the tramway companies removed it at once. The sanction of the Town-council was no justification.[1] It was no answer to a private wrong that a public authority approved of the injurious system. The respondents had no right to obstruct the street, relying on the Town-council to remove the obstruction. They must either remove the snow or

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way traffic could not be carried on, because the cars would leave the rails. It is further proved that the only known method of effectually removing snow and ice from the grooves is by the use of salt.

"As soon as possible after the respondents have treated the part of the streets occupied by the tramway lines in the way which I have described. the town authorities send rotary brushes over the parts of the streets so treated, which sweep the melted snow and slush off the lines towards the sides of the streets. The town authorities then collect the snow and slush which has been piled on either side of the tramway lines into heaps, which they afterwards remove in carts.

"After the operations of the respondents are completed, and before the town authorities have carted away the heaps of snow, there is no doubt that a very inconvenient state of matters exists. The centre of the street, where the tramway lines are, is absolutely cleared, but upon either side of the lines are banks of snow (varying in depth according to the amount of the snowfall) and a quantity of slush, at a low temperature, caused by the mixture of snow and salt. The Town-council say that they remove the snow from the streets as quickly as they possibly can, but in the heavy and protracted snowstorm which occurred during the winter of 1894-5, it is proved that the heaps of snow and slush sometimes remained for many days—so long as a week in some cases—before they were removed.

"During the continuance of that state of matters a carriage using the street meets with no obstruction so long as it can keep upon the tramway track. But if it meets a tramway car, or requires to draw into the pavement, it has to be dragged through or over a bank of snow or slush, it may be several feet in depth, and the horses have to pass through or stand in a slush of low temperature composed of brine and half-melted snow.

"A large body of evidence was led as to the effect of such slush upon horses, and, of course, there was a good deal of difference of opinion among the skilled witnesses. I am satisfied, however, that slush caused by a mixture of snow and salt does frequently injure horses which stand in, or are frequently driven through, the slush, even if there is no previous abrasion of the skin of the leg, and if a horse has a cut or abrasion of the skin of the leg, contact with briny slush is apt to convert what might otherwise be a trivial matter into a serious sore.

"The complainer's case is that the state of matters which I have

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[1] Barber v. Penley, 1893, L. R., 2 Ch. Div. 447; Downie v. Wells, 39 W. R. 58.

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know that the Council were going to do so. It was said that if there was a nuisance the respondents only contributed to it, but if the complainer could prove negligence he was entitled to an interdict even against a contributory.[1] The balance of public convenience and possible loss to the respondents were irrelevant considerations.[2]

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK.—In considering this action it must be kept in view that what was found fault with as being done contrary to law was all in the nature of emergency proceedings. The streets in towns sometimes unavoidably become more or less obstructed by falls of snow, and there cannot be the slightest doubt that it is one of the first duties of the public authority to take some measures as rapidly as possible to clear the way for traffic. If the obstruction is slight it can be cleared away quickly, but if the fall of snow be heavy, and the emergency is thus great, they must deal with the emergency as soon and as rapidly as they can.

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described is a nuisance; that he is entitled to proceed directly against the author of the nuisance, especially as the Town-council, upon the matter being brought before them by the complainer, repudiated all responsibility for the respondents' actings; and that it is no answer on the part of the respondents to say that there would be no nuisance if the town authorities were more expeditious in removing the heaps of snow. . . .

"In the beginning of 1895 the complainer brought the matter before the Town-council, and requested that they would take proceedings against the respondents. . . . In reply the town-clerk wrote to the complainer's agents on the 8th February 1895 as follows:—'The operation complained of is, as you are aware, not carried out by the Town-council but by the tramway company, and, under these circumstances, I am instructed to inform you that the Town-council repudiate all responsibility with the matter.'

"After receipt of that letter the complainer brought the present note of suspension and interdict against the tramway company. After the note was presented the Town-council made a remit to the streets and roads committee to consider the matter, and the committee sent in a report, which was approved by the council, in which they expressed the opinion that, if the complainer was successful, serious inconvenience would be caused to the public, and recommended that 'such members of the Council as may be selected by the company should be authorised to give evidence on behalf of the council in favour of the respondents.'

"Accordingly the provost and other members of the Council appeared as witnesses, and gave evidence to the effect that they were now satisfied that it was in the public interest that the respondents should be allowed to clear their lines as they have been in the habit of doing, and that the council approved of the method adopted by the respondents.

"These being the circumstances under which the question arises, the first point to be considered is the respondents' plea of all parties not called. That plea, of course, is founded upon the fact that the Town-council are not made parties to the action.

"Now, the management of the streets is vested in the Town-council, and it is their duty to see that there is no obstruction placed in the streets, and

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[1] Duke of Buccleuch v. Cowan, Dec. 21, 1866, 5 Macph. 214, 39 Scot. Jur. 152, 591.

[2] Montgomerie v. Buchanan's Trustees, July 7, 1853, 15 D. 853, 25 Scot. Jur. 499; Caledonian Railway Co. v. Baird & Co., June 14, 1876, 3 R. 839; Inglis v. Shotts Iron Co., July 26, 1882, 9 R. (H. L.) 78.

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When the tramway company was established under Act of Parliament they got a right to use the streets in which their lines were laid without obstruction from any other traffic. This right was given to them on account of the necessity which they were under of keeping to a particular line. All other traffic must give way to the tramcar traffic so as not to obstruct it. The moment that a fall of snow of any depth took place the tramway system was brought to a standstill, and it was necessary that the line of rails should be cleared. It must be kept in mind that that place must be cleared at anyrate if no rails were there. It is the ordinary practice in cities to clear the centre of the roads by means of snowploughs, the necessary action of which is to pile the snow at the sides, and thus they keep the road open for traffic. If the tramway company, having the use of the road for their rails, proceed to open up the road in that way, they will be just doing for themselves and for the public what the public authority would be bound to do in ordinary course if there was no tramway there.

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that substances dangerous or offensive to the public are not put upon the streets. Therefore, if the result of the action of the respondents was to cause obstruction to the traffic, or a nuisance to the lieges, it was the Town-council who had the title to interfere, and (as guardians of the public interests in the streets) the duty of interfering. If, then, in a case of obstruction or nuisance in a street, the Town-council, or other local authority in whom the streets are vested, do not take action, or refuse to take action, is any citizen entitled to apply for interdict against the alleged wrongdoer without calling the Town-council or other local authority? In the general case I do not think that an application for interdict at the instance of the individual against the wrongdoer would be sustained, unless the Local Authority was also called, because the footing upon which such a proceeding would be brought, and the justification for bringing it, would be that the Local Authority had neglected, or refused, to do their duty.

"These considerations are, I think, very applicable to the present case, because what the respondents have done is to clear a part of the streets of snow, with the acquiescence and approval of the Town-council, and witness after witness for the complainer admitted that there would be nothing to complain of in the operations of the respondents if the Town-council had with due expedition removed the snow and slush from the sides of the streets.

"The respondents, however, did not ask that the case should be thrown out on the ground that the Town-council were not called, and perhaps the fact that members of the Council appeared, with the authority of the Council, as witnesses, to explain the position which the Council take up, to some extent obviates the plea. I shall therefore express the opinion which I have formed upon the merits of the case.

"In considering the case upon the merits, however, it seems to me that the fact that the Town-council approve of the operations of the Tramway Company is an important element to be taken into consideration. As I have already pointed out, the duty lies upon the Town-council to see that the streets are not obstructed or improperly used, and as, by their approval, they have identified themselves with the practice of the respondents, I think that the question is whether that practice is one which the Town-council was justified in approving; in other words, whether the practice is one which would fall to be interdicted if the actual work of clearing the snow from the tramway lines and laying down salt had been done by the Town-Council and not by the respondents.

"Further, there are two preliminary considerations which must be kept in view. In the first place, it is to be remembered that the occasion of the

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In this case the tramway company clear the snow to the side and keep the road open, which is the thing the public authority ought to do, and I do not see what possible ground there can be for interdict against that. When there was a deep fall of snow it was the duty of the public authority to keep the road clear, and to see that it did not become or remain impassable, and I am at a loss to see why the tramway company should be found fault with when what they have done is exactly the same process which the public authority would have to go through, viz., to open up a passage in the middle of the street. There is therefore no good ground for interdict on the first branch of this case.

As regards the second point a different question arose altogether. It relates to injury by the use of salt upon the streets. I think if we were to express our own opinion, and give judgment accordingly, I, for one, would have very little difficulty in expressing my opinion, and with some emphasis.

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operations complained of is a partial interruption to the traffic by natural causes. . . .

"In the second place, I do not think that the respondents are to be regarded as in no other case, as regards this matter, than any private citizen. The respondents have been authorised to construct and work tramways in Aberdeen, by an Act of Parliament which proceeds upon the preamble that the constructing and working of tramways 'would be a great local and public advantage.' They are accordingly given power to 'lay down, work, use, and maintain' the tramways described in the Act, and undoubtedly they are thereby authorised to do many things in and to the streets which no private individual would be entitled to do. Among other things, they are empowered to work the tramways, which seems to me to involve the power of keeping the lines in such a condition that the tramways can be worked, and to remove obstructions from the lines which would prevent the working of the tramways. Of course I do not mean to say that the respondents are entitled to employ methods which amount to a nuisance to the public who are equally entitled to use the streets. I only desire to point out that I do not altogether agree with the complainer's contention that, as regards operations in the streets, the respondents are in no other or better position than a private ratepayer.

"Coming now to the actual operations complained of, I shall first deal with the clearing of the tramway lines by the snow-plough, and then with the use of salt. . . .

"It seems to me really to resolve into a question of the balance of public convenience—whether it is more convenient to have a long stretch of street with a clear roadway down the middle, and heaps of snow at the sides, or a short stretch of street entirely cleared, and the remainder not cleared at all. It is for the Town-council to decide in the first instance which of these courses is most in the public interest, and I think that this Court would be very slow to interfere with their discretion. I may say, however, that the view which I understand the Town-council to take appears to me to be not unreasonable, but the reverse. That view is that it is in the interest of the general traffic that a track along the centre of the streets should be cleared without delay, and that it is of importance to a large section of the community that tramway traffic should not be interrupted.

"So far, therefore, as the clearing of the tramway lines by the snow-plough is concerned, I am of opinion that the complainer has not made out a case for the interference of the Court.

"The question in regard to putting salt on the streets is attended with more difficulty. . . .

"I think that the question is one of the balance of convenience. It is

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My own impression is that nothing more cruel to man and beast can be done than to shower salt on the streets in winter, producing a freezing mixture, and that it causes serious risk to health and even life I have no doubt. But I am not entitled in such a matter to act on private opinion or private knowledge. What was done was under the sanction of the public authority, and if they are really and seriously of opinion that this is the only reasonable way of keeping the streets clear, I do not think this Court are the judges of whether they are right in the matter or not. At the time of a heavy fall of snow or of a heavy frost inconvenience and risk to the public must always necessarily be caused, and the public authority, the Town-council, are the proper judges in the matter, and have the responsibility imposed upon them of seeing that the streets are satisfactorily and properly kept open and clear. If the ratepayers are of opinion that the affairs of the city in that matter are mismanaged, so as to be injurious to their interests or their health, they have the remedy in their own hands.

LORD YOUNG concurred.

LORD TRAYNER.—I agree with the Lord Ordinary's judgment. I have only to add, that if the case had come before me in the first instance, looking to the terms on which the interdict was prayed for, I should have been disposed to deal with the plea that the action is irrelevant in a different way from that which was adopted.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

AULD & MACDONALD, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

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plain that, in the case of a storm of such severity and continuance as that of last year, there must necessarily be great inconvenience and serious impediment to the traffic, and it is for the Town-council to consider what method of clearing the streets will be most for the public advantage. Some of the complainer's witnesses went so far as to say that the method adopted is so bad that they would prefer that the streets should not be cleared at all. I doubt if that answer would have been given if these witnesses had had actual experience of such a storm without any clearing of the streets. I should think it very probable that, in the latter case, the injuries to horses through strains, tramps, and falls, would be much greater than these caused by the use of salt. It is unprofitable, however, to speculate upon such matters. There is a great deal to be said both for and against the method adopted, and I think that it is sufficient for the decision of this case that the Town-council have come to be of opinion—and I see no reason to doubt that the opinion has been formed honestly and after full consideration—that it is, upon the whole, in the public interests, that the respondents should be allowed to do a part of the work of clearing the streets by sending the snow-ploughs along the tramway lines, and melting the snow not removed by the ploughs by means of salt. And that that view is not an unreasonable one is, I think, shewn by the fact that the same practice is adopted in Edinburgh, Glasgow, and Dundee.

"I am therefore of opinion that the note falls to be refused."

ROBERT WALKER, Pursuer (Reclaimer).—*D. Dundas—Craigie.*
ARCHIBALD GALBRAITH, Defender (Respondent).—*Ure—Cook.*

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Dec. 21, 1895.
Walker v. Galbraith.

Fee and Liferent—Husband and Wife—Assignation of lease—Destination to spouses in conjunct fee and to the survivor in fee.—A lease for ninety-nine years was assigned to spouses "in conjunct fee and to the survivor of them in fee." *Held* (*rev.* judgment of Lord Moncreiff) that the fee vested in the spouses jointly, with the benefit of survivorship.

Succession—Special Destination—General Settlement.—A long lease of heritage was assigned to D. D. and M. D., his wife, "in conjunct fee, and to the survivor of them in fee, and at the death of the survivor to the heirs of the said D. D. and M. D., equally between them."

The spouses subsequently executed a mutual settlement, by which they conveyed to the survivor of them in liferent for his or her liferent use only, and at the death of the survivor to two sons of the wife by a former marriage, their whole heritable and moveable estate.

At the date of the mutual settlement the spouses had no other property than the lease carried by the assignation.

Held that the destination in the assignation to the heirs of the spouses was evacuated by the mutual settlement.

Expenses—Process—Sale of heritage—Objection to title tendered.—Circumstances in which a purchaser of heritable subjects who objected to the title offered him was *held* entitled to expenses incurred in defending an action by the seller, in which the validity of the title tendered was established.

1ST DIVISION.
Ld. Moncreiff.

BY assignation, dated in 1877, Patrick Burns, in consideration of a sum of £189 paid him by Adam Wilson, assigned a 99 years' lease of certain heritable subjects in the parish of Kilwinning "to David Deans, miller and innkeeper in Stevenston, and Marion Sneddon or Deans, his wife, in conjunct fee, and to the survivor of them in fee, and at the death of the survivor, to the heirs of the said David Deans and Marion Sneddon or Deans, equally between them." The assignation was recorded in the Register of Sasines.

On 19th September 1882 David Deans and his wife executed a mutual disposition and settlement in the following terms:—"We, . . . with mutual advice and consent, give, grant, assign, and dispone to and in favour of the survivor of us, in liferent for his or her liferent use only, and at the death of the survivor, to John Paton, miner, Stevenston, and William Paton, residing with us, both sons of me, the said Marion Sneddon or Deans, equally between them, all and sundry our whole estate, heritable and moveable, real and personal, wheresoever situated, also all debts, sums of money and effects now owing and belonging, or that shall be owing and belonging to the first deceaser, with the whole writings, vouchers, and securities, and the rents, interest, profits, and produce of the premises; and we nominate and appoint the survivor of us, and the saids John Paton and William Paton, and the survivors and survivor of them, to be our executors and executor; but these presents are granted and shall be accepted by the executors under the burden of payment of all our just and lawful debts; reserving always to us while both survive full power to alter, innovate, or revoke these presents in whole or in part, as we may see proper. . . ."

David Deans died on 12th December 1890, predeceased by his wife.

After the death of David Deans John and William Paton completed a title to the lease by notarial instrument, which was duly

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recorded, and assigned the lease to Colin Mackenzie, who again assigned it to Robert Walker, both assignations being recorded.

By missives of sale dated in 1894 Robert Walker agreed to assign the lease, with the goodwill, furniture, fitting, and utensils of the premises built upon the subjects leased, to Archibald Galbraith. The latter took possession of the subjects, and consigned the price in the joint names of himself and Walker, but declined to accept an assignation to the lease which was offered him by Walker, unless the respective heirs-at-law of Mr and Mrs Deans validly completed their title, and gave their express consent to such assignation. His objection to the title offered him was founded upon the grounds (1) that the mutual disposition and settlement by Mr and Mrs Deans only conveyed to John and William Paton the estate which belonged to the first deceaser of the spouses, namely, Mrs Deans, and that as her husband was, under the special destination contained in the assignation of the lease by Patrick Burns, sole fiar during their joint lives, the Patons could take no right to the lease under the mutual settlement, in respect it carried none; and (2) that the special destination contained in the assignation was not evacuated by the general conveyance in the mutual settlement.

Walker thereupon brought an action against Galbraith, concluding for declarator that he had a good title to the lease, and an undoubted right to assign it, and for decree ordaining the defender to implement his part of the missives of sale by accepting the assignation offered him, and paying the price.

The pursuer averred that the lease was the only property in which Mr and Mrs Deans had an interest at the date of the mutual settlement or at their deaths.

The defender pleaded;—(2) The pursuer is not at present *in titulo* to grant to the defender a valid assignation of the tack in question.

On 17th July 1895 the Lord Ordinary (Moncreiff) sustained the second plea in law for the defender, and assoilzied him from the conclusions of the summons.*

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* "OPINION.—The subject in dispute in this case is, whether the pursuer of the action has tendered to the defender a good and valid title to a lease for ninety-nine years, which the defender had agreed to purchase. I am of opinion that the title which the pursuer offers the defender is not one which the latter is bound to accept. Under the assignation granted by Patrick Burns in 1877, he assigned the lease to David Deans and Marion Sneddon or Deans, his wife, in conjunct fee, and to the survivor of them in fee, and at the death of the survivor to the heirs of the said David Deans and Marion Sneddon or Deans, equally between them. In 1882 Mr and Mrs Deans executed a mutual trust-disposition and settlement, and they conveyed 'to and in favour of the survivor of us, in liferent for his or her liferent use only, and at the death of the survivor to John Paton, miner, Stevenston, and William Paton, residing with us, both sons of me, the said Marion Sneddon or Deans, equally between them, all and sundry our whole estate, heritable and moveable, real and personal, wheresoever situated, also all debts, sums of money and effects now owing and belonging, or that shall be owing and belonging to the first deceaser,' and so forth. The survivor was appointed executor of the predecessor, and then followed,—'reserving always to us while both survive full power to alter, innovate, or revoke these presents in whole or in part, as we may see proper.'

"The first objection taken is that in the event, which happened, of Mrs Deans predeceasing her husband, no interest in the lease was carried to the survivor; because Mrs Deans had no interest in the lease, and David Deans

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The pursuer reclaimed, and argued;—(1) The destination in the assignation to the spouses "in conjunct fee," was not the same as a destination "in conjunct fee and liferent," and its effect was that the spouses took a joint right of fee, and that on the death of one the fee of the whole passed to the survivor. The destination in favour of the survivor indicated that the husband was not intended to be sole fiar, and the old doctrine founded on by the defender was therefore not applicable. The spouses when they granted the mutual trust-disposition had accordingly a joint right in the lease, and the mutual settlement was clearly intended to carry the whole estate of both at the death of the survivor. (2) The assignation was not to be regarded as the deed of the spouses, but as the deed of a stranger, and therefore the doctrine that a special destination was not evacuated by a general settlement did not apply. Further, the destination in the assignation to the heirs of the spouses, equally between them, was not a special destination in the sense of the doctrine founded on by the defender, the assignees not being definitely pointed out, and was therefore evacuated by the general settlement.[1] According to the pursuer's averment the spouses had no other property at the date of the mutual settlement except the lease, and therefore they must have intended to deal with it in their settlement.[2] The objections to the title offered by the pursuer were therefore unfounded.

himself had the fee in terms of the assignation. Mr Cook maintained that the mutual disposition and settlement only dealt with the interest of the predeceaser. I am inclined to think that looking at the peculiar way in which the deed is framed and worded, that is the construction which must be put upon it. Whatever may have been intended, it practically comes to this, that each of the spouses, in the event of his or her being the predeceaser, conveyed his or her whole estate to the survivor in liferent, and the Patons in fee. If that is the true construction of the deed, then the deed carried nothing, because Mrs Deans predeceased, and in terms of the assignation, David Deans was still fiar; or, at least, if he was not fiar, he, on the death of his wife, became entitled, not under the mutual deed, but under the assignation, to the subjects in fee, being the survivor.

"Now, if that is sound, then the title offered by the pursuer is not sufficient, because the title offered is on the footing that right to this lease vested in the Patons under the settlement on the death of David Deans, who had not revoked it. The pursuer's title is deduced through the Patons from him. In order to make a good title there must be an assignation executed by the heirs at law of David Deans and Mrs Deans.

"There is a further question, and on that also I am inclined to agree with Mr Cook. He maintained that there was a special destination in the assignation, and I am inclined to think that that is so. It is a special destination—half to the heirs of David Deans and half to the heirs of his wife. The general law is that a special destination is not evacuated by a general disposition and settlement executed by the same person who took the deed with the special destination in it. Therefore the special designation in the assignation was not evacuated by the mutual deed of 1882. It is a question of intention, but that is the general rule. It is said in the present case by the pursuer that the only property which these spouses had was this lease. That, of course, is a material fact, and worthy of consideration, but it is not conclusive, and I do not think it is sufficient to overcome the general rule. But undoubtedly there is more difficulty upon this point than upon the former. The result is that I sustain the second plea in law for the defender, and assoilzie him."

[1] Philip v. Philip, Dec. 11, 1885, 13 R. 329.

[2] Gray v. Gray's Trustees, May 24, 1878, 5 R. 820.

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Argued for the defender;—The title offered was not such as the defender was bound to accept. (1) According to the ordinary rule under a destination to spouses "in conjunct fee" the husband as the *dignior persona* became sole fiar.[1] Even when there was a further destination in favour of the survivor, the wife took no right of fee unless and until she survived.[2] There was nothing in the present case to suggest that the consideration for the assignation was paid by the wife, or to take the case out of the ordinary rule. When the mutual settlement was granted the wife had accordingly no interest in the lease, and as that deed dealt only with the estate of the predeceaser, who was the wife, no interest in the lease passed under it to the Patons. (2) The assignation contained a special destination to the survivor and the heirs of the spouses, and that destination must be held to have been inserted at the wish of the assignees.[3] The usual rule, therefore, applied that a special destination was not evacuated by a general disposition.[4] There was no indication of an intention to deal with the lease in the mutual settlement unless it were assumed that, as averred by the pursuer, the spouses had no other property at the date of that settlement. But, even if that averment were assumed to be true, it was not conclusive, for the settlement dealt with *acquirenda*. The case of *Gray*[5] was very special, and the fact that in that case, apart from the property conveyed under the special destination, the general settlement had nothing to operate upon, was only one of many considerations which led the Court to hold that the general settlement was intended to carry that property.

At advising,—

LORD M'LAREN.—I am of opinion that the title offered in this case is sufficient. The foundation of the title is an assignation to the subject (a 99 years' lease) in favour of David Deans and his spouse in conjunct fee, and to the survivor of them in fee. The Lord Ordinary construes this destination as if it were equivalent to a destination to the spouses in conjunct fee and liferent, in which case the ordinary rule of construction is that the wife is liferenter, and the husband fiar.

But I know of no authority for giving to the words "conjunct fee," in a destination to spouses, a different construction from the construction which would be put on them in a destination to persons not connected by marriage, and no authority was cited to us in support of the Lord Ordinary's opinion on this point.

In my opinion the assignation gave equal rights to the husband and wife, the subject being vested in them jointly, with benefit of survivorship.

In this view of the meaning of the assignation, the question raised as to the mutual settlement granted by the spouses in 1882 disappears. They

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[1] Anderson v. Bruce, 1680, M. 4232; Erskine, iii. 8, 36.

[2] Ferguson v. M'George, 1739, M. 4202.

[3] Farquharson v. Farquharson, July 19, 1883, 10 R. 1253, *per* Lord Justice-Clerk, 1257.

[4] Thoms v. Thoms, March 3, 1868, 6 Macph. 704, 40 Scot. Jur. 364, *per* Lords Benholme and Neaves, 6 Macph. 724; Glendonwyn v. Gordon, May 19, 1873, 11 Macph. (H. L.) 33, 45 Scot. Jur. 183; Campbell v. Campbell, Feb. 17, 1743, 1 Pat. 343; Walker's Executor v. Walker, June 19, 1878, 5 R. 965.

[5] Gray v. Gray's Trustees, May 24, 1878, 5 R. 820.

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were then dealing with a subject of which they were the joint owners, unfettered by any limitations other than a destination over to their heirs, which it was in their power to evacuate by making a new destination. In such circumstances, they by a deed in proper form limited the right of the survivor to a liferent, and vested the fee subject to that life interest (and subject of course to the usual liferent by reservation during their joint lives) in John and William Paton, the sons of Mrs Deans by a previous marriage. It is not disputed that the title offered flows from the Patons.

The Lord Ordinary notices another objection which he is disposed to sustain, but without, as I understand, expressing an unqualified opinion upon it.

The objection is that the mutual settlement is a general conveyance, and that a destination inserted in a conveyance, presumably by desire of the grantee, is not necessarily revoked or evacuated by a subsequent general settlement.

This is substantially the same question as the question of the revocation of a specific bequest by a subsequent general settlement. It is, as the Lord Ordinary has observed, a question of intention, and there are two reasons which, in my opinion, lead to the conclusion that it was the intention of the spouses to evacuate the destination. The first is that it does not appear that the spouses had any other joint estate on which the mutual settlement could take effect. The second is that the destination of the joint estate contained in the previous deed was a destination to the heirs of the spouses equally between them. This is not a special destination in the sense of the rule referred to. No claim to the estate has been made by the heirs of David Deans, and I think that the pursuer has a good title, and is entitled to decree of declarator in terms of his first conclusion.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The defender moved for expenses on the ground that, although he had been unsuccessful, he had acted within his rights in refusing to take the title until it had been determined by the Court to be valid.

The pursuer argued that each case of the kind fell to be decided upon its merits, and that in the circumstances of this case the defender was not entitled to expenses.

THE COURT recalled the interlocutor of the Lord Ordinary, and found the defender entitled to expenses both in the Inner and Outer-House.

COWAN & DALMAHOY, W.S.—EMSLIE & GUTHRIE, S.S.C.—Agents.

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Neville v. Shepherd.

MARY BALLINGALL NEVILLE AND OTHERS, First Parties.—*Balfour—Cook.*
JESSIE SHEPHERD, Second Party.—*Johnston—Wilton.*
ARTHUR STEWART MUIR AND OTHERS (Gloag's Trustees), Third Parties.—*Balfour—Cook.*

Succession—Vesting—Declaration as to term of vesting—Destination to survivors—Conditional institution of issue of predeceasers—Conditio si sine liberis.—A testator directed his trustees to pay the liferent of the residue of his estate to his daughter and her husband, and at the first term of Whitsunday or Martinmas after the death of the survivor, to divide and pay

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the whole residue, equally, share and share alike, among their children, and the survivors and survivor of them, declaring that payment should not be made to any grandchild till the first term of Whitsunday or Martinmas after reaching majority. "Further, in the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions, without leaving lawful issue, and all of which provisions it is hereby declared shall vest at the said terms of payment so fixed by me, then and in that case, but in that case only, I direct my trustees . . . to divide, pay, and make over my estate, hereinbefore settled on my said grandchildren, equally, share and share alike," among certain nephews and nieces.

The testator was survived by his daughter and her husband. The latter outlived his wife, and died on 21st March 1895, predeceased by four children who had survived their grandfather, the testator, and survived by two children, of whom one, Mrs N., died on 17th April 1895, leaving issue.

Held (1) that no share of the residue vested in Mrs N., in respect that she predeceased the term of Whitsunday 1895, which was the term of payment; and (2) that her issue were entitled, in virtue of an implied conditional institution in the trust-settlement, to succeed to the half of the residue which would have fallen to their mother, had she survived the term of payment.

Opinion (*per* Lord M'Laren) that, if the claim of Mrs N.'s children had depended on the *conditio si sine liberis*, they could only have been entitled to the sixth share originally destined to their mother.

Young v. *Robertson*, Feb. 14, 1862 (H. L.), 4 Macq. 337, *commented on*.

1ST DIVISION. By trust-disposition and settlement, dated 25th December 1865, Dr James Gloag conveyed his whole estate, heritable and moveable, to trustees for the purposes therein mentioned. In the seventh place he directed his trustees, on the death of the survivor of himself and his wife, to hold the residue of his estate and apply the interest and proceeds for the liferent use of his daughter, Mrs Shepherd, and in the event of her death, to pay the said liferent to her husband during his life. "(Eighth) My trustees are hereby directed and appointed, at the first term of Whitsunday or Martinmas that shall happen after the death of the longest liver of the said Mrs Janet Black Gloag or Shepherd and John Shepherd, and the termination of their said liferent, . . . to divide, pay, and make over the whole residue and remainder of my said whole estates above disponed and conveyed, or the proceeds thereof, including any income accruing thereon between the expiry of the liferent thereof hereinbefore settled on my said daughter and her husband, and the said term of payment, equally, share and share alike, among the whole children already born or to be born of the marriage between the said John Shepherd and Mrs Janet Black Gloag or Shepherd, or last survivor of said children (under the declaration after mentioned): But declaring that in case any of my said grandchildren, being sons, shall not have attained majority, or being daughters, shall not have attained majority or been married, at the period when the said residue of my estates is to be divided as aforesaid, I hereby appoint that the payment of the shares falling to such child or children shall be superseded till the first term of Whitsunday or Martinmas after,—in the case of grandsons, till they respectively attain majority, or in the case of granddaughters, till they respectively attain majority, or be married, whichever of these events shall first happen, and the annual proceeds of such share or shares, or such parts thereof as may be deemed necessary by my trustees, shall be laid out for their clothing, education, and maintenance, and the balance accumulated for their behoof: And further, in the event of any of my said grandchildren predeceasing me leaving

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a lawful child or lawful children, I hereby appoint and declare that such child or children shall succeed equally to the share of my said estates which would have fallen to his or her deceased parent under these presents, if he or she had been alive."

Power was then given to the trustees, with consent of Mr and Mrs Shepherd, before the term of payment of any of the provisions to grandchildren, to advance, in whole or part, to or for behoof of any of such grandchildren, "the provisions which such grandchildren, or any of them, may be entitled to under these presents"; and power was also given to the trustees to postpone payment of the grandchildren's provisions till they attained the age of twenty-five. The settlement continued:—"Further, in the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions without leaving lawful issue, and all of which provisions it is hereby declared shall vest at the said terms of payment so fixed by me, then, and in that case, but in that case only, I direct my trustees (after expiry always of the liferents hereinbefore provided) to divide, pay, and make over my estate hereinbefore settled on my said grandchildren equally, share and share alike, among the child or children of my eldest sister Mrs Margaret Gloag or Millburn, now deceased, . . . and the child or children of my late brother John Gloag, . . . and the survivors and survivor of the children of my said sister and brother: Declaring that, in the event of any of my said nephews and nieces predeceasing the period at which they would have become entitled to participate in my said estate (and which shall not become a vested interest till the period of payment arrives), leaving a lawful child or lawful children, then, and in that case, such child or children shall be entitled, equally among them, *per stirpes*, to the share which would have fallen to their deceasing parent or parents."

Dr Gloag died in 1870, predeceased by his wife. He was survived by his daughter, Mrs Shepherd, and her husband. Mr Shepherd survived his wife, and received the liferent until his death, on 21st March 1895.

There were seven children born of the marriage between Mr and Mrs Shepherd, of whom one was deceased at the date of Dr Gloag's settlement. Only two of the children survived their father Mr Shepherd, viz., Mrs Neville, who died on 17th April 1895, leaving four children, and Jessie Shepherd, who had attained majority prior to her father's death.

Questions having arisen as to the division of the residue of Dr Gloag's estate, a special case, to which the four children of Mrs Neville were first parties, Miss Jessie Shepherd second party, and Dr Gloag's trustees third parties, was presented in order to obtain the opinion of the Court upon the following questions of law:—"(1) Did Mrs Elizabeth Muir Shepherd or Neville acquire a vested right to one-half of the residue of the estate of the said Dr James Gloag? (2) In the event of the preceding question being answered in the negative, are the parties hereto of the first part, the children of the said Mrs Elizabeth Muir Shepherd or Neville, entitled to one-half share of the said residue? or (3) Are they only entitled to one-sixth thereof?"

The first parties, Mrs Neville's children, contended that Mrs Neville having survived her father acquired a vested interest in one-half of the residue of the estate of Dr Gloag, the other half being payable to her sister Jessie Shepherd; or otherwise, if it should be held that Mrs Neville took no vested interest in the residue, that the first

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parties, her children, were entitled, in virtue either of an implied substitution to their mother or of the *conditio si sine liberis*, to one-half of said residue.

The second party maintained that Mrs Neville having predeceased the term of payment did not acquire a vested interest in the residue of the estate, and that her children, the first parties, could only succeed in virtue of the *conditio si sine liberis*, to her original share, being one-sixth of the residue, and that the second party was entitled, by survivance, to the balance.

Argued for the first parties, Mrs Neville's children;—(1) One-half of the residue vested in Mrs Neville, either at the testator's death or at the death of the longest liver of the liferenters. The words "predeceasing me" in the clause declaring that the issue of predeceasers should take their parent's share favoured the conclusion that vesting was *a morte*. At all events vesting took place at the death of the last liferenter, for the postponement of payment to the first term thereafter was evidently for purposes of administration only. (2) Assuming that Mrs Neville took no vested right, her children were nevertheless entitled to take half the residue either in virtue of the *conditio si sine liberis*, which operated as at the death of the parent, so as to give the issue shares which had fallen in prior to the death of the parent, or in virtue of an implied conditional institution in the deed. A conditional institution of issue was clearly implied in the clause which dealt with the event of all the grandchildren predeceasing the terms of payment "without leaving lawful issue," and this conclusion was supported by a reference to the clauses of the deed, which declared that the issue of grandchildren predeceasing the testator, and the issue of his nephews and nieces predeceasing the terms of payment, should take the share which would have fallen to their parent. Under the terms of this conditional institution the issue were entitled not merely to their parent's original share but also to the accrescing shares which he or she would have taken by survivance.[1] In the cases of *M'Nish* and *Young* v. *Robertson*[2] the testator had begun by expressly giving over the share of legatees predeceasing without issue to the survivors, and so accrescing shares were necessarily excluded from the subsequent conditional institution of the issue of legatees who predeceased leaving issue. In *M'Nish* the destination was also to children *nominatim*, but here it was to the class, which was an important distinction.[3] In *Henderson*[4] the declaration was that the shares of children predeceasing the testator without issue should be divided among their "brothers and sisters," an expression which could not be held to include the issue of predeceased brothers and sisters.

Argued for the second party, Miss Shepherd;—(1) There was no vesting, according to the express terms of the will, until the terms of payment, and this declaration was in harmony with the other provisions of the will, except the clause in which the testator declared that the issue of grandchildren "predeceasing me" should take their

[1] M'Culloch's Trustees, May 14, 1892, 19 R. 777, esp. *per* Lord M'Laren, p. 779; Aitken's Trustees v. Wright, Dec. 22, 1871, 10 Macph. 275, *per* Lord Kinloch, 280, 44 Scot. Jur. 164.

[2] M'Nish v. Donald's Trustees, Oct. 25, 1879, 7 R. 96; Young v. Robertson, Feb. 14, 1862, 4 Macq. 337, 34 Scot. Jur. 270.

[3] Aitken's Trustees, *ut supra*.

[4] Henderson v. Henderson, Jan. 9, 1890, 17 R. 294.

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parent's share. The slight difficulty raised by that clause, standing as it did by itself, could not render the express declaration of the testator's intention inoperative. (2) The equity of the *conditio si sine liberis* was never extended so as to give to the issue of a predeceasing child more than the original share destined to their parent. It was also established by a long series of decisions that the conditional institution of issue to their parent's share, when there was a destination to survivors, did not give the issue a right to more than their parent's original share.[1] In *M'Culloch's*[2] case the words of the codicil clearly gave to the issue the share, original and accrescing, which their parent would have taken, but there was no such conclusion to be drawn from the words of the settlement now under consideration.

LORD ADAM.—The questions in this special case relate to the construction of the trust-disposition and settlement of the late Dr Gloag, and in particular of the 8th purpose of that settlement. It is only necessary to mention that Dr Gloag died upon 23d January 1870. He had only one child, who subsequently became Mrs Shepherd, and who died on the 10th July 1873. She was survived by her husband, who died on the 21st March 1895. They had several children, of whom the only one now alive is Miss Shepherd, the second party in this case. Another daughter, Mrs Neville, survived her father, but did not survive the first term of Whitsunday after her father's death, having died on 17th April 1895. Dr Gloag left the liferent of the residue of his estate to the longest liver of Mr and Mrs Shepherd, and after that he directed the fee of the residue to be divided as specified in the 8th purpose, and that, it seems to me, is the only one which requires immediate attention. The first question put to us is this,—Did Mrs Neville acquire a vested right to one-half of the residue of Dr Gloag's estate? Now the 8th purpose deals with the residue thus:—He directs the trustees at the first term of Whitsunday or Martinmas which shall happen after the death of the longest liver of Mrs Shepherd and John Shepherd, on the termination of their said liferent, "to divide, pay, and make over the whole residue and remainder of my said whole estates, or the proceeds thereof, including any income accruing thereon between the expiry of the liferent . . . and the said term of payment, equally, share and share alike, among the whole children already born, or to be born, between Mr and Mrs Shepherd, and to the survivors or last survivor of said children." Then there is a declaration postponing payment if any of the grandchildren should be under twenty-one. Now had the directions of the truster stopped there, very possibly we should have thought it was a case of vesting *a morte testatoris* with postponed payment; but there is a clause later on which in my opinion settles the matter. "In the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions, without leaving lawful issue, and all of which provisions it is

[1] Young v. Robertson, Feb. 14, 1862, 4 Macq. 337, 34 Scot. Jur. 270; M'Nish v. Donald's Trustees, Oct. 25, 1879, 7 R. 96; Henderson v. Henderson, Jan. 9, 1890, 17 R. 294; Aitken's Trustees v. Wright, Dec. 22, 1871, 10 Macph. 275, 44 Scot. Jur. 164; The Earl of Lauderdale, &c., May 19, 1830, 8 S. 771; Clelland v. Gray, June 20, 1839, 1 D. 1031, 11 Scot. Jur. 533; Thornhill v. Macpherson, Jan. 20, 1841, 3 D. 394.

[2] M'Culloch's Trustees, May 14, 1892, 19 R. 777.

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hereby declared shall vest at the said terms of payment so fixed by me, then," &c. That is a declaration that all the provisions to the grandchildren are to vest at the term of payment and not at an earlier date. What then is the term of payment? It is very clearly the first term of Whitsunday or Martinmas occurring after the death of the survivor of Mr and Mrs Shepherd. It appears to me that there can be no vesting of the share in any of the grandchildren before the term of Whitsunday or Martinmas of the year in which Mr Shepherd died. Mrs Neville predeceased the term of payment; therefore she predeceased the term of vesting; and I think there is no doubt that we must answer the first question in the negative.

Then comes the second question:—Are the children of Mrs Neville entitled to one-half or to one-sixth share of the residue? That depends upon the construction of the same clause, and perhaps is not so clear. As I have pointed out, the truster directed his trustees to divide, pay, and make over the residue, or the proceeds thereof, among the whole children already born, or to be born, and to the survivor. There is certainly no substitution of the issue of these children there, but there are other clauses dealing with the issue of the grandchildren of the truster, and the first of these is this:—"And further, in the event of any of my said grandchildren predeceasing me leaving a lawful child or lawful children, I hereby appoint and declare that such child or children shall succeed equally to the share of my said estates which would have fallen to his or her deceased parent under these presents if he or she had been alive." Now, I do not think there is any ambiguity about this clause requiring construction. It provides for the case only of grandchildren predeceasing the truster himself. But it is to be observed that it contains no provision for the case of grandchildren who survived the truster but predeceased the term of vesting. They are not provided for in this clause. We may conjecture that perhaps the words "predeceasing me" are a slip or mistake for the words "predeceasing the term of payment," but I think the words are clear. Therefore if it depended upon this clause only it would be difficult to see that there was any substitution of the issue of grandchildren generally to their parents. But before leaving that clause I may say that I think the clause itself would be sufficient to exclude the presumption that children are substituted to their parents by the application of the doctrine of *si sine liberis*, because Dr Gloag is here dealing with the issue of grandchildren—with those in a particular position—and was therefore applying his mind to the very parties to whom the *conditio* would otherwise apply. But there is a general clause which deals with the whole matter; that namely, which I have already referred to, "Further, in the event," &c. Now, it appears to me to be quite clear that if any issue of the grandchildren were alive at the date of vesting that destination over to the truster's nephews and nieces could not take effect, because it was only upon the failure of issue of grandchildren that the destination was to take effect. And for what reason? Simply because if there were any issue of grandchildren surviving the term of vesting they were to come in place of their parents. Therefore, it appears to me that we have here an implied substitution, or rather conditional institution, of the issue of grandchildren predeceasing, and predeceasing the term of payment. I think that clause is sufficient for

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the determination of this case, and therefore I think we should answer the second question in the affirmative, to the effect that the children of Mrs Neville are entitled to take one-half of the estate.

LORD M'LAREN.—I concur in the opinion of Lord Adam on both points. I do not say anything on the question of vesting, but on the question of the extent of the shares taken by children as representing their parents in a destination, I desire to state my views, because of its general importance.

The second question as originally put invited us to answer what share might be taken by a child or issue claiming under the *conditio si sine liberis;* and if the question had remained unaltered I think that only one answer could be given, because it is settled as matter of legal implication, as distinguished from construction, that a child under the *conditio* never takes more than what is described as the parent's original share, that is, the share which the parent would take supposing everyone in the destination to survive the period of payment. But that principle or implication does not go very far to solve a case like the present. The reason is this, that the right of children under the *conditio* is an equitable extension of the will, and cannot reasonably be extended beyond this, that what the truster thought a reasonable provision for one to whom he was *in loco parentis* shall pass to that person's children. The extent of what is considered a reasonable provision is fixed by the provision which the parent has actually made on the assumption that all his children survive.

When, on the contrary, the substitution is contained in a will or deed, the language used in the deed determines the extent of the right of the substituted legatee. In *Young* v. *Robertson* [1] the scheme of the destination was that the testator made a division amongst a family of grandchildren, and then he proceeded to deal first with the case of a member of the family who might die without leaving issue, and then with the case of a member who should die leaving issue. In the first case he gave that person's share to the survivors exclusively, therefore excluding the issue of any other member of the family from participation. But in well-drawn destinations of this kind it is provided that on the death of a child leaving issue the issue shall take the same share which the parent would take if he survived, or, as it is sometimes put, the parent's share whether original or by accretion; or, again, the principle is sometimes carried out by dealing with the case of a person who shall die childless, and stating that his share shall go to the remaining members of the family, and the issue of those who have predeceased.

Now, if we are to consider what words are to be inserted in this deed by implication, it seems to me that we ought to give the issue of this family of grandchildren the right which we may assume to have been in the testator's mind. In the passage relating to the event of the death of all the members of this family without leaving issue and bringing in the destination over to collaterals, the testator plainly contemplates that if any members of the family die before distribution of the residue their issue are to come in their place, and I agree that the true implication is that issue are to succeed to whatever the parent would have taken had he survived. That construction receives support from the passage in which the testator ineffectually

[1] 4 Macq. 337, 34 Scot. Jur. 270.

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attempted to provide for the event of children dying without issue. That clause is not strictly applicable to the event which has happened. Nevertheless we get some insight as to what the intention was when we find the testator saying that "such child or children shall succeed equally to the share of my said estates which would have fallen to his or her deceased parent if he or she had been alive." It appears to me that we cannot be wrong in holding that the testator meant to give the same right in the event for which he only provides by implication as he has expressly given in the event of any of his grandchildren predeceasing himself.

LORD KINNEAR.—I agree for the reasons given by Lord Adam. I also agree that the question which we should have to consider as to the share which the grandchildren of Mrs Shepherd are to take would have been entirely different if their interest had depended on the *conditio si sine liberis*. I do not consider what the share would have been in that case. But in the case as it stands we are relieved of the question which might have arisen had it been presented upon the *conditio*.

The LORD PRESIDENT concurred.

THE COURT answered the first question in the negative, and the second question in the affirmative.

MORTON, SMART, & MACDONALD, W.S.—ARTHUR S. MUIR, S.S.C.—Agents.

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Dec. 21, 1895. Grahame v. Magistrates of Glasgow.

JAMES GRAHAME (Real Raiser) AND ANOTHER, Pursuers.
THE LORD PROVOST AND MAGISTRATES OF GLASGOW AND OTHER ROAD AUTHORITIES, Claimants (Reclaimers).—*R. V. Campbell—John Wilson.*
THE CALEDONIAN RAILWAY COMPANY, Claimants (Reclaimers).—*Sol.-Gen. Murray—W. C. Smith.*
JOHN ALSTON DYKES (Mackenzie's Trustee) AND OTHERS, Claimants (Respondents).—*J. E. Graham.*
THE DUKE OF ARGYLL AND OTHERS (Rossmore's Trustees), Claimants (Respondents).—*Macfarlane.*

Road—Road Debt—Sale of Road Debt—Roads and Bridges (Scotland) Act, 1878 (41 *and* 42 *Vict. cap.* 51)—*Transfer of Assets and Liabilities to New Road Authorities—Funds held for special purposes.*—The Glasgow and Carlisle Road was constructed, under the authority of Parliament, out of funds one half of which was advanced by Exchequer and the other half subscribed by private persons, who became creditors of the Road Trust to the extent of their respective subscriptions, and entitled to interest thereon. In 1846 the Caledonian Railway Company entered into an agreement to purchase the debts due to the private creditors. The agreement provided that, in the event of the Government then or at any future time abandoning its claims to any part of the surplus revenue accumulated in the hands of the Road Trustees, the sums so abandoned should be divided equally between the private creditors and the railway company. The claims of the Government were about the same date settled finally, except with regard to a sum of £600, which was reserved by the Road Trustees to meet a particular debt, but was not required for this purpose. The Government subsequently abandoned its claim to this sum. The agreement with the railway company was carried into effect in 1852, and, *inter alia*, a fund of surplus revenue was equally divided between the railway company and the private creditors, some of whom, however, did not come forward to claim their shares. In June 1883 the management of the road was transferred by the operation of

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the Roads and Bridges Act of 1878 to the new road authorities created by the Act, and an action of multiplepoinding was subsequently brought by the treasurer of the former Road Trust to determine the right to the following special funds:—(1) A fund consisting of the shares of surplus revenue allotted to individual private creditors, but unclaimed; (2) a fund, consisting in part of unclaimed dividends or interest allotted to individual creditors prior to 1852, and in part of a sum carried to the general dividend or interest account, but not allotted to individual creditors; and (3) a fund representing one half of the £600 abandoned by Government, the other half having been paid to the railway company.

Claims were lodged by (1) the new road authorities, (2) certain of the private creditors, and (3) the Caledonian Railway Company.

Held (1) that the three funds set apart for special purposes, and held by the Road Trustees at the passing of the Roads and Bridges Act, 1878, formed no part of the assets of the Road Trust, and that the claims of the private creditors thereto did not require to be valued and allocated among the new road authorities under sec. 90 of said Act; (2) (*aff.* judgment of Lord Moncreiff) that the compearing private creditors were entitled to the shares of the first and second funds which had been allotted to them, but which they had previously failed to claim, and also to shares, of the unallotted part of the second fund and of the third fund, in the proportion which their original subscriptions bore to the total contributions of the private creditors; and (3) (*rev.* judgment of Lord Moncreiff) that the balance of the three funds fell to be paid to the new road authorities, to be held by them subject to the claims of any other private creditors who might afterwards come forward to claim.

1ST DIVISION.
Ld. Moncreiff.

THE GLASGOW AND CARLISLE ROAD was made under the provisions of various Acts of Parliament, the funds being provided, one half by advances from Exchequer and the other half by subscriptions from private individuals, who became creditors of the Road Trust to the extent of their subscriptions. The maintenance of the road was vested in a body of trustees known as the Glasgow and Carlisle Turnpike Road Trust, and it was provided by the Act 59 Geo. III. cap. xc., that any surplus arising from the tolls of the road, after payment of the expenses of maintenance and the interest on the debts of the private creditors and the Exchequer, should be deposited in bank as a sinking fund for the extinction of the debt.

In June 1883, under the provisions of the Roads and Bridges (Scotland) Act, 1878, the management of the road was taken over by the Road Trustees of the counties and the Local Authorities of the burghs in which it was situated.

At that date there were certain bank accounts in the name either of the treasurer, or of the clerk and treasurer, of the Glasgow and Carlisle Turnpike Road Trust, representing funds held for special purposes; and in 1893 James Grahame, late treasurer of the trust, brought an action of multiplepoinding, in name of himself and William H. Hill, late clerk of the trust, for determining the right to the following funds:—(1) A sum of £232 lodged on deposit-receipt with the Union Bank of Scotland on 4th December 1883 in favour of "The Creditors of the Glasgow and Carlisle Roads, *per* James Grahame, Esq., treasurer"; (2) a sum of £4165, 10s. 3d. lodged on deposit-receipt with the same bank, on the same date, in favour of "The Glasgow and Carlisle Roads Dividend Account, *per* James Grahame, treasurer"; and (3) a sum of £740, 17s. 8d. lodged on deposit-receipt with the National Bank of Scotland on 15th June 1893 in favour of "William Henry Hill and James Grahame (Glasgow and Carlisle Road Trust)."

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The circumstances giving rise to the action were as follows:—In 1846 an agreement was concluded between the Caledonian Railway Company of the first part, and the Lord Provost and Magistrates of Glasgow and others, acting on behalf of the private creditors and trustees of the Glasgow and Carlisle Road on the second part, whereby it was agreed that the railway company should purchase the debts due to the private creditors, amounting to £23,803, at the price of £15,000, and should have right to rank as creditors on the tolls of the road in the same manner as the private creditors were then entitled to do. By the fifth article of the agreement the second parties bound themselves to concur with the railway company in endeavouring to induce Government to abandon their claim to the accumulated surplus revenue funds, it being understood that the private creditors should participate equally with the railway company in any benefit that might be derived from the Government abandoning in any way its claim against the Trust. A settlement was about the same time made with the Government by payment to it of a certain sum.

The agreed-on price was not paid by the railway company until Whitsunday 1852, at which date the company took over the debts due to the private creditors.

There remained in the hands of the treasurer of the Road Trust three funds held by him for special purposes, viz.:—(1) A sum of £131, 6s. 11d., being the amount allotted to but unclaimed by sixty-three of the private creditors of their shares of surplus revenue for the three years ending 30th June 1848, the surplus revenue for that period having been divided between the railway company and the private creditors. In 1883 this sum, with interest, amounted to £232, 16s. 3d., being the sum first mentioned in the summons. (2) A sum of £1651, 13s. 9d., which consisted of (*a*) £1573, 16s. 3d., the amount allotted to but unclaimed by eighty-seven private creditors of dividends declared upon the road debt between the commencement of the trust and Whitsunday 1852; and (*b*) £77, 17s. 6d., being the difference between the sums carried to the general dividend account of the trust, and the sums carried in name of dividend to the accounts of the individual creditors between 1842 and Whitsunday 1852; these two sums, with interest, amounted in 1883 to £4165, 10s. 3d., being the sum second mentioned in the summons. (3) A sum of £600, which had been reserved out of a sum payable to Government from the Scottish section of the road in settlement of the advances from Exchequer under an agreement made in 1846. The sum was reserved to meet certain old claims against the road in Dumfriesshire, but was not used for this purpose. In 1887 the Treasury abandoned their claim to it. One-half of the sum was subsequently paid to the Caledonian Railway Company under article 5 of the agreement of 1846, and the remainder, with interest, amounted in 1893 to £740, 17s. 8d., being the sum third described in the summons.

In 1890 Commissioners were appointed in terms of section 90 of the Roads and Bridges (Scotland) Act, 1878,* (as read with the Secre-

* Section 90 of the Roads and Bridges (Scotland) Act, 1878, provides that "Where any trust existing at the commencement of this Act comprises a road . . . which is situated partly in Scotland and partly in England, the following provisions shall have effect":—(1) Any party interested may "apply to the Secretary of State to determine the manner in which such road . . . shall be managed, maintained, repaired, . . . and also the manner in which the debts affecting such trust and the pro-

tary for Scotland Acts, 1885 to 1889) to inquire as to the manner in which the debts affecting the Road Trust and the property and assets of the Trust should be valued and allocated among the various counties and burghs in Scotland, and the road authority in England.

In the proceedings before the Commissioners (which are referred to in the opinion of Lord Kinnear) the funds were claimed by the Road Trustees of the counties and burghs within which the road was situated, as payable to themselves under section 108 of the Act,* and by the Caledonian Railway Company.

Upon a consideration of the report of the Commissioners the Home Secretary and the Secretary for Scotland found that the value of the debt due to the Caledonian Railway Company was £5845, and they allocated this debt among the burghs and counties in which the road was situated. They further found that the railway company were entitled to one half of the £600 to which the Treasury had abandoned its claim in 1887, with the accrued interest, and that the other half of that sum, and the two sums first and second above described, "do not form assets of the trust to be taken into account in valuing the debt."

The present action was thereafter raised. Claims were lodged to the funds *in medio* by (1) the Lord Provost and Magistrates of Glasgow and others, the new Road Authorities of the counties and burghs in which the road was situated; (2) the Caledonian Railway Company; (3) William Alston Dykes and others, private creditors, or as representing private creditors, of the old Road Trust; and (4) Lord and Lady Rossmore's Trustees, also private creditors of the old Road Trust.

The Town-Council of Glasgow and other road authorities claimed to be preferred to the whole funds *in medio*, under liability upon

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perty and assets belonging thereto shall be valued and allocated upon or among, as the case may be, the county or counties and burgh or burghs in Scotland, and the road authority in England to be named in his determination: (2) Upon such application being presented to the Secretary of State, he may, if he shall think fit, by any writing under his hand, appoint any two persons as Commissioners to institute a local inquiry as to the circumstances of the case, and after hearing all parties interested, to report thereon to the Secretary of State . . . (3) The Commissioners shall prepare and transmit along with their report the draft of the determination which, having regard to the general provisions of this Act, they recommend that the Secretary of State should make in the premises: (4) The Secretary of State, after such further inquiry, if any, as he shall deem necessary, may approve of the draft submitted with or without alterations, and any determination . . . made by him under his hand and seal, shall have the same effect as if it were contained in this Act," unless Parliament resolve otherwise.

* The Roads and Bridges (Scotland) Act, 1878, section 108, provides,—"All persons acting or who have acted under any of the general or local Acts in force at the commencement of this Act as trustees of any of the turnpike roads, statute-labour roads, highways, or bridges within the county, or as clerks, or officers of such trustees who shall at the commencement of this Act have in their custody, power, or possession any moneys collected by virtue of such Acts, or any books, deeds, papers, writings, property, or effects belonging to the said turnpike or statute-labour trusts respectively, or relating to the execution of such Acts, shall pay and deliver up the same to the county road trustees, or to such person as they shall appoint to receive the same, who shall hold them and be liable to pay them over or make them forthcoming, subject to the provisions of this Act."

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them to satisfy all (if any) existing legal claims in respect thereof, or alternatively, to the balance of the funds after such (if any) of the private creditors as shall establish subsisting legal claims have been ranked therefor.

The Caledonian Railway Company claimed to be preferred to the whole funds *in medio*, or at all events, to be found entitled to the custody of the funds unless and until any of the former creditors of the Road Trust instructed a right to the same or any part thereof.

The claimants William Alston Dykes and others claimed in four classes. Class A claimed the shares previously unclaimed by them of the surplus revenue for the period ending 30th June 1848, with interest.

Class B claimed the arrears of dividends declared upon their debts prior to 1852.

Class C claimed shares (1) of the sum of £77, 17s. 6d. (being the amount carried to the general dividend account, but not allotted to particular creditors); and (2) of the sum of £740, 17s. 8d. (third mentioned in the summons), in the proportion which their subscriptions bore to the total debt of the road trust.

Class D claimed, after the creditors claiming in classes A, B, and C had been satisfied to share the whole fund *in medio*, in so far as it might avail to repay to each of them respectively the unpaid balances of their original contributions, with interest.

Lord and Lady Rossmore's Trustees claimed (1) a share rateably with other compearing private creditors according to the amounts of their respective original contributions of the sum first mentioned in the summons, and of the unclaimed dividends so far as these sums were unclaimed by the creditors primarily entitled thereto until the amount of their original contributions had been repaid with interest; (2) a share of the sums of £77, 17s. 6d. and £740, 17s. 8d., with accrued interest in the proportion their original contributions bore to the total debt; and (3) a share rateably with other compearing private creditors of the two last mentioned sums with interest after the claims of the private creditors primarily entitled thereto and coming forward to claim had been satisfied.

On 20th June the Lord Ordinary (Moncreiff) pronounced the following interlocutor:—"Repels the claims for the Caledonian Railway Company, No. 28 of process, and the Town-councils of Glasgow and Hamilton and others, being the Road Authorities of their respective districts, No. 27 of process: Sustains the claim for the private creditors or representatives of private creditors, William Alston Dykes and others, No. 30 of process, to the extent of classes A, B, and C of their claim, and *quoad ultra* repels their said claims: Further, as regards the claim for Lord and Lady Rossmore's trustees, sustains the second branch of their claim, comprising both subdivisions, No. 29 of process, and *quoad ultra* repels their said claim: Finds that on the said claimants satisfying the Court as to their title to represent the original creditors, they will be entitled to be ranked and preferred accordingly: Further, as regards the balance of the fund *in medio*, finds that it must remain consigned in bank to await the orders of the Court, and decerns." *

* "OPINION.— . . . To deal first with the claim for the new Road Authorities, who are now substituted for the old Trust on the Glasgow and Carlisle Road, I shall not attempt to examine in detail the ingenious series of pleas stated on their behalf on pages 61 to 63 of the record. Their

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The claimants the Lord Provost and Magistrates of Glasgow and the other Road Authorities and the Caledonian Railway Company, reclaimed.

Argued for the Lord Provost and Magistrates of Glasgow and Others;—By the provisions of the Roads and Bridges Act, 1878, the whole property and effects of the former road trusts were transferred to the new Road Authorities,[1] and they were expressly entitled to receive moneys collected by the officials of the Trusts which they superseded,[2] the scheme of the Act being that the new trustees being rendered liable in all the obligations should also be entitled to all the assets of the old trustees. The reclaimers were therefore entitled to the funds *in medio*. The fact that the funds were held by the treasurer of the old Trust for special purposes could not bar the new Road Trustees from recovering them, if unclaimed by those for whom they were held.[3] The claim of the railway company was excluded as regarded all the funds described in the summons by the terms of the determination of the Secretaries of State. It was also excluded as regarded the funds first and third described by the terms of the agreement of 1846, for they

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claim in substance is, that these funds were assets of the old Trust, which should have been handed over to them under section 108 of the Roads and Bridges Act of 1878, and allocated among them, leaving the creditors to sue for their debts. It seems to be a sufficient answer to this claim that the only authority (the Secretary of State) who, under section 90 of the Roads and Bridges Act of 1878, is empowered to value and allocate the debts affecting such a trust as this and the property and assets belonging thereto, has refused to deal with the funds in question on the ground that they are not assets of the trust. It is said that the private creditors were not parties to the proceedings before the Commissioners appointed by the Secretary of State and the Secretary for Scotland, who was conjoined with him. But it seems to me that the whole provisions of the Act dealing with the valuation and allocation of debts and assets point to the valuation and allocation being made once for all; and if the private creditors' debts and the funds in question can no longer be valued and allocated upon and among the various counties and burghs, I see no means by which the private creditors could make good their claims if the funds were handed over to the Road Authorities collectively as they now demand. If they sued as creditors, they would probably be met with the objection that they have failed to have their debts valued under the statute and cannot now have that done. Accordingly, the creditors claim the funds as set apart for and belonging to them. And this position is justified by the determination of the Secretary of State for the Home Department and the Secretary for Scotland, which proceeds on the footing of excluding these funds from the assets allocated, and has now the force of a statutory enactment (section 90 (4)).

"Apart from this objection to the claim of the Road Authorities, I am inclined to be of opinion that, looking to the way in which these funds were dealt with ever since they were first deposited, they were, at least in any question between the Trust and the private creditors, as completely separated from the assets of the Trust as if they had been deposited in bank in an account in name of the private creditors.

"To deal next with the claim for the Caledonian Railway Company: The railway company now admits the claim of the compearing creditors and

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[1] Roads and Bridges (Scotland) Act, 1878, secs. 11, 32, and 47.

[2] *Ibid.* sec. 108.

[3] Perthshire County Road Trustees v. Committee for Perth District, March 10, 1880, 7 R. 686.

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had already received all they were entitled to under the 5th article of the agreement of the surplus revenue abandoned by Government; and as regarded the fund second described, by the fact that that fund was already appropriated to payment of dividend before the date at which the company took over the rights of the private creditors. The claims of private creditors were not disputed on the merits, except to the extent that they were not entitled to compound interest, or interest upon arrears of dividend,[1] and that they were not entitled to any share beyond the proportion which their original contributions bore to whole road debt.[2] But their claims could not be sustained until they had been valued and allocated.[3]

Argued for the Caledonian Railway Company;—This company purchased the debts due to the private creditors, and by the terms of their agreement had a right to payment out of the tolls of the road after payment of expenses. The company was in the position of assignee of the private creditors, and as such had right to these special funds so far as not claimed by individual creditors. Further, the individual creditors who had come forward were not entitled to a greater proportion of the funds than that which their original contributions bore to the total debt on the road, and they had no right to any part of the sum of £77 which had been carried to the general dividend account prior to Whitsunday 1852,

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representatives of creditors to their own proportions of unclaimed dividends, and other sums set aside for private creditors; but it claims the balance effeiring to those creditors who have not appeared as an accessory of the debt which it purchased. In the view which I take neither the railway company nor the compearing creditors are entitled to that balance. It seems to me that by conceding the right of the compearing creditors to their proportions of the funds, the railway company has admitted away its claim to the balance. It admits to that extent the claim of the compearing creditors, because the unclaimed dividends and other funds were set apart for the private creditors before the railway company's purchase of the debt was completed, and it seems to me that the same reason applies to the balance still unclaimed.

"As to the one-half of the sum given up by Government, that by express agreement (the agreement of 1846) belongs to the private creditors; and if the compearing creditors have no claim to the balance now unclaimed, *a fortiori* the railway company has none. The railway company has claimed and received its proper half in the proceedings before the Debt Commissioners, and in regard to this fund, as well as the others, its claim is specially barred by its actings.

"Lastly, to deal with the case of the private creditors, I have no doubt that they are entitled to the sums specially allotted to them. I am also of opinion that they are entitled to share in the two sums of £77 and £740 not specially allotted to individual creditors, but set aside for the private creditors as a body in the proportion which their debts bear to the total original debt. But as I have indicated as regards the balance which would have fallen to be paid to the other private creditors, had they appeared, in the same proportions, I do not feel justified in allowing them to share in that.

"Before pronouncing a decree of ranking the private creditors must produce satisfactory evidence of title."

[1] Dinham v. Bradford, 1869, L. R., 5 Ch. 519; Companies Act, 1862, First Schedule, Table A, sec. (77); Bankruptcy (Scotland) Act, 1856, sec. 153.

[2] Mellish v. Brooks, 1840, 3 Beavan, 22.

[3] Roads and Bridges (Scotland) Act, 1878, secs. 65, 69, and 90.

but not allocated to individual creditors. That sum passed to the company as the general assignee of the private creditors.[1] The valuation of the Commissioners was not under section 65 of the Roads Act, but section 90. The claim of the company was therefore not extinguished under the provisions of section 69. The valuation also was only a valuation of the debt as chargeable on the general funds of the Road Trust, and the company's claim to special funds in the possession of the trust was therefore not excluded by the determination of the Secretaries of State.

Argued for John Alston Dykes and others, and Lord and Lady Rossmore's Trustees, the compearing private creditors;—The claim of the Caledonian Railway Company was excluded on the grounds stated by the new Road Authorities. As regarded the claim of the compearing private creditors, the sections of the Roads and Bridges Act which provided for the valuation and allocation of debts did not apply to special funds such as those now in question.[2] Claims A, B, and C for Dykes and others, and the second branch of the claim for Rossmore's Trustees, not being disputed on the merits, were therefore rightly sustained by the Lord Ordinary. But the compearing private creditors were further entitled to have the balance of the funds *in medio* divided among them, until they had received repayment of the whole amount of their original contributions, in respect that the funds in question belonged to the private creditors, and they were the only creditors who had come forward to claim. The appropriate form of interlocutor was to rank them "for aught yet seen." The effect of an interlocutor in that form would be to bar creditors who had been cited and had failed to appear, unless they presented a note craving to be reponed within twenty days, in which case they might be admitted to claim on conditions.[3] Parties not cited could be reponed *simpliciter* or on conditions, so long as the fund *in medio* existed;[4] but, in any event, such parties would not be debarred from vindicating their right against the parties to whom payment had erroneously been made.[5]

At advising,—

LORD KINNEAR.—The history of the three sums which form the fund *in medio* in this action is given, as the Lord Ordinary observes, very clearly in the condescendence attached to the summons, and I do not understand that there is any difference between the parties as to the material facts.

It appears that the roads between Glasgow and Carlisle were constructed partly out of public moneys and partly by the subscription of private persons, who thereupon became creditors of the Glasgow and Carlisle Road Trust, and the revenue of the trust, after defraying the expenses of maintenance and management, was accordingly applicable to the payment of interest on the sums subscribed, to the payment of interest on the money

[1] Carron Co. v. Hunter, June 25, 1868, 6 Macph. (H. L.) 1868, 40 Scot. Jur. 546.

[2] Lanarkshire and Linlithgowshire Road Trustees v. Lady Torphichen's Trustees, July 9, 1885, 12 R. 1252.

[3] Beveridge on Forms of Process, p. 183; Duncan's Factor v. Duncan, June 3, 1874, 1 R. 964, *per* Lord Deas, p. 968.

[4] Geikie v. Morris, June 14, 1858, 3 Macq. 347, 30 Scot. Jur. 528; Johnston v. Elder, Jan. 17, 1832, 10 S. 195; Stodart v. Bell, May 23, 1860, 22 D. 1092, 32 Scot. Jur. 501.

[5] Erak. iv. 3, 23; Bell's Comm. (7th edn.) ii. 277.

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advanced by Exchequer, and ultimately to the extinction of the debt by means of a sinking fund. In 1846 an agreement was made between the Caledonian Railway Company and the Road Trustees and certain trustees for the private creditors by which the railway company agreed to buy the debts of the Road Trust to the private creditors for the sum of £15,000, payable at Martinmas 1846, when the right of the purchasers was to take effect. The agreement contained a stipulation that if the Government should be induced to abandon their claim to the surplus revenue funds accumulated in the hands of the treasurer of the Road Trust, the amount so abandoned should be divided equally between the Road Trust and the private creditors. But the railway company did not pay at the stipulated time, and the debts were not, in fact, taken over until Whitsunday 1852. This was the result of a variety of transactions, which it is unnecessary to consider in detail, because the parties are agreed as to the material fact. The pursuers state in the 10th article of the condescendence that the debts were taken over by the Caledonian Railway at Whitsunday 1852, and this statement is adopted and held as their own by the railway company. But at that date there were certain unsatisfied claims for past due interests, and also claims for dividends, which were not carried by the agreement to the railway company; and the funds specified 1st and 2d in the conclusions of the summons are, with accumulations, sums set apart to meet these unsatisfied claims. The fund first described of £232, 16s. 3d. represents the amount, with interest, unclaimed by sixty-three of the private creditors of their shares of the surplus revenue of the trust for the three years ending 30th June 1848. Half the surplus revenue was payable under the agreement to the railway company, and the other half to the private creditors, and the parties are agreed that the portion payable to each amounted to £1557, 15s. 3½d., that a scheme of division shewing the several debts and the respective shares of the various creditors was prepared by the Road Trust or its officials; that £1426 was claimed and paid according to this scheme; and that the balance was set apart or deposited in bank to meet the claims which had not been brought forward.

The second fund consists of unclaimed arrears of dividends which had been carried to the credit of the accounts of individual creditors between the 2d of April 1842 and Whitsunday 1852, with the addition of a sum of £77, 17s. 6½d. which had been carried to the credit of the general dividend account during the same period, and which had not been allotted. These sums amounted together to £1651, 13s. 9d., and with interest to 4th December 1883 they amount to £4165, 10s. 3½d.

These two funds are thus much in the same position. We are not told when or in what terms they were first deposited, and this is probably immaterial. It is clear that they were special sums set apart to meet specific claims. There can be no question as to the purpose to which they were appropriated, or that they would have been paid long ago to the creditors entitled to receive them, if they had come forward to make their claims.

When Mr James Grahame was appointed treasurer of the Road Trust in 1864, he found them to be funds set apart for the special purposes already mentioned. When the trust came to an end by the operation of

the Roads and Bridges Act they were deposited with the interest which had accrued on deposit-receipts, the first being taken in favour of "the creditors of the Glasgow and Carlisle Roads, *per* James Grahame, Esq., treasurer," and the second in favour of "the Glasgow and Carlisle Roads dividend account, *per* James Grahame, Esq., treasurer."

The fund third described in the summons arose in a somewhat different way. In 1887 the attention of the Treasury was directed to this sum, which had accumulated then to £1148, 17s. It was part of a sum set aside to meet old claims and debts in Dumfriesshire. The Government had a claim upon it, but after some correspondence with the Caledonian Railway Company their claim was withdrawn, and the sum left in the hands of the Road Trustees. The sum third described is one-half of the sum so abandoned, the other half having been already paid to the Caledonian Railway Company in terms of the agreement that one-half of the sums to which Government might abandon their claim should be divided equally between the railway company and the private creditors.

It appears to me that if the competition had arisen before the Roads and Bridges Act came into operation, there would have been no reasonable dispute as to the rights of the competing parties. Each of the private creditors must have received his own share of each of these funds and nothing more, and the unclaimed balance, if any, must have remained in the hands of the Road Trustees subject to the emerging claims of the unpaid creditors. The creditors who first came forward could have no right to the shares of the others who had not yet appeared to claim, either because they did not know of the rights arising to them out of long past transactions, or because they did not know that funds were available for distribution. On the other hand, the trustees could not appropriate the funds to other purposes so as to relieve themselves of their liability to meet such claims as might afterwards be well established, because the deposit shews that they had money in hand to meet the claims in question, and also that no preferable claims existed. The claims of the compearing creditors to their several shares must therefore have been sustained, and the remainder of the fund must have been left in the hands of the Road Trustees subject to the legal claims affecting it. The railway company, so far as I can see, could have had no right to participate in any one of the three funds. They could have no more claim to dividends accruing before they took over the debt than the purchaser of land would have to arrears of rent accruing before the date of his entry, and they could have no claim to more than one-half of the surplus revenue or the special fund set free by the abandonment of the claim of the Treasury, because their agreement was that the amount so abandoned should be divided equally between them and the private creditors.

The question, therefore, is whether the rights of parties have been in any way altered by the Roads and Bridges Act of 1878, and it appears to me that the statute and the procedure which followed upon it make no difference whatever, except that the Lord Provost and Magistrates of Glasgow, and certain town-councils and county councils have come in place of the Road Trustees. I agree with the Lord Ordinary that the rights of parties have been fixed by the determination of the Secretary for State and the Secretary for Scotland in so far as they fell within their jurisdiction,

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but I do not quite agree with him as to the effect of that determination. It appears to me to leave the rights of parties exactly as they were before the Act came into operation. The determination was made under the 90th section of the Act on a report of Commissioners appointed to value and allocate the debts of the Trust, because the roads were partly in England and partly in Scotland. The only debt valued, or which was subject to valuation under these proceedings, was that of the Caledonian Railway Company, who had purchased and taken over the rights of the private creditors. They accordingly appeared before the Commissioners as sole creditors, and in the course of the inquiry a question arose between the railway company and the Road Trustees in regard to the funds now in dispute, and we may look at the report of the Commissioners for the purpose of seeing what was the question raised for decision so that we may be enabled to construe the determination itself. It was argued for the Caledonian Railway Company that "in so far as the creditors did not come forward to claim these several funds they passed to the trust, and being trust assets are available for payment of the debts, which now belong to the Caledonian Railway Company." On the other hand the Road Trustees maintained that "as the funds consist of unclaimed shares of capital and dividend existing prior to the settlement with the railway company their title to these sums was expressly excluded, and that any rights they acquired were only rights subsequently emerging; that the money must be held in trust for the creditors who may claim it; that it has ceased to be part of corporation finance, and is only in the trustees' custody to be held for behoof of the parties to whom it may ultimately be found to belong." That was the position maintained by the Road Trustees, and it appears to have expressed the contention put forward by them for the benefit of the private creditors. The Commissioners' report on this point was in these terms:—"The Commissioners find that the three funds referred to do not fall to be paid to the road authorities as forming assets of the trust, and therefore do not fall to be taken into computation in valuing the debt." The Secretary of State and the Secretary for Scotland did not adopt this report in terms, and the variation which they made upon it appears to me to be significant. Their determination was that the funds in question "do not form assets of the trust to be taken into computation in valuing the debt." There may not be any substantial difference between the two findings, but the determination of the Secretary of State and the Secretary for Scotland expresses with greater precision and accuracy the point really decided, and makes it clear that the determination is limited to the question which was within the jurisdiction of the statutory tribunal. They decided that the funds did not form assets of the trust to be taken into computation in valuing the debt. They gave no decision on the question—it was not within the scope of their inquiry to decide—whether the road trustees had a title to continue to hold the funds or to what purposes they might be applicable in their hands. But the determination proceeded on the plea put forward by the Road Trustees that the three funds were not available to meet the claims of the Caledonian Railway Company, because they were not part of the funds of the corporation available for the general purposes of the trust, but had been set apart to meet particular debts; and

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indeed it is obvious that they could only be excluded from the computation on the ground that they were appropriated to a particular purpose excluding general creditors, and there can be no question at all as to what that particular purpose was. The effect, therefore, of the determination of the statutory tribunal was, it appears to me, to leave the rights of parties exactly where they were before the Roads Act came into operation. They have decided absolutely that these funds do not belong to the Caledonian Railway Company, for that is the meaning and effect of their determination, that "they do not form assets of the trust to be taken into consideration in valuing the debt." The Caledonian Railway Company are therefore excluded, and it appears to me that the rights of the private creditors are confirmed, not by the direct operation of the determination but because the determination of the statutory tribunal proceeds upon the acceptance of the contention put forward by the Road Trustees for behoof of the private creditors, and acted upon in such a way as to make it impossible for the Road Trustees to withdraw it if they desired to do so.

I think the right of the compearing creditors to share in each of the three funds must be maintained, and the claim for the Lord Provost and Magistrates of Glasgow and the other authorities repelled. They maintain that the private creditors have no substantial claim, because their rights were not valued in terms of the statute, and are therefore excluded by the statute. But the conclusive answer to that contention is that the claims in question are not claims upon the general funds requiring or capable of valuation, but specific claims to particular funds appropriated to a special purpose. These funds, therefore, could not pass to the new authorities created by statute except subject to the claims arising from the special appropriation previously made. If there were any question as to the effect of that appropriation I think it is removed by the procedure which took place under the Roads and Bridges Act, in which the trustees came forward to plead that the effect of the manner in which these funds had been treated was to give to the creditors for whose benefit they had been set aside exclusive right to the funds, so as to render them unavailable for the general creditors of the Trust. The only question which seems to me to remain is, what is to be done with the balance after payment of the compearing creditors' shares? I agree that neither the compearing creditors nor the railway company have any claim upon it. The compearing creditors have no claim, because their right is only to a proportionate share of the funds which are to be divided equally between them and those creditors who have not appeared to claim. They have no accruing right owing to the nonappearance of other creditors. The dividends were set apart for the private creditors, separately and individually, and I agree with the Lord Ordinary that the sums not specially allocated to the different creditors stand in the same position. The railway company has no claim, both for the reason already given, and because they could have no claim except through their right as purchasers of the debts due by the Trust, and the extent of that right has been finally determined by the statutory tribunal, and on the footing that they have no right to these funds.

The only question then is, whether the balance should remain in Court or be paid to the Local Authorities. It appears to me that the balance

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came into the hands of the real raisers as treasurer and clerk of the Road Trust, and in no other capacity. There is no evidence that they held the funds except as officials of the Trust. The funds were held no doubt by the officials for payment of the particular claims to which they were appropriated, but nevertheless they were held by them as representing the Road Trust. If the Roads and Bridges Act had not been passed, the proper holders would have been the Road Trustees. If the creditors had come forward, they would have received the shares of the money to which they were entitled. If they did not come forward, there was no one else entitled to a dividend. I think the sums stand in the same position now as they did before the Act passed. I see no advantage in keeping the funds in Court, because if that were done none of the creditors could obtain payment except by lodging a claim in this multiplepoinding. The Lord Ordinary has directed that the funds should remain in Court, because if they were handed over to the Road Authorities, creditors coming forward hereafter might be met with the objection that their debts had not been valued under the statute. But if that were a good objection, the claims already made for the compearing creditors should have been repelled. For the reasons which I have given, I consider that the view of the Lord Ordinary on this point is not sound, and that the private creditors who have not come forward to claim have not lost their right to claim. I think, therefore, that we should recall the Lord Ordinary's interlocutor, so far as he repels the claim of the Road Authorities, and ordains the balance to be consigned in bank to await the orders of the Court. Otherwise, I propose that we should adhere to the Lord Ordinary's interlocutor, and, in place of the finding which I have suggested should be recalled, find that the Road Authorities are entitled to payment of the balance of the fund, subject always to their liability to meet the claims of creditors who may establish that they had a good claim against the Road Trustees.

LORD M'LAREN and the LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor, in so far as it repels the claim No. 27 of process for the Town-councils of Glasgow and Hamilton and others, being the Road Authorities of their respective districts, and in so far as it ordains the balance of the fund *in medio* to be consigned in bank to await the orders of the Court: Find that the said Road Authorities are entitled to the balance of the fund *in medio*, subject always to their liability to meet the claims of such creditors as may hereafter establish their rights, and to that extent rank and prefer them in terms of the second alternative branch of their claim: *Quoad ultra* adhere to the said interlocutor, except in so far as regards the finding for expenses, and decern," &c.

J. & A. F. ADAM, W.S.—BRUCE & KERR, W.S.—HOPE, TODD, & KIRK, W.S.—TODS, MURRAY, & JAMIESON, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

ALEXANDER OGSTON GILL AND ANOTHER, Pursuers (Respondents).—*Sol.-Gen. Murray—Salvesen—Younger.*
WILLIAM CUTLER, Defender (Appellant).—*Ure—Hunter.*
WILLIAM COUTTS & SONS, Defenders.

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Patent—Validity—Prior Use.—A paint manufacturer took out a patent for a gold paint made by mixing dissolved liquid pyroxylin with metallic substances in a powdered state. In an action for infringement against a person who was proved to have sold a gold paint of the same chemical composition, the defender pleaded that the patent was invalid by reason of prior use, and proved that prior to the date of the patent he had publicly used and sold his gold paint, which he had made by mixing a compound known as "Hartley's kristaline," of the composition of which he was ignorant, with metallic substances in a powdered state. It was proved that "Hartley's kristaline" was dissolved liquid pyroxylin. *Held* that the patent was invalid by reason of prior use.

Observed that when the validity of a patent is challenged on the ground of prior use, it is sufficient to shew that the invention has been publicly used without proving sale.

Jurisdiction—Sheriff—Interdict—Patent.—A paint manufacturer in Aberdeen brought an action in the Sheriff Court at Aberdeen against a paint merchant there, to have him interdicted from making, using, and selling a paint which the pursuer alleged was an infringement of a patent which he had taken out. After the action was raised a paint manufacturer in Birmingham craved to be sisted as a defender, on the ground that he was the manufacturer of the paint sold by the defender, and thus had the real interest in defending the action. The Birmingham manufacturer was sisted accordingly. Thereafter the original defender withdrew from the action, interdict being pronounced against him, of consent and with the concurrence of the Birmingham manufacturer, and a record was made up between the pursuers and the Birmingham manufacturer, in which the latter raised the question of the validity of the pursuers' patent. After a proof, the Sheriff affirmed the validity of the patent, and granted interdict against the Birmingham manufacturer.

In an appeal, *held* (*diss.* Lord Young) that the Sheriff had jurisdiction to pronounce this interlocutor.

2D DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

IN July 1893 Alexander Gill and William Smith Gill, of the firm of Farquhar & Gill, paint manufacturers, North of Scotland Colour Works, Aberdeen, brought an action against William Coutts & Sons, painters, 216B Union Street, Aberdeen, praying the Court "to interdict the defenders by themselves or by others from infringing the letters-patent number 22610[91], dated and sealed the 28th December 1891, granted to the pursuers for 'improvements in and relating to paints and lacquers,' and in particular to interdict the defenders by themselves or others from making, offering for sale, selling or using without the consent, licence, or agreement of the pursuers a paint in which collodion or dissolved liquid pyroxylin is used as the essential element, this being combined or mixed with bronze or other metallic or alloyed substances in a powdered state, to form a paint or a lacquer for gilding purposes manufactured in the manner described in the said letters-patent and the specification relative thereto,†

* Decided Dec. 13, 1895.

† The subject of the patent was thus described in the specification:—"A paint in which collodion or dissolved liquid pyroxylin is used as the essential element, this being combined or mixed with bronze or other metallic or alloyed substance, in a powdered state, to form a paint or a lacquer for gilding purposes."

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or in manner substantially the same, and from further or otherwise infringing the said letters-patent, and to grant interim interdict," &c.

Immediately after the action was raised William Cutler, manufacturer, Cannon Works, Constitution Hill, Birmingham, lodged a minute, in which he craved to be sisted as a defender, alleging that he was the person really interested in the action, as being the manufacturer of the permanent gold enamel paint which the pursuers sought to have Coutts & Sons interdicted from selling.

Cutler was sisted accordingly.

Thereafter Coutts & Sons lodged a minute, in which they stated that as they had no interest in the letters-patent in question, they, with the concurrence of Cutler, consented to decree of interdict being pronounced against them without damages or expenses. Decree, accordingly, was, on 10th November, pronounced against Coutts & Sons, and the action proceeded thereafter against Cutler as the defender.

A record having been made up, the pursuers averred that they were the inventors of the paints and lacquers known as "Bonaccord Liquid Gold" or "Gold Paint," and that these were duly patented by the pursuers under the letters-patent specified in the prayer of the petition;—(Cond. 5) " . . . A preparation called 'Patent Permanent Gold Enamel Paint,' or 'Permanent Gold Enamel Paint,' and purporting to be manufactured by the defender William Cutler, who describes himself as 'Patentee and Sole Manufacturer, 89 Snow Hill and Cannon Works, Constitution Hill, Birmingham,' has in contravention of the Patents Act of 1883 been made up in style similar to those used by pursuers, and extensively sold throughout Great Britain by defender Cutler, and in Aberdeen by defenders Cutler and Coutts & Sons. . . ." (Cond. 7) "The defender William Cutler has been manufacturing in Birmingham or elsewhere, and selling and using the said preparation throughout England and Scotland in infringement of the pursuers' said patent; in particular, he refuses to desist from the manufacturing, selling, or using of the said 'Patent Permanent Gold Enamel Paint,' or 'Permanent Gold Enamel Paint' . . ."

The defender Cutler did not deny that his gold paint was practically identical with that of the pursuers', and that an infringement of patent had been committed if the pursuers' letters-patent were valid, but he pleaded that pursuers' letters-patent were invalid, in respect that the alleged invention was publicly used, or at least was publicly known, prior to the date of the said letters-patent.

A proof was allowed. The evidence of prior public use founded on by the defender consisted in the evidence that he had publicly used and sold his own paint prior to the date of the pursuers' letters-patent, and in the evidence relating to a similar paint made by James Denham, of Ballantine & Company, painters, Edinburgh. It appeared that about the year 1887 the defender became aware of a preparation called "kristaline," sold by a Mr Hartley of Birmingham, as agent for an American company. Kristaline was in fact pyroxylin, or gun-cotton, dissolved in amyl acetate, and, when mixed with bronze or other metal powder, produced a substance identical with the pursuers' paint. The defender at first used the kristaline, which he bought in open market, as a lacquer, but in March or April 1888 it occurred to him to mix it with bronze powder in order to see how it would act as paint, and finding it successful, he continued to make such paint for use on articles made and sold by him in the ordinary course of his business. There was also evidence that, prior to the date of the pur-

suers' patent, he sold small quantities of the paint to the public—see note of Sheriff-substitute, *infra*. It further appeared that, until after the date of the pursuers' patent, the defender was ignorant of the chemical constituents of kristaline.

The evidence with regard to Denham's paint was in all material respects the same as that relating to the defender's. Denham also was ignorant of the chemical constituents of kristaline.

On 16th January 1895 the Sheriff-substitute (Robertson) pronounced this interlocutor (after findings in fact:)—"Finds with reference to annexed note that the defender has failed to prove as contended by him (1) that there has been prior use or prior knowledge in the sense of the patent laws of the invention set forth in pursuers' said patent either by defender himself or by anyone else." [The Sheriff-substitute then dealt with other grounds of defence.] "Finds that the pursuers are the first and true inventors of the invention as described in said patent, and that defender has infringed said patent; therefore repels the defences, declares the interim interdict already granted perpetual, and decerns: Finds further that the defender is liable in damages to the pursuers; assesses same at the sum of £5 sterling, for which decerns against the defender William Cutler: Finds the pursuers entitled to expenses against the said William Cutler," &c.*

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* "NOTE.— . . . There is no prior publication alleged, but the defender avers, and says he has proved, (1) that he himself made and used and gave to the public his paint, which was an anticipation of pursuers' prior to the date of pursuers' patent; and (2) that the witness Denham, of Ballantine & Company, of Edinburgh, had also used this paint in the sense of the patent law prior to pursuers' patent. (1) As regards defender himself, the facts as proved seem to me to be as follows:—About the year 1887 defender came to know of a preparation called 'kristaline,' sold by a Mr Hartley, in Birmingham, as agent for an American company. Kristaline was sold as a lacquer or varnish, and for about a year after he knew it first defender used it as a lacquer over metal. He was in the way then of using in his business a gold paint made of terebene and bronze powder, and about 1888 he began to coat this with the kristaline. About March or April 1888 accident, more or less, led him to try mixing the kristaline with bronze powder to see how it would act as a paint, when it was found to act very well indeed. From that time up to March 1892 defender states that he continued to make small quantities of gold paint with kristaline. He has only brought evidence of one actual sale of the paint during that period, namely, 5s. worth to the witness Bendall, and that was rather to try as an experiment than in the ordinary course of business; but I think in addition it is clear he gave a certain number of bottles to the French Wreath Company without charge, in order that they might touch up and renew metal-bound glass cases, &c., got from him. Defender's son also (the witness Walter Cutler) speaks to getting 5s. from a Mr Hope for regilding some frames, but that was rather as a gratuity than actual payment. Defender was in the way of using this kristaline as a lacquer as well as a paint, and I find that for both purposes the quantity he got from May 1888 to September 1890 was sixteen quarts, and he continued at about the same rate down to March or April 1892. Keeping in view the amount and nature of prior use so spoken to, and the further fact that when the paint was applied no one could tell what it was composed of, I think, upon the authorities, a nice question might have arisen, whether what defender had done had gone beyond the region of experiment, and was sufficient prior use to exclude a subsequent patent, whether this was 'use in public, so as to come to the knowledge of others than the inventor.' But this case presents another feature, which to my mind seriously alters the complexion of

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The defender Cutler appealed.

At the hearing a doubt was suggested from the Bench as to the jurisdiction of the Sheriff Court to entertain the action against the defender Cutler, and argument was, at the desire of the Court, heard on that point.[1]

The arguments on the merits sufficiently appear from the opinions of the Lord Justice-Clerk and Lord Trayner, and from the note of the Sheriff-substitute.[2]

At advising,—

LORD TRAYNER.—The question in this case upon which the parties are at issue is the validity or invalidity of letters-patent granted to the pursuers on 28th December 1891. The subject of the patent was a certain gold paint and lacquer, of which the pursuers claim to be the first and true inventors, and this action was brought to have the defender interdicted from making, selling, or using (without the pursuers' licence) a gold paint which the pursuers allege to be an infringement of their patent right.

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the alleged prior use. Defender was using kristaline to combine with bronze, &c., powder, but, in point of fact, up to and even after the date of pursuers' patent, in fact, up to the end of March 1892, defender did not know what kristaline was. He no doubt knew it was a lacquer, and that it was called a celluloid lacquer by the sellers, for that appears on some of the invoices, but as to how it was composed he was absolutely ignorant. I think we may take it now as proved (though as to this the proof is not very satisfactory) that kristaline is pyroxylin dissolved in amyl acetate, and that a paint made with it is identical with pursuers' (but even as to this we are pretty much dependent on the analysis of one sample). But at the time when pursuers took out their patent, all that defender knew was that a lacquer with a fancy name, the composition of which he was quite unacquainted with, but which was sold by an American company in Birmingham, made a good gold paint when combined with bronze powder. If the company that sold the kristaline had failed, defender's paint was put a stop to, or if for some reason they had slightly altered the nature of kristaline, it might quite well be that it would have been useless for a paint, and defender would have been helpless. It seems to me that a good test of the matter is this: Had the defender at the date of pursuers' patent discovered enough to take out a patent himself, and had he made this discovery known to the public? I think there can be no doubt this question must be answered in the negative. Defender could not have patented the combination of kristaline and bronze powder without knowing what kristaline was, and if so, his prior use of the article was not of the intelligent and understanding nature which in my opinion would be necessary to come in the way of the pursuers, who had unquestionably honestly invented the paint for themselves. The defender himself was quite conscious of this, for we find both him and his son stating that they were most anxious to find out the composition of kristaline, even

[1] *Authorities cited.*—White v. Spottiswoode, June 30, 1846, 8 D. 952, 18 Scot. Jur. 479; Longmuir v. Longmuir, May 21, 1850, 12 D. 926, 22 Scot. Jur. 406; Waygood v. Bennie, Feb. 17, 1885, 12 R. 651; Erskine Inst. i. 2, 27.

[2] *Authorities cited* (*by the Defender*).—Humpherson v. Syer, 1887, 4 Pat. Off. Rep. 407; King, Brown, & Co. v. Brush Electric Corporation, Limited, July 1890, 17 R. 1266; (*by the Pursuers*) Smith v. Davidson & Wilson, March 11, 1857, 19 D. 691 (*per* Lord President M'Neill at p. 691), 29 Scot. Jur. 327; Hancock v. Somervell, 1851, 39 Newton's London Journal 158; Hills v. London Gaslight Co., 1860, 5 H. and N. 312.

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Before dealing with the question of the validity of the patent, I must advert to a matter not raised by the parties, but upon which some discussion took place before us. The pursuers carry on their business in Aberdeen, and having found that Messrs Coutts & Sons, painters there, were using or selling a gold paint got by them from the defender Mr Cutler, who is a manufacturer in Birmingham, they brought this action originally against Messrs Coutts. As an interdict against them in the terms prayed for would, if granted, interfere very materially with what Mr Cutler regarded as his interests, by practically excluding his gold paint (said to be an infringement of the pursuers' patent right) from the Scotch market, he appeared and craved leave to sist himself as a party to the cause. This leave was granted, and Mr Cutler was duly sisted as a party. Thereafter Messrs Coutts, having no interest to discuss the question of the validity of the pursuers' claims, consented to interdict being pronounced against them, and retired from the case. The case thus came to be an action of interdict at the instance of an Aberdeen firm against a defender resident in Birmingham, and in this state of the facts it was questioned whether this Court could grant any interdict against a defender not subject to its ordinary jurisdiction, whether there was a relevant case for granting such an interdict, and whether such an interdict could be to any extent effectual. Parties were ultimately heard before us on the merits of the cause, without any decision being pronounced on the questions I have just indicated, but it is necessary now to deal with these questions, and I will do so before entering upon what I have said is the question on which the parties are at issue.

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going the length of asking Mr Hartley, the agent for the sale, what it was; and the moment that the son by accident did so, about March 1892, the defender at once applied for a patent. . . .

"On this point, therefore, of prior use by the defender, my opinion is that the prior use even if sufficient in extent to void the patent, which is at least doubtful, was not of a character to anticipate pursuers' patent, in respect the person using had no knowledge or understanding of the composition of kristaline, and therefore did not know the actual materials of which the paint he was making was composed. . . .

"Mr Denham seems to me to have been practically in the same position as Mr Cutler with regard to the matter. He discovered exactly what Mr Cutler did, namely, that kristaline with bronze powder made a good gold paint, and his use of what he discovered up to December 1891 was even less than Mr Cutler's. His whole evidence as to dates is vague, but it is certain he used a very small quantity, and of that he sold nothing, and in no way made his discovery public prior to the date of pursuers' patent. No doubt he spoke to Mr Ballantine about it, but he was his partner, and that was not in any sense making it public. No more was the making of presents of a few articles covered with it, for as already stated, no one getting these articles would know what they were painted with. On this ground, therefore, I should be inclined to hold that Mr Denham had made no public use of the combination prior to December 1891. But further, to my mind exactly the same objection applies to Mr Denham's knowledge as I have found fatal to Mr Cutler's. I don't think he knew what he was using, and I don't think that if the sale of kristaline had been stopped he could have made the paint, at anyrate at first, or without experiments, which, as he is not a chemist, he apparently could not have made himself. . . ."

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In ordinary circumstances, no doubt, Mr Cutler would not be subject to the jurisdiction of this Court, being an Englishman carrying on his business and residing in England. But where he voluntarily submits himself to our jurisdiction, or the jurisdiction of any Court in Scotland, I cannot doubt that he is as much subject to that jurisdiction as if he were a native or resident Scotsman. This has long ago been decided, and of this the cases of *White*[1] and *Longmuir*[2] may be cited as examples. So far as jurisdiction is concerned, Mr Cutler, having voluntarily appeared in the Scots Court as a defender to try the question with the pursuers of the validity of their patent (and that was the question which the pursuers and Mr Cutler joined issue upon), is in the same position as if he had raised in Scotland a reduction of the pursuers' patent. In the latter case he would have been the pursuer of the action; in the present case he is the defender—but the jurisdiction of the Court is the same in either case. Mr Cutler could not be compelled to appear in our Courts in either character, but having voluntarily appeared in our Court, in the one character or the other, the Court has jurisdiction to try and determine the question he submits to the Court, and having such jurisdiction is bound to exercise it. With regard to relevancy, it appears to me sufficient to refer to the fifth article of the pursuers' condescendence, in which it is distinctly averred that the defender Cutler has extensively sold throughout Great Britain and in Aberdeen the particular gold paint which is said to be an infringement of the pursuers' right. If sold illegally in Aberdeen, the Sheriff of that county had the right to interdict it,—the defender charged with the illegal act being competently before him, as in this case I have shewn he was. Nor have I any doubt as to the interdict, if granted, being effectual. The interdict of the Sheriff of Aberdeen, if affirmed by us, would in practical effect be an interdict applicable to all Scotland,—all inferior Judges would follow the judgment pronounced by us. The effect of our judgment, however, goes farther even than that. For the defender Mr Cutler and the pursuers having submitted to a competent Court the question between them as to the validity of the pursuers' patent, any judgment pronounced on that question will be *res judicata* between the parties, and finally determine that question, certainly in Scotland, and probably throughout the United Kingdom. That being so, I have no hesitation in proceeding to the decision of the case from any anticipation that such judgment would be ineffectual. I admit that we could not enforce our interdict by sentencing an Englishman to suffer punishment by imprisonment for breach of interdict, unless we could apprehend him in Scotland. But the interdict granted against him here *causa cognita* could easily be made effectual against him elsewhere. Besides, the question of interdict is a minor question. The real question submitted to us under this application—the question the parties have agreed in asking us to decide—is whether the patent is valid or not, and an application for interdict is a competent and usual mode for raising such a question.

Proceeding now to the merits of the cause, I observe that the defender does not seriously deny that the gold paint manufactured and sold by him is the same as the pursuers', and that an infringement of the pursuers'

[1] 8 D. 952.

[2] 12 D. 926.

patent has been committed if that patent is to be regarded as valid. The pursuers' invention is thus described by them in their complete or final specification:—"A paint in which collodion or dissolved liquid pyroxylin is used as the essential element, this being combined or mixed with bronze or other metallic or alloyed substance, in a powdered state, to form a paint or a lacquer for gilding purposes." The paint manufactured by the defender, which is said to be an infringement of the pursuers' patent, is composed of a liquid called Hartley's kristaline, combined with bronze or other metallic substance in a powdered state. Hartley's kristaline has been well known and been sold commercially from a period considerably anterior to the pursuers' patent. If this kristaline is not "dissolved liquid pyroxylin," then obviously there has been no infringement, for dissolved liquid pyroxylin is the "essential element" in the pursuers' invention. The pursuers, however, say that it is, and one of them in his evidence states that he has analysed the kristaline and found "that it was pyroxylin dissolved in amyl acetate." It follows that kristaline and bronze power combined produce the pursuers' patented paint. It is the pursuers' case that this is so; it is this combination of which they complain as an infringement. Now, I think it is abundantly proved that in the year 1888 the defender made a paint of this combination, and used it both as a paint and as a lacquer in the ordinary course of his business, that the special articles sold by the defender to his customers in trade were painted with this paint; that he has ever since continued to make, use, and sell the same kind of paint; that on more than one occasion prior to the date of the pursuers' patent the defender sold the paint so made by him to persons desiring to use the same, and who did use it as a paint, and that he furnished it, without charge, to trade customers (I refer to the French Wreath Company) at their request, prior to the date of said patent, to enable them to touch up or re-paint articles sold and supplied to them by the defender, which, originally painted by the defender with the same kind of paint, had got tarnished or damaged. I think it is also proved that the witness Denham made the same paint by combining kristaline and bronze powder in February 1891—a date anterior to the patent—and that he and his firm have "continued ever since using this combination." Mr Denham says,—"My company have sold this mixture," but by some oversight, which it is difficult to explain, neither party asked Mr Denham when such sale began to be made. While, therefore, it cannot be said to be proved that Mr Denham or his firm sold this paint before the date of the patent, it is proved that Mr Denham painted or decorated a pair of vases "with this combination," which he gave to a friend in June 1891. It is unnecessary, in support of what I have said, to refer to passages in the proof; they have all been read over by the counsel for the parties more than once, and commented on at length. It is the less necessary to do so, because the Sheriff-substitute's judgment does not proceed on any view of the facts materially different from what I have stated, the only difference probably being that the Sheriff-substitute doubts whether it has been sufficiently established that the defender ever sold the paint which he has made. He does not doubt that he used it himself, and that he gave it away to customers and friends. The question then comes to be, whether, taking the facts as I have stated them (or even subject to the Sheriff-substitute's doubt),

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they amount to proof of prior user. On this question the Sheriff-substitute's judgment is favourable to the pursuers, and I am of opinion that that judgment is erroneous.

I think the Sheriff-substitute has proceeded upon a mistaken view of what it is that constitutes prior use. He seems to think (1) that the pursuers' alleged invention could not be anticipated by the defender's paint unless the latter had been sold to the public; and (2) that it could not anticipate the pursuers' patent unless the public had knowledge "what it was composed of." Neither of these elements are essential to that prior use which will anticipate and so void a patent. In *Betts* v. *Neilson*[1] Lord Chelmsford said that it was not "necessary that the patented article should have been previously manufactured for sale," and it is the result of several decisions (see Edmonds on Patents, 43), and writers on patent law are agreed, that actual sale of the article said to anticipate the patent need not be proved in order to constitute prior use. The words of the letters-patent themselves, indeed, lead to this view, for there the patent is declared void if the invention has been in prior "public use," which, of course, might very well exist without public sale. Then as to the notion that the public must know what the article is "composed of" before it can anticipate a patent, I think the Sheriff-substitute has fallen into error by misapprehending the statement often made that there must be disclosure as well as use. But that disclosure does not mean that the public shall know as much about the article used as the maker of it knows. It means that the thing must be disclosed to the public and not kept by the maker of it to himself. It is the use of the thing in public, as distinguished from the use in private by the inventor—public user involves disclosure. In the case of *Carpenter*[2] a patented lock was held to have been anticipated by the fact that a similar lock had been used by "an individual on a gate adjoining a public road." There was no suggestion in that case that the lock on the gate had been examined by any member of the public so as to ascertain its peculiar construction, or that any such examination or knowledge arising therefrom on the part of the public was necessary to constitute public use. Public use, as Lord Abinger said in *Carpenter's* case[2] (and the *dictum* is quoted with approval by Lord Chelmsford in the case of *Betts* v. *Neilson*[1]), "means a use in public, not by the public." I think there is no room for doubt that the use by the defender of his own paint was of this character. It is quite true (and perhaps this may be what was passing through the mind of the Sheriff-substitute) that in order to obtain letters-patent the inventor must disclose his secret to the public in return for the temporary monopoly conferred upon him. But such a disclosure as that is not necessary to the prior use, which will anticipate and so void a patent. The Sheriff-substitute, however, does not proceed to his conclusion in favour of the pursuers upon the ground that prior use had not been sufficiently established with so much confidence as he does upon another ground. He says,—"The prior use, even if sufficient in extent to void the patent, which is at least doubtful, was not of a character to anticipate pursuers' patent, in respect the person using had no knowledge or

[1] L. R., 4 Ch. Ap. 436.

[2] 9 M. and W. 300.

understanding of the composition of kristaline, and therefore did not know the actual materials of which the paint he was making was composed." In this opinion I cannot concur. The defender found in the market an article called kristaline, and he found another called bronze powder. He combined them, and got a gold paint. But, according to the view of the Sheriff-substitute, the combination is not his invention, nor can its use anticipate the same invention by another, because he cannot tell what are the constituents, chemically or otherwise, of the articles he has combined. How far back is his knowledge to go? Suppose he had analysed the kristaline and found that it was dissolved pyroxylin, must he then proceed to find out what pyroxylin is, and what the solvent was? If this is required from the defender for anticipation, what is to be required from the pursuers for their patent? They are in the dark as to the chemical constituents of their pyroxylin. They supply a formula descriptive of it, but the pyroxylin so described will not dissolve in ether or alcohol, or other solvent of that type (for so I think the words "or other solvents" in the specification must be read), as they say it will. But if it was enough for them, as I think it would have been, without giving any formula, to say that their invention was dissolved pyroxylin combined with metallic powder, why should it not be enough to anticipate the patent for the defender to say that he had used or sold paint composed of metallic powder combined with kristaline—kristaline and dissolved pyroxylin being the same thing? That the defender did not know the composition of kristaline was of no importance to the public who took and used his combination, and who could have bought kristaline under that name in the market; it was of no use to the defender beyond this, that if he had known the constituents of kristaline he could have made it for himself instead of buying it ready made. The Sheriff-substitute does not seem to notice that neither the pursuers nor defender is asked how they make bronze powder, the other substance used in the combination, or whether they know of what it is composed. I suppose, however, a knowledge of that is as essential—or non-essential—as a knowledge of how to make kristaline.

I am of opinion that the prior use by the defender of his gold paint was an anticipation of the pursuers' patent, and that that patent is consequently void.

LORD JUSTICE-CLERK.—The pursuers hold a patent for a paint for gilding. It specifies as an essential element of the composition that collodion—that is, pyroxylin or gun-cotton—dissolved in ether or some other solvent named, is used by mixing with it bronze or other metallic powder to form a paint or lacquer for gilding purposes. They petitioned for interdict against a firm—Messrs Coutts of Aberdeen—to prohibit them from selling a certain gold paint in infringement of their patent rights. These defenders did not consider that they had any sufficient interest to impugn the validity of the pursuers' patent, and consented to interdict, but the defender Cutler, who was the maker of the paint sold by them, craved leave to be sisted as a defender to defend the action, and he was accordingly sisted, and the case proceeded before the Sheriff-substitute.

His defence truly takes the form of an attack upon the pursuers' patent

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as having been anticipated by prior user of the combination which they claim. The case went to proof on this defence, and the Sheriff-substitute has upheld the pursuers' patent and granted interdict. I am unable to agree with the judgment he has pronounced, and am of opinion that the defence based on allegation of prior user has been sufficiently established.

The materials used in the paints of the pursuers and the defender are the same. It is not disputed that Hartley's kristaline which the defender uses is just dissolved pyroxylin—indeed it is proved by the pursuers that Hartley's preparation is just pyroxylin dissolved in amyl acetate, and it is of course on the ground that they are the same that they maintain infringement of their patent.

The defender, admitting that his article is the same, maintains that the pursuers' patent was anticipated, as he made and publicly used the paint in 1888, and up to the time of the taking out of the pursuers' patent in 1891 continued to do so. I am of opinion that the defender has proved that he made this material and used it in his business, that he sold articles made in the ordinary course of trade which had been gilded by it, and that he supplied the mixture itself to customers for practical use in touching up articles gilded by him with this paint and supplied by him in the course of business, also that he gave a bottle of it to a customer to gild a frame with it. The evidence upon this part of the case seems to me to be conclusive, and indeed the view of the Sheriff-substitute himself upon this matter is in accordance with what I have expressed. I would only make this additional remark, that the law as laid down in the decided cases does not require that there should be actual sales to the public, but only such public use as brings the subject of the patent to the knowledge of members of the public, as distinguished from mere secret and experimental use, such as a private trial, with a view to consideration of the value of the invention before taking out a patent. I hold also that it is established that Mr Denham also made and used the same article prior to the pursuers' patent.

But the Sheriff-substitute seems to have been led away by the idea that even if the defender used publicly a combination the very same as that afterwards patented by the pursuers, such use would not invalidate the patent if the defender were at the time ignorant of the analytical details of any substance they used in making their combination. He expresses this very distinctly. I cannot agree with this view of the Sheriff-substitute, which seems to have been a view that the defenders themselves also had in their minds. I hold without doubt that if anyone discovers a useful and valuable combination of substances for some purpose of trade, and uses and sells that combination publicly, then such user is sufficient to prevent any other person from afterwards effectually protecting the same combination by a patent as being a new invention of his own. There is no novelty, and therefore there can be no good patent, which must be the disclosure of an invention of novelty. If a known article that can be bought in the market is called by a patentee by its own name in describing a combination of it with other materials as being his invention, it would not be a good objection to his patent to aver that the patentee did not know the chemical ingredients of the article named, nor disclose its chemical composition in

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his specification. Equally it must hold that if such a combination is publicly used, it is an anticipation of a subsequent patent, although the person who made it up and used it was not aware of the constituent elements of a particular article obtainable in the market, which formed one ingredient of the combination. I have no doubt in holding that if public user is made of a combination of articles purchaseable in ordinary trade, that is public disclosure of the combination, so as to make the obtaining of effectual rights by patent for the combination at any subsequent time impossible,—it is a use in a public way of the combination which is in question, and not a conveying to the public mind of minute details about the composition of ingredients. Here the defender put together certain articles obtainable in the market, and produced a useful article by the combination, and he used this combination in his business, and sold and gave it for practical use to his customers. That seems to me to make the validity of a subsequent patent for an article which is made by precisely the same combination not maintainable. I therefore would move your Lordships to recall the Sheriff-substitute's interlocutor, and to pronounce findings to the effect that the alleged invention of the pursuers was publicly used and known prior to the date of the letters-patent founded on by the pursuers, and accordingly that the prayer of the petition falls to be refused.

LORD YOUNG.—I have given all the attention in my power to this case, all the more so because my opinion and views differ, not only from those of both parties, but also from those which both of your Lordships have adopted regarding the regularity of these proceedings. I think that it is material that attention should be directed to the irregularity of these proceedings almost from the first. The petitioners are paint manufacturers in Aberdeen, and in 1891 obtained letters-patent for a certain paint which they believed they had invented. The appellants, who became the respondents in this petition, are paint manufacturers in Birmingham, carrying on the same kind of business in Birmingham as the pursuers carry on in Aberdeen. It appears from all the statements of the petitioners before us and their averments on record that the respondents, the Birmingham manufacturers, made and put into the market paint which the petitioners thought was an infringement of their patent—(Here his Lordship read articles 5 and 7 of the condescendence as quoted in the narrative). Now, I think that it is quite distinctly stated, and it is apparently in accordance with fact, that Cutler had for a considerable period before 1893 been manufacturing paint in Birmingham, which the petitioners believe, I have no doubt on plausible grounds, to be an infringement of their patent, and that he has put that into the market in England, in Scotland, and abroad. One would have supposed that a patentee, whether he was in Aberdeen or in Birmingham, or wherever he was, if he wished a legal remedy, would proceed in the ordinary way by action in a proper Court which could effectually try the question and give the proper remedy. But the Aberdeen patentees selected one particular retail dealer in Aberdeen, and they might equally well have selected a dealer in Kirkwall, and said,—"You have got some of the paint of the Birmingham infringer, and we will try the question of his infringement with you here in Aberdeen." I do not for a moment question

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the jurisdiction of the Sheriff Court of Aberdeen to try the validity of a patent right, and whether there has been an infringement of a patent right by a retail dealer. I quite understand that the Sheriff of Aberdeen has jurisdiction to restrain any infringement of a patent, though I do not think he could decide as to the validity of this patent. The Sheriff, in the exercise of his discretion, should have granted interdict on caution, but should have sent the petitioners to try the validity of their patent elsewhere with the real infringer.

I quite appreciate what Lord Trayner said, that when this extraordinary, I do not say irregular, petition was presented, the man really interested in this petition, viz., the manufacturer in Birmingham, might have come forward and said that the interdict would interfere with his business, and that he would appear and defend, so that no interdict would be pronounced. That is indeed the only rational ground for the Birmingham manufacturer's appearance in the case at all. But the first thing he does after appearing is to consent to the interdict prayed for being granted against the original defenders, therefore he was not there to prevent interference with his business by Coutts & Sons being interdicted. Then what reason was there for his appearance? It could not be to prevent interdict against himself; there was no question of that. Was it to get this case tried in Aberdeen? I have not been able to find any rational ground for his interference, unless it be that the Birmingham manufacturer was sagacious enough to know that if the other firm was so foolish as to expose their whole case in Aberdeen, it would be the best possible thing for him. He would have the case tried, and his opponent's case disclosed, before a Judge who was absolutely incompetent to deal with him, and who could not prevent him from selling the paint in Birmingham.

Cutler cannot have sisted himself to defend Coutts & Sons, because the first step taken was to interdict them by a now absolutely final judgment; they are absolutely interdicted, therefore no one could by sisting prevent that—the only interdict asked—being granted. I think that this was as irregular a proceeding as could be. It is said that there was a conclusion for damages and that this transferred to Cutler. But there was no conclusion for damages against Cutler as the petition originally stood, so that the only damages could be against Coutts & Sons for what Coutts & Sons sold. What did they sell? There is no evidence on the point, but it is said a few shillings' worth. There is no allegation against Cutler for which damages could be given. Suppose an action of damages brought against the retail dealer who sells the paint. I suppose the action could be brought in the Small-Debt Court, but whether there or in the Sheriff Court, the idea of the inferior Court entering into the question of the validity of the patent, or as to whether it had been infringed by a firm in Birmingham, in an action of damages against one of a thousand retail dealers who sold a bit of it—is that rational? I altogether condemn this course of procedure. There is no precedent for it. Such a thing never occurred before, and I hope will never occur again. I think that the only regular course was for the Aberdeen manufacturers to proceed against the Birmingham manufacturer who manufactured and put in the market paint which was an infringement of their patent, and to proceed against him before a Court which could deal with him and restrain him from doing what was wrong.

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This procedure would lead to this, that a patentee in Birmingham might arrange with another manufacturer in the next street to try the question in the Sheriff Court of Aberdeen against some Aberdeen retail dealer to determine the validity of his patent.

I feel so strongly that this case is so unprecedented and so inexpedient that I must express my strong condemnation of it. Holding this view, I think it more in accordance with my duty to refrain from expressing any opinion on the question whether the manufacture in Birmingham of the paint in question was an infringement of the patent rights of the Aberdeen manufacturer.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact (1) that the pursuers have obtained letters-patent dated 28th December 1892, numbered 22160[91], for improvements relating to paints and lacquers; (2) that the invention for which said letters-patent were granted is described in the complete specifications by the pursuers as a paint in which collodion or dissolved liquid pyroxylin is used as the essential element, this being combined or mixed with bronze or other metallic or alloyed substances in a powdered state to form a paint or a lacquer for gilding purposes; (3) that the defender Cutler in the year 1888, and from that date down to the 28th December 1891, made, sold, and publicly used, both as a paint and a lacquer for gilding purposes, a paint composed of dissolved liquid pyroxylin combined or mixed with bronze powder or other metallic substances, and that he has since said 28th December 1891 continued to make, sell, and publicly use the same; and (4) that the paint so made, sold, and publicly used by said defender was the same as that for which said letters-patent were granted: Find in law that the pursuers' letters-patent foresaid are invalid and void on the ground of prior public use: Therefore assoilzie the defender Cutler from the whole conclusions of the action, and decern."

ALEXANDER MORISON, S.S.C.—DALGLEISH, GRAY, & DOBBIE, W.S.—Agents.

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Magistrates of Edinburgh v. Magistrates of Leith.

THE LORD PROVOST AND MAGISTRATES OF EDINBURGH, Petitioners.—*Comrie Thomson—Boyd.*
PROVOST AND MAGISTRATES OF LEITH, Respondents.—*Asher—Salvesen.*

Public Health—Burgh—Erection of hospital—Antecedent Approval of Local Government Board—Conditional Approval—Public Health (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 39—*Local Government (Scotland) Act*, 1894 (57 *and* 58 *Vict. c.* 58), *sec.* 3.—The Public Health (Scotland) Act, 1867, sec. 39, empowers Local Authorities to build hospitals, "provided" the Local Government Board "approve of the situation and construction thereof."

In an application by a burgh Local Authority to the Local Government Board for the approval of the site and plans of a temporary cholera hospital the Board gave its approval thus,—"The Board approve of the site subject to the following conditions . . . 4. That all infected matter (other than clothing, which, if to be used again, must be duly disinfected) is to be disposed of by means of an incinerator . . .

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"The Board approve of the plans, subject to provision being made for the proper disinfection of clothing."

Held that this was a valid approval by the Board, under section 39.

Public Health—Burgh—Erection of hospital by Local Authority "within a convenient distance" from its own district—Right to erect within neighbouring burgh—Public Health (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 39—*Public Health Amendment (Scotland) Act*, 1890 (53 *and* 54 *Vict. c.* 20), *sec.* 1.—Under the Public Health Acts a burgh Local Authority may with the approval of the Local Government Board erect a hospital within its own district, "or within a convenient distance of such district."

Held that the Local Authority of a burgh, with the approval of the Local Government Board, might erect a hospital within the district of a neighbouring burgh.

1st Division. Dean of Guild Court, Leith.

In July 1895 a petition was presented by the Lord Provost and Magistrates of Edinburgh to the Leith Dean of Guild Court for a warrant to erect a temporary cholera hospital on the lands of Quarryholes, within the burgh of Leith, which they alleged belonged to them. The First Division of the Court, upon 29th October 1895 (*vide supra*, p. 44), recalled an interlocutor of the Dean of Guild Court refusing the petition, and remitted the cause to that Court to proceed.

On 22d November 1895 the Local Government Board for Scotland, who by section 3 of the Local Government (Scotland) Act, 1894 (57 and 58 Vict. c. 58), came in place of the Board of Supervision, dealt with the application by the Edinburgh Corporation for approval of the site and plans in the manner set forth in the following minute:—"Temporary Hospital at Quarryholes.—The application of the Local Authority of Edinburgh for the approval of the Board to the site and plans of a temporary hospital to be erected at Quarryholes, within the boundaries of the burgh of Leith, as shewn in the Ordnance Survey map, was further considered by the Board. Having made inquiry, the Board, in terms of section 39 of the Public Health Act,* approve of the site, subject to the following conditions:—1. That the approval of the Board is, in the meantime, limited to a period of three years only. 2. That the hospital is to be used for the treatment of cases of cholera only. 3. That the drain from the hospital joining the main in Easter Road is to be used for non-infected matter only. 4. That all infected matter (other than clothing, which, if to be used again, must be duly disinfected) is to be disposed of by means of an incinerator, to be placed in a convenient situation. The Board approve of the plans, subject to provision being made for the proper disinfection of clothing."

On 18th November the Provost and Magistrates of Leith were sisted as parties to the process, and a record was made up and closed on 2d December 1895.

* The Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101), sec. 39, enacts,—"The Local Authority may provide within their district hospitals or temporary places for the reception of the sick, for the use of the inhabitants.

"Such Authority may build such hospitals or places of reception, provided the Board approve of the situation and construction thereof . . ."

The Public Health Amendment (Scotland) Act, 1890 (53 and 54 Vict. c. 20), sec. 1, enacts,—"In the application of secs. 39 and 42 of the Public Health (Scotland) Act, 1867, to burghs, the said sections shall be read and construed as if the words 'or within a convenient distance of such district' were inserted after the word 'district' where it first occurs in each of the said sections. . . ."

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The petitioners averred,—(Cond. 5) "The said ground lies within a convenient distance of the burgh of Edinburgh, and is within the jurisdiction of the Dean of Guild Court of Leith, and the respondent William Beatson, master of works, who is cited for the public interest, has alone any interest in the operations proposed to be executed. The said hospital is to be used for the treatment of cases of cholera only. The drain from the hospital joining the main in Easter Road is to be used for non-infected matter only. All infected matter (other than clothing, which, if to be used again, will be duly disinfected) is to be disposed of by means of an incinerator on the premises."

The respondents averred,—(Stat. 6) "The petitioners, the Lord Provost, Magistrates, and Council of Edinburgh now propose to erect an hospital for infectious diseases upon a site which is outwith their own burgh and within the burgh of Leith. The site so chosen is unsuitable. . . ."

They further averred that the petitioners had not received any sufficient approval of the situation and construction of the proposed hospital by the Local Government Board under section 39 of the Public Health (Scotland) Act, 1867.

The petitioners pleaded;—(4) The respondents' answers are irrelevant. (5) The site of the proposed hospital being within a convenient distance of the burgh of Edinburgh, and the hospital being required for public health purposes, warrant for its erection ought to be granted. (6) The Local Government Board having approved of the site and plans of the proposed hospital, and no valid objections having been stated by the respondents to the structures, the petitioners, the Lord Provost, Magistrates, and Council of the city of Edinburgh, as representing the community thereof, are, in the circumstances condescended on, entitled, as Local Authority foresaid, to warrant to erect as craved.

The respondents pleaded;—(1) No title. (3) It being illegal for the Lord Provost, Magistrates, and Council of Edinburgh to erect an hospital within the burgh of Leith, the prayer of the present petition should be refused, with expenses. (4) The approval of the Local Government Board not being in conformity with the provisions of the Public Health (Scotland) Acts, the petitioners are not entitled to obtain warrant for the erection of the proposed hospital buildings until said approval is obtained in terms of the statute, and produced to the Court. (5) The approval of the Local Government Board, being *ultra vires*, is inept and insufficient as a warrant for the erection of said hospital buildings.

On 16th December the Dean of Guild sustained the first, third, fourth, and fifth pleas in law for the respondents, and dismissed the petition.*

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* "NOTE.— . . . The fourth and fifth pleas in law for the respondents raise a different question, and one of general importance. . . .

"It appears plain that, if the result of the petitioners' application had been a refusal by the Local Government Board to approve of the situation and construction of the hospital for the erection of which warrant is craved, the Court would have had no option but to dismiss the petition. Does its conditional approval, as expressed in these letters, satisfy the provisions of section 39? The Court are of opinion that it does not. There is no authority in the Act for the approval of the Board of the situation and construction of a proposed hospital being for a limited time or for the treatment of one class of infectious diseases only. The situation and construction must

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The petitioners appealed, and argued;—(1) It was incompetent for the Dean of Guild to decide questions of nuisance. The jurisdiction of his Court was confined to questions of building. Interdict was the respondents' proper remedy.[1] (2) It was true that the approval of the petitioners' scheme by the Local Government Board was an approval subject to conditions, but it was sufficient under section 39 of the Act of 1867. Under that section the Board had right to give an absolute approval, and that involved the right to give a qualified approval. (3) The Public Health (Amendment) Act, 1890, placed no restriction upon the territory which a burgh might invade except only that it must be within a convenient distance of the burgh.

Argued for the respondents;—(1) The Dean of Guild was quite entitled to decide the cause upon the grounds set forth in his note.[2] (2) The approval of the Local Government Board must, under section 39, be an absolute approval. It was, however, conditional (*a*) on something being done which was not shewn on any of the plans, and (*b*) on a certain use being made of the hospital after it was built. The Board had in short given their approval to what was upon their own

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be such as the Board can unconditionally approve; and the mere fact that the Board have limited their approval to a period of three years seems to indicate that they were not in a position to give an approval in terms of the Act. The district in question is known to the Court to be one in which a considerable amount of feuing has recently been going on, and which might reasonably be expected, in ordinary course, to be entirely built upon within a comparatively short period. The site of the proposed hospital is within a comparatively short distance of Easter Road, which is rapidly becoming an important thoroughfare in Leith; and the Court infer, from the terms of the minute in question, that the Local Government Board did not feel themselves in a position to give an unqualified approval of the site for the purposes of an infectious diseases hospital, on that, among other grounds. The petitioners' agent expressly refused to make any restriction or amendment on the prayer of his petition, and accordingly, if warrant were granted as prayed for, the petitioners would obtain something more than, on their own shewing, they are entitled to demand. It may also be noted that, if warrant were granted in the form prayed for, the Local Authority of Leith would, apparently, have no power to insist upon the conditions laid down by the Local Government Board being implemented, more especially in reference to the use of their drain in Easter Road, which, it is proposed, should receive the discharges from the proposed hospital. The Court accordingly have sustained the fourth and fifth pleas in law for the respondents, which embody these contentions.

"The third plea raises the question whether the Local Authority of one burgh is entitled to erect an hospital for infectious diseases which it deems necessary for the use of its inhabitants within the precincts of another burgh which happens to be in close proximity. Had section 39 of the Act of 1867 alone fallen to be considered, there would be no dubiety upon this point; but the petitioners contended that, by the Act of 1890, any restriction as to the invasion of the districts of neighbouring Local Authorities was entirely removed, whether that Local Authority was a burgh or a parish, provided only the site selected was 'within a convenient distance' of the district whose Local Authority desired to erect the hospital. If the words are construed literally, and without regard to the presumed inten-

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[1] Donaldson v. Pattison, Nov. 14, 1834, 13 S. 27, 7 Scot. Jur. 43; Colville v. Carrick, &c., July 19, 1883, 10 R. 1241; Kirkwood's Trustees v. Leith and Bremner, Dec. 20, 1888, 16 R. 255.

[2] Pitman v. Burnett's Trustees, Jan. 26, 1882, 9 R. 444.

minute an incomplete hospital. (3) The theory of the Public Health Amendment Act, 1890, was that burghs might be too densely populated to admit of an hospital being built within their own district, and section 1 contemplated their invasion of the territory of thinly populated landward districts for the purpose.

The respondent abandoned his first plea.

LORD PRESIDENT.—The Local Authority of the burgh of Leith have stated objections to the prayer of this petition being granted, and the grounds of these objections are brought together in six pleas in law. My opinion is that each and all of these are ill founded. It was conceded by the respondents that the sustaining by the Dean of Guild of the plea of no title to sue was an error, and, accordingly, I do not further comment upon that point than to say that I think the respondents are extremely well advised in the course they have followed.

The next question is whether the Local Authority of Edinburgh have obtained the approval of the Local Government Board, which is an indispensable pre-requisite of their proceeding to build an hospital under section 39 of the Public Health Act of 1867. My opinion on that point is, that they have obtained the approval of the Local Government Board of the situation and construction of this hospital. As regards the situation, there can be no doubt, because the Board of Supervision in express terms approve of the site. The only question, therefore, raised is whether they have approved of the construction of the proposed hospital. Now, that stands in this position: On the face of the minute of the Local Government Board to which I have referred it appears that the Board had before them the plans of this hospital, and the Board approved of the plans, subject to provision being made for the proper disinfection of clothing. From the fourth articulated head of their

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tion of the Legislature, there is no doubt that the site in question fulfils this condition. It appears, however, to be equally plain that such a result was not contemplated by the amending statute, the object of which was to enable a burgh which within its own precincts could not find a convenient site for an infectious hospital to go into the surrounding country with a view of obtaining a site there. The enactment applies only to burghs, and no reason was suggested why it should have been passed other than that above stated. If, however, the contention of the petitioners is sound, the position of Leith, which, in common with other burghs was entitled to the benefit of section 1 of the amending statute, is considerably altered for the worse. Under the previous Act, while Leith was bound to find accommodation within its own district for its own hospitals, it was entitled to exclude the hospitals of other Local Authorities. On the petitioners' contention, however, the amending statute would enable the Magistrates of Edinburgh to plant all the hospitals they proposed to erect within the precincts of the burgh of Leith, subject only to the control of the Local Government Board. The Court does not think that this could have been the intention of the Legislature, and that the second clause of section 1, which provides that 'for the purpose of the said Act, any hospital or temporary place for the reception of the sick, provided within a convenient distance of a burgh, shall be held to be within the burgh,' sufficiently shews that the sites contemplated by the statute were sites outwith the boundaries of any burgh. In short, that the object of the amending statute was to enable the Local Authorities of burghs to invade landward districts for the purposes of the Act, but not to invade each other's territories."

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conclusions, which precede what I have read, it appears that the infected matter other than clothing which must be duly disinfected, is to be disposed of by means of an incinerator.

Now, I do not think that it is necessary, in order to satisfy the terms of section 39, that the Board of Supervision should have before them detailed plans of every minute particular of the hospital as it is to be carried out. In the present case they, accustomed to the use of such things, and knowing the Local Authorities of towns to be accustomed to their use and provision, say merely,—"We approve of the plans, but you must have an incinerator." That, I think, is a good approval of the hospital in question,—this adjunct or detail being one which is to be provided by the Local Authority, but which does not enter as a vital element into the construction of the proposed hospital.

But the matter does not rest there, because on this expression of the opinion of the Local Government Board the Local Authority of Edinburgh present their application, or rather I should say amend their application, so as to completely square with the requirements of the Local Government Board, for the Dean of Guild Court of Leith is now asked not to approve of the construction of the plans without an incinerator but with an incinerator. How that is to be worked out will manifestly be a matter for the good sense and business habits of the parties who have to deal with it.

It may be that it would be convenient if the petitioners were to submit detailed plans of the incinerator to the Local Government Board, in order that they may indicate their views upon that matter. But even supposing that, as a matter of convenience or expediency, to be the course adopted, that does not enter into what we have now to consider, viz., whether the petitioners have not obtained the antecedent approval of the construction of the hospital which is required under the 39th section. I think that they have.

I should say that the other so-called conditions of the Local Government Board seem to me to stand in a different position altogether. I do not think that they are in any sense at all conditions of the approval of the site and the construction of the hospital. They are merely a very well-timed notice, given by the Local Government Board to the Local Authority, that, in the use of this hospital which is to be constructed, they must attend to certain particulars of use and administration. The Local Government Board has complete power to enforce their views upon such matters on a Local Authority, and the mode of doing it is brought out quite clearly in the Public Health Act. If they thought that their views were not being given effect to in this hospital, they would ask for explanations from the Local Authority, and if these were unsatisfactory or were refused, they have power under the Public Health Act to send down some skilled person to make inquiry into the matter, and on his report being obtained, if the Local Authority were in fault, the Local Government Board have power to come to this Court by summary petition to obtain an order requiring fulfilment of the prescribed duties in that regard. And accordingly, so far as matters other than an incinerator are concerned, I treat them not as conditions of the approval of the construction, but merely as a timely intimation that in the use of this hospital certain things will be required.

Now, the next plea which has been sustained by the Dean of Guild

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relates to the construction to be put upon the Act of 1890. Under the 39th section of the Act of 1867, which I have hitherto alone referred to, the Local Authority were entitled to provide hospitals, but they must confine themselves to their own district.

But the Act of 1890 enables burghs to pass out of their own district and take ground for an hospital within a convenient distance of such district. Now, it is said that because this power to invade a neighbouring district is conferred upon a burgh, it therefore follows that the invaded territory must necessarily be a landward district. I confess that seems to me a complete *non sequitur*. What is required is merely that the burgh is to be enabled to take ground, subject, of course, to the approval of the Board of Supervision, where ground is to be had more easily or conveniently. As we know, many burghs, except in the matter of jurisdiction, are really, as regards part of their area, country districts, and many burghs also have more free land than their contiguous neighbour burghs; but to say that you must go to the country to get land seems to me to interpolate into the statute a limitation which is certainly not expressed in it, and which does not seem at all congenial to the theory of expediency and convenience which animates the enactment.

Now, I think that that is the last of the pleas which have been maintained in argument at the bar, and I consider that the proper result is that all the pleas stated by the burgh of Leith should be repelled.

I suppose your Lordships will necessarily, in repelling these pleas, remit to the Dean of Guild Court to proceed as shall be just. The remaining matter, therefore, will be the examination and approval of the plans, and I cannot doubt that these matters will be treated in the business-like spirit proper to the Dean of Guild Court.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT sustained the appeal, recalled the interlocutor of 16th December 1895, repelled the pleas in law for the respondents, and remitted to the Dean of Guild Court to proceed as shall be just.

WILLIAM ASHER, S.S.C.—IRONS, ROBERTS, & Co., S.S.C.—Agents.

No. 76.

Jan. 14, 1896.
Gibson v. Clark.

1ST DIVISION.

JOHN GILCHRIST CLARK, Defender (Petitioner).—*Clyde.*
ALEXANDER GIBSON, Pursuer (Respondent).—*W. Thomson.*

Appeal to the House of Lords—Interim execution pending appeal—Application for leave to appeal in forma pauperis.

(SEQUEL of case reported *supra*, p. 294.)

The First Division of the Court, by their interlocutor, dated 29th November 1895, adhered to the interlocutor of the Lord Ordinary, which assoilzied the defender and found him entitled to expenses, and found the defender entitled to additional expenses. The pursuer having appealed to the House of Lords on 17th December 1895, the defender presented a petition for execution pending appeal in terms of the Act 48 Geo. III. cap. 151, sec. 17, and referred to the undernoted authorities.[1] The pursuer opposed the petition on the ground

[1] Cochrane v. Bogle, Dec. 11, 1847, 12 D. 302; M'Beath v. Forsyth, Oct. 25, 1887, 15 R. 8.

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that it was entirely within the discretion of the Court to grant or to refuse execution, and that it was premature and inexpedient to grant it here, as the pursuer had presented an application to the House for leave to prosecute his appeal *in forma pauperis*, and the application had not been disposed of by the Committee.

THE COURT, holding that the rule of practice was clear, and that there was nothing in the present case to take it out of the rule, pronounced the following interlocutor:—"Having considered the petition of the defender, John Gilchrist Clark, for execution pending appeal, and heard counsel for the parties, remit the account of expenses found due by the interlocutors of 27th June and 29th November 1895 to the Auditor, to tax, and to report."

WEBSTER, WILL, & RITCHIE, S.S.C.—THOMAS M'NAUGHT, S.S.C.—Agents.

No. 77.
Jan. 14, 1896.
Religious Tract and Book Society v. Inland Revenue.

RELIGIOUS TRACT AND BOOK SOCIETY OF SCOTLAND, Appellants.—*Cook.* R. S. FORBES (Surveyor of Taxes), Respondent.—*Lord Adv. Sir Charles Pearson—A. J. Young.*

Revenue—Income-Tax—Profits arising from Trade—Trade carried on by Religious Society—Deductions—Losses not connected with Trade—Income-Tax Act 1853 (16 *and* 17 *Vict. c.* 34), *sec.* 2, *Sched. D.—Income-Tax Act*, 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Sched. D.*, *Case* 1, *Rule* 3.—A Society whose object was to promote religion by the circulation of tracts and books, carried on the business of booksellers in a shop, and earned profits therefrom. The Society also sold books by colporteurs, but the colportage work could not by itself be carried on at a profit as a commercial undertaking, and the Society was able to continue it only by means of the profits earned in the shop and of voluntary subscriptions. *Held* that the profits earned in carrying on the business of booksellers were trade profits and fell to be assessed for income-tax, and that the losses arising from the colportage agencies did not fall to be deducted therefrom, the colportage being essentially distinct from the bookselling business, and not being of the nature of trade.

1ST DIVISION. THIS was a case stated for the Religious Tract and Book Society of Scotland by the Commissioners of Income-Tax.

The case set forth the following facts:—"At a meeting of General Commissioners of Income-Tax for the county of Midlothian, held at Edinburgh on 2d July 1895:—

"The Religious Tract and Book Society of Scotland appealed against an assessment under Schedule D. of the Income-Tax Acts,* for year 1894-95 on £532, 12s. 6d., as profits derived from bookselling at the Society's Central Depository, 99 George Street, Edinburgh (after deducting £210, 18s. 6d., loss on business of the Society's depository at Belfast), on the average of three years to 20th September 1893.

"The constitution of the Society provides (Article 2) that 'the object of the Society shall be, by the circulation of religious tracts and books, to diffuse a pure and religious literature among all classes of the community,' and (Article 3) 'This object shall be carried out by

* The Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100, Sched. D, First Case, Rule 3, enacts—"In estimating the balance of profits and gains chargeable under Sched. D, no sum shall be . . . deducted from such profits or gains . . . on account of loss not connected with or arising out of such trade. . . ."

the establishment of central and branch depositories and of auxiliary societies and by means of colportage and other agencies.'

"Separate accounts are kept of the receipts and expenditure of each of the depositories and of the colportage department. The accounts for each of the three years immediately preceding the year to be assessed (1894-95) shew a profit on the business of the Edinburgh depository, but a loss on the Belfast depot, and a loss upon the colportage department. The result is, that placing the loss upon the Belfast depot and the colportage agencies against the profit on the Edinburgh depository, there is overhead a considerable loss on the Society's operations, which is only made good by subscriptions and donations from the public. As stated in the annual reports of the Society, the business of the depositories is conducted on strictly commercial principles, no subscriptions being received or sought on their behalf. . . . The following is a statement of the facts admitted by the parties:—

"1. The colportage agencies, the Edinburgh depository, and the Belfast depot, are alike integral parts of the Society's machinery.

"2. The colportage business, estimated by sales, is much larger than that of the Edinburgh depository and the Belfast depot put together. The sales in all three departments are of the same goods, at the same prices, and for the same object; also there is only one stock out of which the salesmen at them all are supplied, and the Society is responsible for the expenses of all the departments alike.

"3. The Society's colporteurs are to a certain extent cottage missionaries, . . . and the directors attach importance to that portion of their work. But this does not represent the chief part of a colporteur's duties. The first instruction put into the hands of every applicant for service as a colporteur, after referring to cottage visitation, declares explicitly that 'as the Society exists to spread the knowledge of the Gospel, and promote the kingdom of Christ by means of the press, and to circulate pure and healthy general literature, a colporteur's chief duty is to sell Bibles and the books and periodicals which are supplied to him.'

"4. The two departments of the Society's work (the depository and the colportage) are alike missionary in character, as stated in the constitution of the Society, and are alike carried on by selling to the public at ordinary retail prices; but the colportage agency could not by itself be carried on at a profit as a commercial undertaking, and required the aid of subscriptions. Before the colportage agencies were added, and when the Edinburgh depository stood alone, even the latter was carried on at a loss, and the Society required and received subscriptions. That depository continued to shew financial loss for many years, both before and after the addition of colportage.

"On behalf of the Society it was maintained that its business, which consists, according to its constitution, of the purchase and sale, from the same stock, and at the same prices, of Bibles, books, and periodicals, at the depository in Edinburgh, the depot in Belfast, and colportage agencies throughout the country, should be treated as a whole, and any loss made on one department should be deducted from profit made in others before striking the balance on which an assessment of income-tax is made.

"In support of the assessment, the Surveyor of Taxes, Mr R. S. Forbes, maintained that the profits from the business of bookselling, carried on by means of the depositories on strictly commercial principles,

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could not be distinguished from ordinary profits of trade, and the application of such profits to religious or charitable purposes did not exempt them from assessment. . . . He also maintained that the deficiency on the colportage agencies being due to their expenses as missionary and philanthropic undertakings, and such agencies not being of the nature of trade, losses arising from them could not be set off against profits from the depositories."

The commissioners were of opinion that the business of the depositories was of the nature of trade, and must be distinguished from the operations of the colportage agencies, that the application of the profits to religious purposes did not exempt them from assessment, also that the loss by colportage agencies could not be set against such profits. They therefore refused the appeal and sustained the assessment.

"The question of law for the opinion of the Court is—In ascertaining whether the Society has earned profits assessable under schedule D, does the deficiency on its operations in the colportage agencies fall to be set against its profits in the Edinburgh depository?"

The appellants argued;—The business and work carried on by the Society must be regarded as a whole, and the loss arising on one branch must be deducted from the gain arising on another, before profits could be assessed for income-tax.[1] The principle contended for by the appellants was recognised by the Inland Revenue, for they allowed the loss on the Belfast business to be deducted from the gain on the Edinburgh business. In the same way the deficiency arising on the colportage business should be deducted. The net result of the whole operations carried on by the Society was loss, the deficit being met by voluntary subscriptions. The Society ought to be exempted from income-tax in any view, for it did not exist for the purpose of making gain in the sense of distributing its profits among its members. It was substantially a charity, and its whole income was devoted to philanthropic work. It should make no difference that profits were earned in a particular department of that work.[2]

Argued for the respondent;—The bookselling business in the shops was a trade, and was essentially distinct from the work done by the colportage agencies. The latter was in no sense a commercial undertaking. That was clearly shewn by the fact that it required the support of voluntary subscriptions to enable it to be carried on at all. It did not make the profits derived from the bookselling business any the less trade profits that they were entirely devoted to a philanthropic object.

LORD PRESIDENT.—It may be conceded to the appellants that the object of their Society is not that of making profit but the diffusion of religious literature among all classes of the community. But incidental to that large and beneficial purpose they engage in trade, and this assessment proceeds upon the very intelligible theory that the business of bookselling cannot be taxable or not taxable according to the motive of the bookseller. Now, quite consistently in that businesslike view, the Revenue find that this Society has a bookseller's shop in Edinburgh, and a bookseller's shop in Belfast, that it is the same business, and accordingly they allow the loss on the

[1] Last v. London Assurance Corporation, 1884, L. R., 12 Q. B. D. 389.
[2] Cawse v. The Committee of the Nottingham Lunatic Asylum, L. R. [1891], 1 Q. B. 585.

shop in Belfast to be deducted from the gains of the shop in Edinburgh. But then they are moved to bring into the account of this bookselling establishment the accounts of the colportage which is carried on by the Society. Now, the legitimacy of the importation into the account of the colportage must depend entirely on whether it, as well as the shops, is a business, trade, or adventure carried on on commercial principles. It seems to me that the statements in the case entirely negative that view. It appears that the colportage agency could not be carried on at a profit as a commercial undertaking, and is persevered in merely because the Society find that by appealing to the religious public, they are able to obtain subscriptions which enable them to fill up the deficit. When we turn to the methods of the colportage, it appears that they are not commercial methods, —that is to say, that the business carried on is not purely that of pushing the sale of their goods, but that on the contrary the duty of the salesman is to dwell over the purchase and make it the occasion of administering religious advice and counsel. Now, under these conditions, it seems to me to be impossible to hold that this is a business, trade, or adventure which is unfortunately resulting in loss. It is really a charitable mission, in which the sale of the Scriptures is made the occasion for doing something more than merely effecting the sale of books. And accordingly, while I completely assent to the view that the establishment and conduct of the shops and the establishment and conduct of the colportage all rest upon the same ultimate motive, yet at the same time the two operations seem to be essentially distinguished. The shops are simply booksellers' shops, the other is a combination of the sale of books with a missionary enterprise, and therefore I think the judgment is perfectly right.

LORD ADAM.—I am of the same opinion. I think this question arises upon the matter of striking the balance-sheet of the trade or business carried on by this Society. If this colportage business be a proper part of the trade or business carried on by them along with the two shops which they keep, then the loss arises from the business, and falls to be taken into account in striking the balance under the first rule of Schedule D. I do not think the case raises any question about loss connected with or arising out of some different concern altogether. Now, I think the Society is carrying on the trade of bookselling. It keeps two shops—I do not care whether you call them depositories or shops—for the sale of books, the one in Edinburgh and the other in Belfast. That being the trade carried on by this Society, the Crown very properly put these two parts of the business of bookselling together, and seeing there is loss on the Belfast shop, they deduct that from the gain on the Edinburgh shop. That is according to ordinary practice. I agree with your Lordship that if a party takes to selling books, it does not matter to the Crown what his object is in doing so—whether it is to put profit into his own pocket, or, having made profit, to expend it in charity or donation. It makes no difference therefore in this case what is the object with which these two shops are carried on, or the purpose for which the Society expend the profits made in these shops. I think the true question is, whether this colportage system to which the profits of the shops are applied is or is not part of the trade of bookselling carried on by the Society.

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Now, this colportage system is not a commercial system at all. It is not carried on for the purpose of making profit. It is not carried on as a trade speculation, because, as we are told in this case, it could not be carried on at a profit. It appears to me to be a very remarkable trade, as to which those who carry it on admit that they could not possibly make any profit out of it. That shews clearly that it is not carried on as part of the business of bookselling; but the Society carry on the business of bookselling for the purpose of making profit, and having made profit, they expend it on the charitable purpose for which this Society exists, namely, the sale of books by colporteurs.

LORD M'LAREN.—This Society, as we are informed, is constituted for the purpose of promoting the circulation of the Scriptures and of religious books, and its objects are carried out in two ways,—first, by keeping retail shops in Edinburgh and Belfast for the sale of their books, and secondly, by sending colporteurs about the country for the purpose of bringing the Bible and religious publications to the homes of the poor. It is stated that the shops if taken together are carried on at a profit, but that the colportage business results in a loss, and, as I read the case, it results in an intentional loss, because there is one element which appears to me to be decisive of this case, and that is, that not to meet an occasional loss, but as part of the system on which the Society's operations are carried on, the public are appealed to for subscriptions to make up so much of the loss arising on the colportage business as is not covered by the profits arising on the shop sales. Now, in their reports as stated in the case the Society disclaims the intention of asking the public to contribute towards meeting loss or reduced profits upon their proper commercial business, and one understands the reason why this disclaimer should be entered in the Society's reports, because it is unlikely that the public would contribute money in order to allow the Society to undersell other dealers. But the subscriptions are asked expressly to meet the loss arising on the colportage business, which is of a combined missionary and charitable character. It appears to me therefore that these two branches of the Society's operations cannot be identified as one and the same trade, adventure, or concern, and therefore that under the third rule for estimating profits under schedule D the Society is not entitled to set off the loss arising from the colportage business in reduction of the profits upon which they fall to be assessed for their commercial business. The two being clearly separable, I think income-tax is payable upon the remunerative part of the Society's business.

LORD KINNEAR.—I agree with your Lordships. I think that the Society carries on the business of booksellers in Edinburgh and Belfast, and that their operations in disseminating books by the system of colportage do not constitute a trade, adventure, or concern in the nature of a trade at all, but form one of the purposes to which the profits derived from their trade of booksellers are applied. I agree that it is entirely in accordance with this distinction, and very significant, that they say they carry on their trade of booksellers on purely commercial principles, and do not seek or receive the aid of subscriptions for the purposes of that business, but on the other hand

that they do ask and obtain subscriptions, most legitimately, in aid of the purpose to which their profits are applied. No. 77.

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THE COURT answered the question in the negative, affirmed the determination of the Commissioners, and sustained the assessment.

R. C. BELL & J. SCOTT, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

H. FISCHER & COMPANY, Pursuers and Claimants (Reclaimers).—*Salvesen—Younger.*
AKTIESELSKABET TREMASTET SKONNERT "MOLLY," Defenders.
J. R. ANDERSEN, Claimant (Respondent).—*Dickson—Aitken.* No. 78.

Jan. 15, 1896.
Fischer & Co. v. Andersen.

Process—Decree in absence—Mandate to lodge defences.—In an action by A against a Danish company defences were lodged on the instructions of a person resident in Scotland. The pursuer on the case appearing in the Adjustment Roll objected that the defences had been lodged without the authority of the defender, and moved for decree in absence. The Lord Ordinary, after adjourning the adjustment of the record on three occasions in order to allow a mandate to be produced, but without pronouncing an order for the production of a mandate, refused a minute craving further delay alleged to be necessary to allow a meeting of the company to be called for the purpose of granting a mandate, and granted decree in absence.

In a competition between A and another creditor of the company, *held* that the decree in absence was irregular, and could not receive effect.

Arrestment—Arrestment on the dependence—Amendment of summons—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.—An action was raised at the instance of five pursuers, on separate grounds of action, concluding for payment to each of separate sums, and arrestments were used on the dependence of the action. Subsequently, on the motion of the pursuers, the names of four of the pursuers were deleted from the summons, together with the conclusions applicable to them respectively. The remaining pursuer afterwards obtained a decree.

Held (1) that the original summons was incompetent; and (2) that the alteration on the summons was an amendment in the sense of the Court of Session Act, 1868, sec. 29, and did not validate the arrestments so as to confer a preference on the remaining pursuer in competition with other creditors of the defender at the date of the arrestment.

2D DIVISION. Ld. Moncreiff.

IN July 1895 H. Fischer & Company, shipbrokers, Grangemouth, raised an action against the Aktieselskabet Tremastet Skonnert "Molly"—the company registered as owners of the three-masted schooner "Molly" of Svendborg, Denmark, which had been arrested by the pursuers at Grangemouth—concluding for the judicial sale of the "Molly," and for the division of the price.

The ship was sold under judicial warrant on 3d September 1895 for £675, and parties were thereafter ordained to lodge their condescendences and claims on the price. Claims amounting to about £400 in all were found to be preferable claims, and were ordered to be paid out of the price accordingly. Competing claims for the balance were lodged (1) by J. R. Andersen, who founded on an arrestment of the "Molly," dated 8th April 1895, used on the dependence of an action against the registered company, and on a decree in that action for the sum of £311, 15s. 7d.; and (2) by the pursuers, Fischer & Company, who founded on an arrestment of the "Molly," dated 7th May 1895, used on the dependence of an action in the Sheriff Court at Falkirk, against the registered company, and on a decree therein for £292, 3s. 2d. The competition depended on the validity and priority of Andersen's

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arrestment. The material steps of procedure in the action, upon the dependence of which that arrestment was used, were as follow:—

The summons in the action, which was signeted on 8th April 1895, was at the instance of Andersen and of four other tradesmen in Svendborg, against the company registered as owners of the "Molly," and also against H. Fischer, sole partner of Fischer & Company, and two other members of the registered company, and concluded first for payment of £311, 15s. 7d. to Andersen, and secondly, thirdly, fourthly, and fifthly, for payment of other sums specified to each of the four other pursuers.

The arrestment on the dependence was, as already mentioned, dated 8th April. The execution of arrestment bore that the ship should remain arrested until caution should be found "that the same shall be made forthcoming to the said pursuers as accords with law, conform to the said summons in all points."

The summons was served edictally on the registered company.

Defences were lodged on behalf of all the defenders by instructions of H. Fischer, in which it was pleaded, *inter alia*, that the action was incompetent.

Before the case was called the pursuers annexed a minute of restriction, in which they restricted the summons to the conclusions against the registered company, in respect that they were informed that that company was capable of being sued in its own name.

When the case was called in the Adjustment Roll the pursuers objected that Fischer had no mandate to lodge defences on behalf of the registered company. Thereafter the Lord Ordinary (Stormonth-Darling) on three successive occasions continued the adjustment of the record for a period in all of three weeks extending to 22d June, in order to admit of a mandate from the company being obtained.

On 22d June a minute was tendered for Fischer, setting forth that he was managing owner of the company, and held a majority of the shares, and craving that the time for lodging a mandate from the company should be extended till a meeting of the company could be held. The Lord Ordinary refused to receive this minute.

On 25th June the pursuers lodged a minute (No. 40 of process), in which they "craved leave of the Lord Ordinary to strike out of the summons the names of the pursuers" other than Andersen, and the conclusions of the summons applicable to these pursuers respectively, "and on this being done to grant decree in favour of the pursuer the said J. R. Andersen in terms of the first conclusion of the summons."

On the same day the Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the pursuers, decerns in absence against the defenders Aktieselskabet Tremastet Skonnert 'Molly,' in terms of the first petitory conclusion of the summons, as restricted by minute annexed thereto, and by minute No. 40 of process, with expenses."

In the present action the claimants Fischer & Company pleaded, *inter alia*;—4. The claimants are entitled to be ranked and preferred for all their claims in priority to the claim of the said J. R. Andersen in respect (1) the decree in absence on which he founds was irregular and should be set aside, and (2) in any event, the decree proceeded on an amendment which was subsequent in date to the arrestments at the instance of the claimants.

On 27th December 1895 the Lord Ordinary (Moncreiff) pronounced the following interlocutor:—"Having heard counsel for the claimants H. Fischer & Company and others, and J. R. Andersen,

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pursuer did not do, but he founds on his arrestment as having been made good by reason of the amendment of the summons to which I have referred. But if, as I submit we must, we take as an amendment of the summons this correction of the error, without which the action could not have proceeded, and would have been dismissed, the section of the Court of Session Act applies. The section provides that no amendment of the summons shall have the effect of validating diligence used on the dependence of the action, so as to prejudice the rights of creditors interested in defeating such diligence, or, as I read it, no amendment of the summons shall have the effect of making a diligence used on the dependence of the action prior to the amendment of the summons good, so as to give the pursuer a preference over other creditors. I am therefore of opinion that the second branch of the fourth plea in law should be sustained.

We have also had an argument on the first branch of the plea that the decree in absence is irregular. Mr Aitken stated that if we decided against him on the second branch of the plea, that disposed of the case and rendered it unnecessary to pronounce a decision in the first branch. But as we have heard an argument on this matter I think it proper to express an opinion upon it. I am of opinion that the decree in absence is quite irregular. Defences to the action were given in, bearing to be by those who were called as defenders. On the back of the defences is the name of a practising agent, and the defences are signed by counsel. The action is therefore a defended action. No doubt it was open to the pursuer to say that the defences were lodged without the authority of the defenders. On this being stated it was explained that the authority was derived from a mercantile gentleman at Grangemouth, who was the owner of the ship to the extent of three-fourths or four-fifths, and that he had the authority of the other owners. An offer was made on his behalf to produce a mandate from these other owners if time was given him to get it sent from Denmark. I think it perfectly clear in the ordinary course of procedure that where the authority of the agent and counsel is disputed, or where the authority of the party defending an action on behalf of himself and others is disputed, time should be given so as to permit the production of a mandate. This was not done here. The Lord Ordinary proceeded to deal with the case as an undefended action, and gave decree in absence. Such a course is quite irregular, and ought not to have been followed.

In order to dispose of the case it would be sufficient to sustain the second branch of the fourth plea. But if your Lordships agree with what I have said on the first branch, what I suggest we should do is to recall the Lord Ordinary's interlocutor and sustain the whole of the fourth plea in law.

LORD TRAYNER.—I agree with Lord Young.

The soundness of the first branch of the fourth plea, viz., that the decree in absence was irregular, is made apparent by consideration of the pleadings. This decree is pronounced against a defender whose defences were lodged in process and have been considered. In such circumstances it appears to me that a decree in absence is entirely out of the question. And decree by default was also excluded, because no order on the defender was

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no common right of action. *Douglas* v. *Tait*, founded on by the Lord Ordinary, was not in point—the question there was between debtor and creditor, not between competing creditors. Further, the summons authorised arrestments at the instance of the whole pursuers, and the arrestments used were for behoof of the whole pursuers. Andersen could not therefore, merely by amending the summons, convert the arrestment into an arrestment for his individual behoof. The whole arrestment necessarily became inoperative as soon as the summons on which it proceeded had been altered. (2) The decree in the former action had been improperly pronounced as a decree in absence. The defences lodged were *prima facie* regular, and on Fischer's authority to act for the company being called in question the proper course would have been to pronounce an order requiring him to produce a mandate from the company within a time specified. It was not necessary to bring a reduction of that decree; it was competent to object to it by way of exception.[1]

Argued for Andersen;—(1) The decision of the Lord Ordinary was well founded. The former action was simply a congeries of five actions. It might be that judgment could not be obtained in such an action, but it was not an incompetent action, and there was no incompetency in four of the pursuers giving up the action and the conclusions applicable to them, and in the fifth proceeding with the action;[2] nor was the arrestment affected by such a procedure, which was not an amendment, but merely a restriction of the summons. (2) The decree in the former action was not irregular, but even if it was the Lord Ordinary was right in thinking that it must stand until reduced.

Lord Young.—This is a question dealing with the law of diligence, and it is quite true that all such questions must be dealt with strictly. The Lord Ordinary has held that Mr Andersen's arrestment being prior in date to the arrestment of his competitor he is entitled to prevail, and in order to reach that conclusion the Lord Ordinary has repelled the second branch of the fourth plea in law stated by the reclaimer.

Andersen's diligence was used on the dependence of a summons at the instance of five different pursuers for five distinct debts brought against the owners of a vessel called the "Molly." It occurred to those representing the pursuers that the action was incompetent as it stood, and that it would require correction before it could proceed. So a minute was put in, in which it was proposed to make this correction by striking out four of the pursuers and the four conclusions applicable to the debts of these pursuers, and to proceed with the case at the instance of one of the pursuers alone. Now, I am of opinion that this amendment—for I think that is the proper name for a correction of an error committed when the summons was framed—was competent. But I greatly doubt whether an arrestment can stand which has been used on the dependence of an action in its original incompetent form, although the action may have been subsequently amended so as to become competent. It would have occurred to me that the proper course would have been to use new arrestments on the dependence of the action after the summons had been amended. This, however, the

[1] Shand's Practice, i. 618.
[2] Gray v. Steuart, 1741, M. 11,986.

shares getting that stock in the proportion of 90 per cent of their holdings. In this way the capital of the company would be reduced from £154,651 to £145,679, 18s. The company having by a majority of votes passed and confirmed a resolution to reduce the capital from £154,651 to £145,679, 18s. by cancelling the existing preferred stock and deferred shares, and issuing ordinary stock to the smaller amount, presented a petition for confirmation of the proposed reduction of capital.

No. 79.

Jan. 17, 1896.

City Property Investment Trust Corporation, Limited, v. Thorburn.

Question, whether it was within the power of the company under the cover of a resolution to reduce capital to reconstruct the company on a basis essentially different from that on which it was constituted.

2D DIVISION.

THE CITY PROPERTY INVESTMENT TRUST CORPORATION, LIMITED, was incorporated under the Companies Acts, 1862 to 1886, on 9th January 1890.

By section 5 of the memorandum of association the capital of the company was declared to be £230,000, divided into 20,000 preferred shares of £10 each and 30,000 deferred or founders' shares of £1 each. The holders of preferred shares were declared to be entitled to a preferable dividend of £5 per cent per annum out of the profits of each year, and to preferable repayment of their capital in the event of a liquidation. Subject to these rights, the profits and assets of the company were declared to belong to the holders of deferred or founders' shares. It was further provided that the preferred shares, when fully paid up, should be converted by the directors into stock, and that the directors might, with the sanction of the shareholders, convert any paid-up shares into stock.*

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* Among the objects of the company as defined by the memorandum of association (sec. 3) were the following:—

"(*p*) From time to time by special resolution to modify the conditions contained in the memorandum of association so as to increase the capital of the company by the issue of new shares of such amount as may be thought expedient, or to consolidate and divide the capital into shares of larger or of smaller amount than the amount hereby fixed, or to convert the paid-up shares into stock, or to reduce the capital to such an extent and in such manner as may by such resolution be determined. (*q*) From time to time to create and issue the shares of capital, original, increased, or reduced, or any part thereof, as ordinary, preferred, guaranteed, deferred, or founders' shares. (*r*) From time to time to convert or subdivide the shares of capital into shares of different nominal amount, and also from time to time to convert the shares of capital, or the stock of the company in the event of shares being converted into stock, or any part of such shares or stock, into shares or stock of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, and as regards shares subject to calls, subject to the payment of calls of such amounts and at such times as the company from time to time thinks fit; and in the case of shares and stock, with such rights in the distribution of the assets of the company, and with a special or without any right of voting, and subject to such other conditions and restrictions as may by the company in general meeting be from time to time determined. . . ."

The articles of association contained, *inter alia*, the following provision: —"(10) The company may at any time reduce its capital and subdivide or consolidate its shares in any manner permitted by law, and, when requisite, the directors may apply for the sanction of the Court to any such reduction."

The articles of association further provided that each holder of shares

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The leading business of the company was that of investment in heritable, and especially city, property, and it had also wide general powers of investment.

On the formation of the company there were issued of its authorised capital 12,988 preferred shares of £10 each, afterwards converted into £129,880 preferred stock, and 24,771 deferred or founders' shares of £1 each, fully paid, amounting together to £154,651. The remaining 7012 preferred and 5229 deferred shares were not issued.

On 9th July 1895 the company presented a petition for an order confirming a reduction of its capital. The petition contained the following statements:—"In pursuance of its objects the company acquired various heritable properties, and also conducted a general investment business. Certain losses have been made, and depreciation in value has taken place on the general investments of the company, estimated together at £10,500 or thereby. Each class of the capital of the company shews a considerable depreciation, judged by market quotations, amounting, in the case of the preferred stock, to £11,039 or thereby; and in the case of the deferred, to £12,385 or thereby.

"Hitherto any losses made by the company have been made good out of the profits of the year, but doubts have arisen whether this is in accordance with the articles of association, and in the working of the company it was found that questions arose in which preferred and deferred shareholders' interests came into conflict. The directors were satisfied that it would be of advantage to merge the whole interest of the shareholders in one stock.

"With this object the directors submitted for the approval of the shareholders a scheme for meeting the depreciation on the investments, and for merging the rights of the two classes of shareholders in one stock. Under this arrangement the capital of the company is reduced to the extent of £5 per £100 stock in the case of the preferred capital, and 2s. per share in the case of the deferred shares. The effect of this arrangement is to make the capital £145,679, 18s. instead of £154,651, thus cancelling capital to the extent of £8971, 2s. This reduced capital it is proposed to issue as consolidated ordinary stock, apportioned between the holders of preferred stock and deferred shares, in the proportion of 95 per cent of their present holdings to the former, and of 90 per cent of their present holdings to the latter.

"The resolution for effecting such reduction of capital and unification of the two classes of capital was duly passed at a meeting of the company held on 28th March 1895, and was confirmed as a special resolution at a meeting of the company held on 27th April 1895. In each case the resolution was passed by a majority largely exceeding three-fourths of each class of the shareholders present personally or by proxy. The said special resolution is as follows:—

"'The capital of the company shall be reduced from £154,651 to £145,679, 18s., and such reduction shall be effected by cancelling capital which has been lost or is not represented by available assets in manner following, that is to say,—The whole of the preferred stock amounting to £129,880, and the whole of the deferred shares, amounting to £24,771, which together amount to said sum of £154,651, shall

should have one vote for every share held by him, the holders of stock having no higher voting privilege than they would have had had the stock remained in the form of shares.

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be cancelled, and in lieu thereof there shall be created and issued ordinary stock to the amount of £145,679, 18s., and the same shall be apportioned amongst the holders of the preferred stock and deferred shares as follows:—(1) The holders of the present preferred stock shall receive of the ordinary stock 95 per cent of their present holding; and (2) the holders of the present deferred shares shall receive of the ordinary stock 90 per cent of their present holding.'

"The minute proposed to be registered is in the following terms:—

"'The capital of the City Property Investment Trust Corporation, Limited, is from henceforth £145,679, 18s. ordinary stock, instead of £129,880 preferred stock and 24,771 deferred shares of £1 each fully paid up.'"

The petitioners prayed the Court to confirm the reduction of capital effected by the special resolution passed on 28th March and confirmed on 27th April, and to approve of the minute quoted in the petition.

Answers were lodged by Mr M. G. Thorburn, Glenormiston, Innerleithen, who stated that he was a holder of £1500 preferred stock of the company, and of 113 deferred shares, and that he represented shareholders holding £11,200 preferred stock and 1731 deferred shares; and further, that he and several of the shareholders whom he represented had appeared at a meeting at which the special resolution was passed and voted against that resolution. He maintained that the prayer of the petition ought to be refused, on the grounds (1) that the proposed alteration in the status of the two classes of shareholders was incompetent; (2) that no sufficient reasons were averred or existed for such alteration, and that it was unfair to the deferred shareholders, who had looked forward to profit from the realisation of the heritable property of the company; (3) that with regard to the proposed reduction of capital, it had not been ascertained that the company had suffered any loss on capital account; that, on the contrary, there was a strong presumption that the company's heritable property had risen in value since its purchase by the company, the general increase in the value of heritable property in Glasgow, where the company's property was situated, having been from 10 to 15 per cent; and (4) that in any event the method adopted of writing down the capital was arbitrary and not founded on any intelligible principle.

On 22d August 1895 the Lord Ordinary on the Bills (Low) remitted to Mr Donald Mackenzie, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital.

From Mr Mackenzie's report, it appeared, *inter alia*,—"In pursuance of its objects, the company has expended large sums in the purchase of heritable properties in Glasgow, and in particular, on its inception in 1890, it acquired the Blythswood Holm property, now known as the Central Chambers, at the price of £125,800, and has subsequently made great improvements thereon. In the last balance-sheet of the company, for the financial year ending on 31st January 1895, the heritable properties owned by the company taken at their cost and the amount expended thereon to date are entered at £170,450, 4s. 10d.

"The company has also, in exercise of its general powers of investment, . . . invested large sums in various securities. The total amount of these at the date of the last balance-sheet, as therein stated, was £78,311, 13s. 7d.

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On 9th July 1895 the company presented a petition for an order confirming a reduction of its capital. The petition contained the following statements:—"In pursuance of its objects the company acquired various heritable properties, and also conducted a general investment business. Certain losses have been made, and depreciation in value has taken place on the general investments of the company, estimated together at £10,500 or thereby. Each class of the capital of the company shews a considerable depreciation, judged by market quotations, amounting, in the case of the preferred stock, to £11,039 or thereby; and in the case of the deferred, to £12,385 or thereby.

"Hitherto any losses made by the company have been made good out of the profits of the year, but doubts have arisen whether this is in accordance with the articles of association, and in the working of the company it was found that questions arose in which preferred and deferred shareholders' interests came into conflict. The directors were satisfied that it would be of advantage to merge the whole interest of the shareholders in one stock.

"With this object the directors submitted for the approval of the shareholders a scheme for meeting the depreciation on the investments, and for merging the rights of the two classes of shareholders in one stock. Under this arrangement the capital of the company is reduced to the extent of £5 per £100 stock in the case of the preferred capital, and 2s. per share in the case of the deferred shares. The effect of this arrangement is to make the capital £145,679, 18s. instead of £154,651, thus cancelling capital to the extent of £8971, 2s. This reduced capital it is proposed to issue as consolidated ordinary stock, apportioned between the holders of preferred stock and deferred shares, in the proportion of 95 per cent of their present holdings to the former, and of 90 per cent of their present holdings to the latter.

"The resolution for effecting such reduction of capital and unification of the two classes of capital was duly passed at a meeting of the company held on 28th March 1895, and was confirmed as a special resolution at a meeting of the company held on 27th April 1895. In each case the resolution was passed by a majority largely exceeding three-fourths of each class of the shareholders present personally or by proxy. The said special resolution is as follows:—

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"'The capital of the City Property Investment Trust Corporation, Limited, is from henceforth £145,679, 18s. ordinary stock, instead of £129,880 preferred stock and 24,771 deferred shares of £1 each fully paid up.'"

The petitioners prayed the Court to confirm the reduction of capital effected by the special resolution passed on 28th March and confirmed on 27th April, and to approve of the minute quoted in the petition.

Answers were lodged by Mr M. G. Thorburn, Glenormiston, Innerleithen, who stated that he was a holder of £1500 preferred stock of the company, and of 113 deferred shares, and that he represented shareholders holding £11,200 preferred stock and 1731 deferred shares; and further, that he and several of the shareholders whom he represented had appeared at a meeting at which the special resolution was passed and voted against that resolution. He maintained that the prayer of the petition ought to be refused, on the grounds (1) that the proposed alteration in the status of the two classes of shareholders was incompetent; (2) that no sufficient reasons were averred or existed for such alteration, and that it was unfair to the deferred shareholders, who had looked forward to profit from the realisation of the heritable property of the company; (3) that with regard to the proposed reduction of capital, it had not been ascertained that the company had suffered any loss on capital account; that, on the contrary, there was a strong presumption that the company's heritable property had risen in value since its purchase by the company, the general increase in the value of heritable property in Glasgow, where the company's property was situated, having been from 10 to 15 per cent; and (4) that in any event the method adopted of writing down the capital was arbitrary and not founded on any intelligible principle.

On 22d August 1895 the Lord Ordinary on the Bills (Low) remitted to Mr Donald Mackenzie, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital.

From Mr Mackenzie's report, it appeared, *inter alia*,—"In pursuance of its objects, the company has expended large sums in the purchase of heritable properties in Glasgow, and in particular, on its inception in 1890, it acquired the Blythswood Holm property, now known as the Central Chambers, at the price of £125,800, and has subsequently made great improvements thereon. In the last balance-sheet of the company, for the financial year ending on 31st January 1895, the heritable properties owned by the company taken at their cost and the amount expended thereon to date are entered at £170,450, 4s. 10d.

"The company has also, in exercise of its general powers of investment, . . . invested large sums in various securities. The total amount of these at the date of the last balance-sheet, as therein stated, was £78,311, 13s. 7d.

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"On only one occasion, viz., on the accounts for the year closing on 31st January 1892, has the preferred capital received its full dividend of 5 per cent. It has received dividends at the rate of 4 per cent in respect of the years closing on 31st January 1891, 1893, and 1894, and an interim dividend at that rate has been paid during the year closing on 31st January 1895. No dividend has ever been paid on the deferred shares."

It further appeared from Mr Mackenzie's report that the chairman of the company had prepared two statements shewing the valuation of the company's general investments, not including heritable property, as at 31st January 1895 and 1st November 1895 respectively, and the report further stated that the respondent adopted these valuations for the purposes of the present application. The statement for 31st January 1895 brought out a depreciation on the company's general investments of £10,533, 0s. 6d. in all; while the statement for 1st November 1895 shewed that the depreciation had fallen to £8113, 12s. 6d., being less than the amount of the proposed reduction.

There was no evidence, in the report or otherwise, to shew that the company's heritable properties had fallen in value, or that they had not increased in value as averred by the respondent.

Argued for the petitioners;—The question whether or not there had been a loss on a company's capital was a question which it was for the company to determine, and not for the Court. If the company were satisfied that there had been in fact a loss necessitating a reduction of capital, the Court would approve of a resolution to reduce the capital, provided that the resolution was not prejudicial to the creditors of the company, or to the shareholders, or classes of shareholders. In the present case it was not suggested that the creditors of the company had any interest to oppose the reduction of the capital; but with respect to the shareholders it was said that the reduction was carried out in an incompetent, or at least in an unfair manner. The incompetency was said to consist in this, that under the cover of a resolution to reduce capital a fundamental alteration in the status and rights of the different classes of shareholders was effected. But section 3, subsections (*p*), (*q*), and (*r*) of the memorandum of association, read in conjunction with article 10 of the articles of association, contemplated just such a change as that now proposed. It was these provisions which distinguished the present case from the cases founded on by the respondent, in which there were no similar provisions. If then the shares had been issued subject to the condition that a change like the present might be carried out, it would require a very clear case of unfairness to entitle the Court to interfere when it was proposed to carry out the change. There was, however, no unfairness. Each class of shareholders gave up something—the preferred shareholders their preferences and the deferred shareholders their preponderant voting power, and their right to the surplus assets and profits—in order to effect a unification of the capital—a change which a majority of shareholders of both classes thought to be of advantage to the company. If the proposed reduction of capital was in itself reasonable, there was no statutory objection to the manner in which it was proposed to effect it.[1]

Argued for the respondent;—It had not been shewn that the

[1] British and American Trustee and Finance Corporation v. Couper, L. R. [1894], A. C. 399.

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capital of the company had suffered any loss—permanent loss that was to say. Upon the general investments of the company there might be a small depreciation, but there was nothing to shew that this depreciation was permanent; while as regarded the heritable properties of the company, it was not suggested that they had depreciated; the respondent maintained, on the contrary, that they had appreciated. The petition ought therefore to be refused on that ground. But assuming that a reduction of capital was necessary, the loss ought not to be thrown on the preferred shareholders, who under the memorandum of association had a preference with respect not only to the income, but also to the capital of the company. Further, it was incompetent to carry out the reduction in the way proposed, by completely altering the status of the shareholders. Such a change was *ultra vires* of a company, whatever the powers in its memorandum of association might be,[1] and in any case the powers in the memorandum here did not justify so extensive a change. Such a change could be brought about only by the liquidation and reconstruction of the company, giving shareholders who objected the right to have their shares repaid out of the assets of the company.

At advising,—

LORD TRAYNER.—I have the greatest doubt whether it was within the competency of the petitioners to pass the resolution of which they ask our approval. It seems to me that under the disguise of a reduction of capital the pursuers are seeking to reconstruct their company on a basis essentially different from that on which it was constituted. The resolution before us infringes the rights alike of the preference and the deferred shareholders, and I am not surprised that it has met with opposition from both classes of shareholders. It is enough, however, for the decision of the question now before us, to say that the petitioners have entirely failed to satisfy me that any capital has been lost, or that there is any good reason for sanctioning at present a reduction of that capital, and therefore I am for refusing the petition.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT refused the petition.

J. & J. Ross, W.S.—MENZIES, BLACK, & MENZIES, W.S.—Agents.

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REV. THOMAS REID THOMSON, Pursuer (Reclaimer).—*D.-F. Asher*—*M'Lennan.*

THE PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF GREENOCK, Defenders (Respondents).—*Ure*—*Sym.*

Church—Burgh—Minister—Stipend.—In 1809 the magistrates and town-council of a burgh and certain of the proprietors of a chapel of ease in the burgh, brought a summons in the Court of Teinds, concluding for the disjunction of certain portions of an existing parish, partly burghal and

[1] Hutton v. Scarborough Cliff Hotel Company, Limited, 1865, 4 De G. J. & S. 672; *In re* Financial Corporation (Holme's case), 1867, L. R., 2 Ch. App. 714; Ashbury v. Watson, 1885, L. R., 30 Chan. Div. 376; Liquidator of the Milford Haven Shipping Co. v. Jones, March 20, 1895, 22 R. 577, *per* Lord Kinnear, at p. 582.

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partly landward, the erection of these disjoined portions into a new parish under the proviso that the landward portion should be annexed *quoad sacra* only, and concluding further for declarator that the magistrates should be bound to provide the minister of the new parish in a "competent stipend."

In this action the Court pronounced an interlocutor, by which they decerned, "in the disjunction, erection, and annexation *quoad sacra* as libelled, on the magistrates . . . engaging to be answerable for a stipend of £200 per annum."

The magistrates thereupon by an act of council undertook to be answerable for a stipend of "not less than £200 per annum."

In 1895 the minister of the parish brought an action for declarator that the magistrates were bound to provide him in a competent stipend suited to the circumstances of the time and the position of the benefice, and for decree for payment of £400 a-year as such stipend, contending that the words "as libelled" applied, *inter alia*, to the conclusion for declarator that the magistrates should be bound to provide the minister "in a competent stipend."

The Court (*aff.* judgment of Lord Kyllachy) *assoilzied* the defenders, holding that the Court of Teinds had decerned "as libelled" only in regard to the conclusions for disjunction, erection, and annexation *quoad sacra*, and that the magistrates were liable for a stipend of £200 a-year only.

Peters v. *Magistrates of Greenock*, 19 R. 643, aff. 20 R. (H. L.) 42, *distinguished.*

2D DIVISION. Ld. Kyllachy.

IN June 1895 the Reverend Thomas Reid Thomson, minister of the East Church and Parish of Greenock, with consent of the Presbytery of Greenock, raised an action against the Provost, Magistrates, and Town-Council of Greenock, concluding for declarator "that the pursuer, as the minister serving the cure of the East Church and Parish of Greenock and district thereof, within the burgh of Greenock, was and is entitled to be furnished and provided by the defenders, and that the defenders were and are bound to furnish and provide the pursuer, with a competent stipend, suited to the circumstances of the time, and the position and duties of the benefice, to be paid out of the revenue of the burgh, or out of the other funds, property, and revenues held and enjoyed by the said Magistrates and Town-Council for the special use and behoof of the minister serving the cure of the said church, parish, and district, from the date of his ordination and induction to the said cure, and in all time coming, during his lifetime and serving the said cure." Then followed a conclusion for decree ordaining the defenders to make payment to the pursuer of the sum of £400 per annum as a competent stipend for the period from Whitsunday 1893, or of such other sum, less or more, as should in the circumstances appear to the Court a competent stipend.

The pursuer set forth the proceedings and decree in a process of disjunction and erection in the Teind Court after mentioned, and pleaded, *inter alia*;—(1) According to the terms and meaning of the conclusions of the summons of disjunction and erection of the East Church and Parish of Greenock, the decree pronounced in the process following thereon, the extract of said decree, and the usage and prescriptive use and enjoyment following thereon, the defenders, as representing the community of the burgh of Greenock, are liable in payment of a competent stipend to the pursuer, as minister of the said church and parish; and decree should accordingly be pronounced in terms of the declaratory conclusions of the present action.

The Magistrates and Town-Council lodged defences, in which they pleaded, *inter alia*;—(2) On a sound construction of the proceedings and decree of the Teind Court, the defenders are not bound to furnish

the pursuer with a stipend exceeding £200 (with Communion elements). (3) The decree pronounced by the Teind Court not being a decree to furnish the pursuer with a competent and legal stipend, but a decree for a fixed sum of £200, the action cannot be maintained.

The procedure connected with the disjunction and erection of the parish, upon which alone the question raised by the declaratory conclusion of the summons came to turn, was to the following effect:—

In 1809 the Magistrates and Town-Council of Greenock and the members of a committee of managers appointed by the proprietors of the East Chapel of Ease of Greenock brought a summons against the heritors and minister of the Old Parish of Greenock and the Officers of State for disjunction and erection of a new church and parish, to be called the East Church and Parish of Greenock.

Prior to the raising of this action a resolution had been passed at a meeting of the Magistrates and Town-Council of Greenock on 30th January 1809, which bore that the magistrates "agree to execute, as representing the town, the necessary bond for the payment of such stipend as the Commissioners for Plantation of Kirks may fix upon, not exceeding £150, and the usual allowance for Communion elements, and on the conveyance and renunciation above mentioned being procured [*i.e.*, a conveyance of the chapel by the proprietors thereof, and a renunciation of all claim to patronage by Sir John Shaw Stewart and others], authorise the clerk to prepare the requisite bond." A bond for £150 embodying this obligation was lodged in the teind process.

The summons, which narrated the resolution of the Magistrates and Town-Council, but with the omission (or erasure) of the words "not exceeding £150," concluded for the disjunction of certain portions of the Old or West Parish of Greenock, and the erection of the same into a new parish, to be called the East Church and Parish of Greenock, and for declarator "that the Magistrates and Town-Council of Greenock for the time being, and a committee of seven to be named by and from the proprietors of seats reserved in the said chapel, shall in all time coming have the sole and undoubted right of patronage of the said church, and the right of presentation and calling a minister to serve the cure thereat, and as oft in time coming as any vacance shall happen, and of modelling and disposing of the said church and haill seats thereof and bounds within the same, under the exceptions before and after mentioned, and of setting the said seats, and uplifting the rents thereof, and of naming and appointing the beadles," &c. "from time to time as they shall think fit, and of disposing during any vacancy of the fund which shall be provided by them for a stipend to their minister, or for Communion elements, manse, or schoolhouse." Then followed an exemption of the patron and heritors of the old parish from liability for stipend, &c. to the new parish, the reservation of certain existing rights, and a proviso that "the landward part of the said new parish,—that is, the lands and others before described included therein, not forming parts of the said towns of Greenock and Crawfordsdyke,—shall only be held as annexed *quoad sacra*, and not *quoad civilia*." The summons further contained this conclusion,—"And in order that the said church may be kept in repair and the minister supplied with a proper stipend, it ought to be found and declared by decreet foresaid that the said Magistrates and Council of the said burgh and barony of Greenock, and their successors in office, and the corporation and community of the said town, shall be bound and obliged in

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all time coming, not only to keep in repair the said church and rebuild the same when necessary, and to relieve the heritors of all claims on this account, or at the instance of the minister thereof for a manse or glebe, and of the expense of a schoolhouse, school salary, and other parochial burdens, but also to provide the minister of the said church in a competent stipend, with a sufficient sum for furnishing Communion elements, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, with interest of each term's payment from the time the same falls due and until payment."

On 8th March 1809 the Court of Teinds pronounced the following interlocutor:—"M'Cormick and Connell for the pursuers repeated the libel, and craved the Lords would decern conform to the conclusions thereof—*Alt.* absent.—The Lords having advised the libel and writings produced, and heard the procurators for the pursuers thereupon, they decern in the disjunction, erection, and annexation *quoad sacra* as libelled, on the Magistrates and Council of Greenock engaging to be answerable for a stipend of £200 sterling per annum, besides Communion elements, and appoint them to lodge in process a minute of Council binding themselves in the above terms, and decern, and remit to Lord Robertson to examine the said minute when lodged, and to approve thereof before extract."

The Magistrates and Town-Council thereupon, on 10th March, adopted a minute in the following terms:—"At Greenock, the 10th day of March 1809 years.—The Magistrates and Town-Council of Greenock being duly convened in council, it was stated that decree had been pronounced as libelled in the summons of disjunction and erection referred to in the former minutes of Council, on the Magistrates and Council engaging to be answerable for a stipend of not less than £200 sterling per annum besides Communion elements, and lodging in process a minute of Council binding themselves in the above terms; and the Magistrates and Council being now willing to be answerable for such stipend, they bind and oblige them and their successors in office, and the funds of the community, for payment of such stipend accordingly, besides Communion elements, and authorise the clerk to give out an extract of this minute to be lodged in process."

On 11th March 1809 Lord Robertson, by docquet written upon an extract of this act of Council approved thereof, and thereafter the decree of disjunction and erection was extracted.

The extract decreet bore, *inter alia*, that the Lords of Session as Commissioners for Plantation of Kirks "have found and declared, and hereby find and declare, that the said Magistrates and Council of the said burgh of barony of Greenock, and their successors in office, and the Corporation and community of the said town, shall be bound and obliged in all time coming, not only to keep in repair the said church, and rebuild the same when necessary . . . but also to provide the minister of the said church in a competent stipend, with a sufficient sum for furnishing Communion elements, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, with interest of such term's payment from the time the same falls due until payment; and declaring that the minister of the said new erected parish shall not be entitled in any time to come to insist for a manse or glebe; and have found, and hereby find, the Magistrates and Council of Greenock answerable for a stipend to the minister of the said new erected parish of two hundred pounds sterling per annum, besides Communion elements, and that conform to their bond

and obligation, dated the tenth day of March one thousand eight hundred and nine years, lodged in process," *i.e.*, the minute of Council last above mentioned.

In the present action the Lord Ordinary (Kyllachy), on 7th November 1895, assoilzied the defenders.*

* "OPINION.—The question here raised is said to be similar to that lately decided in the case of *Peters* v. *The Magistrates of Greenock*, 19 R. 643; and certainly, as in that case, the controversy relates to the stipend of one of the parish churches of Greenock—churches which were erected during the last and present century, on the foundation of former chapels of ease. As in that case also, the decision depends on the construction of what was in effect a judicial contract, embodied in a decreet of disjunction and erection pronounced by the Court of Teinds.

"The terms, however, of the decreet of the Court of Teinds (which in this case was obtained in the year 1809), and the tenour of the other documents which have to be construed, differ, I think, not immaterially from those which the Court had to construe in the case of *Peters;* and the question I have now to decide is, whether, giving due effect to those differences, I can here pronounce a similar judgment, viz., a judgment to the effect (as claimed by the pursuer) that the defenders, the Magistrates of Greenock, are bound—without prejudice to a bond for £200 per annum, which they granted at the time of the erection, and to which the decreet refers—to provide the pursuer and his successors with a competent and legal stipend suitable to the circumstances of the time and the position and duties of the benefice.

"Now, there is no doubt that up to a certain point the terms of the obligation for stipend, in this case undertaken by or imposed upon the magistrates, bear a considerable resemblance to the terms of the obligation which the Court had to construe in the case of *Peters*, and also in the older case of *Cæsar* v. *The Magistrates of Dundee*, 20 D. 859, to which the judgment in the case of *Peters* refers. In the *Dundee* case the magistrates were taken bound to provide to the minister 'a competent and legal stipend not under the sum of £1000 Scots money yearly.' In *Peters'* case the obligation was to provide the minister with 'a competent and legal stipend not under 950 merks, with 50 merks for Communion elements.' In the present case, the decreet, following the terms of the summons, finds and declares that the Magistrates and Town-council 'shall, *inter alia*, be bound and obliged, in all time coming, to provide the minister of the said church in a competent stipend, with a sufficient sum for furnishing Communion elements.' Up to this point there is certainly a close resemblance between the several obligations.

"In the present case, however, the decreet (that is to say, the extract decreet) goes on to add to the above general declaration a special finding in the following terms:—'And [the Commissioners foresaid] have found, and hereby find, the Magistrates and Council of Greenock answerable for a stipend to the minister of the said new erected parish of £200 sterling per annum, besides Communion elements, and that conform to their bond and obligation, dated 10th March 1809, lodged in process.'

"This makes it necessary to look a little more closely into the proceedings the effect of which the extract decreet purports to set forth. These proceedings are narrated in the decreet itself; and the interlocutors and documents to which the decreet refers are to be found in the process, which has been transmitted from the Register House, and to which both parties appeal.

"Now, it is, I think, clear to begin with, that what was contemplated by the several bodies and persons interested, before they came into Court, was not an obligation for stipend the extent of which was to vary from time to time, but an obligation the extent of which was to be fixed once for all by the Court. That appears from the documents narrated in the decreet, and indeed from the narrative part of the summons. The agreement of the

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The pursuer reclaimed.

At the hearing in the Inner-House both parties treated the extract decree as open to construction by reference to the interlocutor of 8th March 1809, the pursuer contending that the extract was unauthorised, if and in so far as it restricted the obligation of the Magistrates to payment of a stipend of £200 a year, and the defenders contending that it was unauthorised in so far as it found the Magistrates liable in payment of a "competent" stipend, *i.e.*, a stipend varying with the circumstances of the time. Neither party moved that the cause should be sisted in order to bring a reduction of the extract decree.

The pursuer argued;—The interlocutor of the Court of Teinds of 8th March 1809 decerned "as libelled," and looking to the conclusions of the summons that imported a decerniture for a competent stipend, and so brought the case within that of *Peters*.[1] The obliga-

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Magistrates was, as expressed in their minute of 30th January 1809, 'to pay such stipend as the Commissioners for Plantation of Kirks may fix upon, not exceeding £150 a year, with the usual allowance for Communion elements.' And a bond for £150 a year was in fact prepared and lodged in process prior to the first calling of the cause.

"It is therefore clear enough what was at least contemplated. In the summons, however, the Magistrates' agreement is narrated with the omission of the words 'not exceeding £150'—at least these words appear to have been erased—and the conclusion of the summons, as I have already said, is for declarator simply that the Magistrates shall be bound to provide 'a competent stipend'—the amount being left indefinite, and nothing being at least expressed as to its fixture by the Court. If therefore the Court had decerned *simpliciter* in terms of the conclusion thus expressed, I do not at present see that there could have been much doubt.

"But the interlocutor of Court was in fact as follows:—[His Lordship quoted the interlocutor]. In other words, the Court did not decern *simpliciter*, but subject to a condition or qualification, the exact effect of which is, as it seems to me, the point on which the case turns. The pursuer says that the Court's requirement of a bond or minute for £200 was a superadded condition, not derogating from the Magistrates' general obligation to pay a competent stipend, but fixing a minimum, and defining the obligation for the immediate future.

"The defenders, on the other hand, say that the adjected clause operated as a qualification of the decreet, and was intended as a definition of the obligation which the Court had been asked to declare indefinitely.

"There is, I am bound to admit, much to say for both of these views. The pursuer's construction is perhaps more in accordance with the practice of the Court of Teinds, which is accustomed to fix stipends subject to augmentation from time to time. On the other hand, the defenders' view is, I think, more in accordance with the natural construction of the writings, and is certainly more in accordance with what we may gather, from the course of the process and the writs produced, to have been the true intent and contemplation of parties. What I have to do is to endeavour to balance these considerations as best I may. In doing so, I have hesitated a good deal, and am not confident that I have reached the right conclusion. On the whole, however, I have come to prefer the defenders' construction of the writings, which constitute or express the judicial contract, and accordingly my judgment must be in the defenders' favour. I propose to pronounce an interlocutor sustaining the defences and assoilzieing the defenders from the conclusions of the summons."

[1] Peters v. Magistrates of Greenock, March 16, 1892, 19 R. 643, aff. May 18, 1893, 20 R. (H. L.) 42.

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tion of the Magistrates to pay £200 a year was thus collateral merely, and did not derogate from the general obligation to provide a competent stipend. If the interlocutor was ambiguous it was competent to construe it by reference to the terms of the Magistrates' minute of 10th March, by which they came under an obligation to provide a stipend of "not less than" £200. Lord Robertson approved of that, and this obligation was embodied in the extract decree. The presumption was that these later documents correctly expressed what the parties and the Court meant. It was to be remembered that the decree was a decree in absence at the instance of the Magistrates themselves. It was to be assumed, therefore, that the extract decree correctly expressed what they wanted; and the extract decree, on a sound construction, imported a general obligation on the Magistrates to provide the minister in a competent stipend, the amount varying with the circumstances of the time, and a particular obligation, applicable to the circumstances as then existing, to provide him in a stipend of £200 a year. The Magistrates' minute of 10th March shewed plainly that that was what they thought, and there was nothing to the contrary. The case was indistinguishable from *Peters'* [1] case and the subsequent case of *Newton-on-Ayr*.[2]

Argued for the defenders;—The case of *Peters* decided that a decree of the Court of Teinds erecting a new parish in a burgh might embody a judicial contract under which the magistrates of the burgh became bound to provide a reasonable stipend to the minister; and the judgment in that case proceeded on this governing consideration, that the Court of Teinds would not create a new parish without being satisfied that there was a sufficient endowment of it. The endowment was not to depend on the uncertain will of others, nor could it be held to consist of a trifling provision, such as 950 merks. There must be a better security and a larger endowment. Hence the Court held in *Peters'* case that the sum mentioned in the decree in that case was not the measure of the magistrates' obligation for all time coming. If, however, the sum mentioned in the decree was one which could be regarded as a reasonable endowment, that sum, *prima facie*, was the limit of the magistrates' obligation. Coming now to the decree in the present case, it was in marked contrast to that in *Peters'* case. In *Peters'* case there was an operative decree for "a competent and legal stipend," here there was no such operative decree. If, indeed, the decree here had simply decerned "as libelled," and then proceeded to set forth the obligation of the Magistrates, it might have been difficult to say that the principle of *Peters'* case did not apply, for the summons undoubtedly concluded for declarator that the Magistrates should be bound to provide "a competent stipend." The decree, however, was studiously expressed so as to avoid giving decree in terms of that conclusion. It decerned "in the disjunction, erection, and annexation *quoad sacra* as libelled," but with respect to the stipend all that the decree did was to make it a condition of granting decree of disjunction, erection, and annexation, that the Magistrates should become bound to pay a stipend of £200. In short, this was an example of a class of cases of which there were everyday instances in the recent practice of the Court of Teinds, and of which the *Kil-*

[1] Peters v. Magistrates of Greenock, March 16, 1892, 19 R. 643, aff. May 18, 1893, 20 R. (H. L.) 42.

[2] Rainie v. Magistrates of Newton-on-Ayr, June 6, 1895, 22 R. 633.

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marnock[1] case was an earlier example, in which the Court fixed the amount of the endowment once and for all; *Peters'*[2] case, on the other hand, and the *Dundee*[3] and *Newton-on-Ayr*[4] cases, were examples of the other class of cases, in which the Court did not fix the amount but merely satisfied themselves that there was a sufficient security for a proper endowment, leaving the amount to be determined and varied according to circumstances. Such being the unambiguous construction of the interlocutor of the Court, it was incompetent to modify that construction either by reference to the minute which the Magistrates and Town-Council subsequently adopted, or by reference to the terms of the extract decree.

At advising,—

LORD TRAYNER.—The case of *Peters*[2] referred to by the Lord Ordinary presents, in its general features, considerable similarity to the case now before us. But as the judgment in that case proceeded upon the view which the Court took of the construction and import of the judicial contract there in question, it does and can form no necessary precedent for the decision of the present case. Of course, if the contract there construed and the contract in this case were the same, the judgment would be repeated. The defenders however, contend that this is not so, and say that the contracts are materially different. The Lord Ordinary has given effect to the defenders' contention, although, as he says, with hesitation. I have come to the same conclusion as the Lord Ordinary, and without the hesitation he has felt and expressed. In reaching the opinion which I have formed, I have not, however, taken into account, as the Lord Ordinary has done, any writings or other evidence of a date anterior to the contract itself, tending to shew what the parties intended by their contract. That course may legitimately be resorted to to throw light upon a contract which is ambiguous, but I do not think this contract is of that character. I think it is explicit enough, and that the rights and obligations thence arising must be determined on the contract as expressed, the contract itself being taken as the final expression of the intention of the parties to it.

The contract or obligation now to be considered is contained in the interlocutor of the Court dated 8th March 1809, whereby the Court decerned "in the disjunction, erection, and annexation *quoad sacra* as libelled, on the Magistrates and Council of Greenock engaging to be answerable for a stipend of £200 sterling per annum, besides Communion elements," and appointed them to lodge in process "a minute of council binding themselves in the above terms." Now, it does not appear to me to be open to any doubt that the decree I have just quoted was pronounced on the condition that the defenders should undertake liability for "a stipend of £200 sterling per annum, besides Communion elements," and nothing more. In *Peters'*[2] case it was different. The condition of the decree and the obligation undertaken by the defenders there was to provide a legal and competent stipend, not less than a certain fixed sum. What was or might be a legal

[1] Magistrates of Kilmarnock v. Aitken, May 31, 1849, 11 D. 1089, 21 Scot. Jur. 416.

[2] 19 R. 643, 20 R. (H. L.) 42.

[3] Cæsar v. Magistrates of Dundee, June 9, 1848, 20 D. 859, footnote.

[4] Rainie v. Magistrates of Newton-on-Ayr, June 6, 1895, 22 R. 633.

and competent stipend depended largely on circumstances as they might emerge; but a legal and competent stipend, whatever that might come to be, was the extent of the obligation undertaken. Here, the amount of the obligation is fixed once for all. I do not understand that the pursuer objects to this view, if there was no other consideration in the case. But he thinks he can assimilate this case to *Peters'*[1] case in respect of two circumstances, to which I shall now advert. The first of these is, that the interlocutor of the Court in which the obligation is expressed, "decerns in the disjunction, erection, and annexation *quoad sacra* as libelled." These last words, according to the pursuer's contention, import into the interlocutor the conclusions of the summons, and among these conclusions there is one that the defenders should be bound and obliged "to provide the minister of the said church in a competent stipend," &c. But that conclusion is not one of those for which decree was given. The decree of disjunction, erection, and annexation "as libelled" does not cover the conclusion as to stipend at all. The decerniture as libelled only applied to the conclusions (1) that certain lands should be disjoined from an existing parish; (2) that these lands should be erected into a new parish; and (3) that the disjoined lands should be annexed *quoad sacra* to the new parish. Decree as libelled was certainly pronounced so far as these conclusions went, but no further. With reference to the conclusion as to stipend, quite separate from the three I have alluded to, no decree was pronounced by the interlocutor of 8th March 1809. If there had been—if, as the pursuer says, there was then pronounced a decree against the defenders for payment of a competent stipend—it would have been superfluous to stipulate, as the interlocutor does, that the interlocutor erecting the new parish should only become operative on the defenders engaging to be answerable for a fixed stipend of £200 per annum. But, as I have said, the words "as libelled" have only reference to the conclusions of the summons relative to disjunction, erection, and annexation. The interlocutor is so limited in distinct terms. The Lords "decern in the disjunction, erection, and annexation *quoad sacra* as libelled"—they decern as libelled in nothing else.

The second matter on which the pursuer specially relies is this, that in the minute of council lodged by the defenders in compliance with the order contained in the interlocutor above quoted, the defenders undertook to be "answerable for a stipend of not less than £200 sterling per annum," &c. This, he says, shews that the stipend for which the defenders became answerable was a competent stipend, and not less than £200 a year. I think this is not an admissible reading of the defenders' undertaking. The words "not less" were certainly unnecessary as matter of compliance with the order of Court, and I think the undertaking should be read in connection with the order in obedience to which it was lodged. The defenders were only ordered to lodge a minute in which they undertook to be answerable for £200 a year. That they undertook to be answerable for not less than £200 a year cannot in any reason be read as an undertaking that they undertook to be liable for more. The words "not less" had a different signification in the case of *Peters*,[1] but they were there used in a very different connection.

[1] 19 R. 643, 20 R. (H. L.) 42.

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Jan. 17, 1896. Thomson v. Magistrates of Greenock.

I think the pursuer has failed to shew that the defenders are liable to him in any stipend beyond £200 a year, and that therefore the interlocutor of the Lord Ordinary assoilzieing the defenders should be adhered to.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

DUNCAN & BLACK, W.S.—CUMMING & DUFF, S.S.C.—Agents.

No. 81.

Jan. 22, 1896. Gibson's Trustees v. Galloway.

JOHN WATT AND OTHERS (Gibson's Trustees), Pursuers (Reclaimers). —*Clyde.*

WILLIAM HARRY GALLOWAY, Defender (Respondent).—*A. M. Anderson.*

Bill of Exchange—Proof—Parole—Competency—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.—In defence to an action for the amount due under a promissory-note, the debtor stated that, under an arrangement between him and the creditor, the promissory-note was to be renewed when due, and from time to time thereafter until he should be in a position to repay it without detriment to his business engagements, and that he had been assured by the creditor that the date of repayment would be left to himself so long as interest was paid.

The Court (*rev.* judgment of Lord Kincairney) *held* that the defender was not entitled to a proof of his averment, on the ground that if the agreement meant that the defender was not bound to pay the principal sum, but an annuity, it contradicted the written obligation; and that if the agreement meant a promise by the creditor not to press for payment, the agreement not being in writing, it was not binding on his executors.

Opinion reserved whether it would be open to an obligant to prove a verbal agreement that a bill should be renewable for a definite time, or that the debt should subsist for a definite time, the bill being treated as a mere security for its ultimate payment.

1ST DIVISION. Lord Kincairney.

THOMAS GIBSON, of Bainfield, lent a sum of £200 to William Harry Galloway, Leith, for which Galloway granted a promissory-note. The promissory-note was renewed from time to time, the last renewal being granted on 1st June 1894 by a promissory-note payable three months after date.

Thomas Gibson died on 1st October 1894, and thereafter his testamentary trustees brought an action against Galloway for payment of £200, with interest from 1st September 1894.

The pursuers produced and founded on the promissory-note of 1st June 1894.

The defender (answer 2) admitted that he had received the advance of £200, and granted his promissory-note therefor, but explained "that under an arrangement between the defender and the said deceased, made on 1st June 1894, the said loan was to bear interest at the rate of five per cent per annum, and the said promissory-note was to be renewed when due, and from time to time thereafter, until the defender should be in a position to repay same without detriment to his business engagements. The defender was assured by the deceased that the date of repayment would be left to himself so long as interest was paid, and Mr Gibson further undertook that this arrangement would subsist even after his death. The defender has understood, since this arrangement was come to, that the contract could be terminated only on his initiative."

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The pursuers pleaded;—(2) No relevant defence.

On 27th November 1895 the Lord Ordinary (Kincairney) allowed a proof.

The pursuers reclaimed, and argued;—The defence was irrelevant. It was an attempt on the part of the defender to negative his liability under the promissory-note by evidence of a parole agreement. In allowing proof the Lord Ordinary had proceeded on section 100 of the Bills of Exchange Act, but that section did not entitle an obligant in a bill to make any such defence.[1] Further, section 16 of the same Act provided a perfectly convenient way for attaining the purpose which the parties were alleged by the defender to have had in view, by the insertion in the note of some qualification of the obligant's liability.

Argued for the defender;—The defence was not a denial, but only a qualification of the defender's liability under the note, and was admissible to proof under section 100.*

At advising,—

LORD M'LAREN.—This is an action by testamentary trustees on a promissory-note for £200 granted by the defender to the truster, which, according to its terms, is payable three months after date. The defence is contained in the answer to the second article of the condescendence, in which the defender admits the advance of £200, and states:—(His Lordship read the answer quoted above). It is not easy to reduce this statement to a definite proposition, and the difficulty is probably due to the inherent indefiniteness of the arrangement described rather than to any want of care or precision on the part of the defender's legal advisers. It appears to me that the statement can have only two meanings; either it means that the defender was not liable in payment of the principal sum in the bill, but was only to pay an annuity to his creditor equal to the interest on that sum, or it means that Mr Gibson, having made this advance as a favour to the defender, represented to him that he should not press him for payment at the end of the three months, but would expect the defender to pay interest on the loan.

On the first hypothesis, I think that the defence is irrelevant, because it is contradictory of the defender's written obligation, and it is an established rule of pleading that a party cannot avoid his written obligation by merely averring and offering to prove that it was not binding on him. The second alternative amounts to this, that Mr Gibson was willing to give his debtor indulgence. But such an arrangement not reduced to writing, and especially where it is wholly indefinite as to time, is not binding on executors, whose duty is to ingather the estate which they are administering with the least possible delay.

To say that the arrangement was to bind the executors, and that the loan could only be terminated on the defender's initiative, is just another way of saying that the defender was not legally compellable to pay his bill, and for the reason stated I think that this is an inadmissible defence.

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[1] National Bank of Australasia v. Turnbull & Co., March 5, 1891, 18 R. 629.

* Section 100 of the Bills of Exchange Act, 1882, enacts,—"In any judicial proceeding in Scotland any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability therein, may be proved by parole . . ."

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I do not think it is necessary to consider the provisions of the Bills of Exchange Act as to the admissibility of parole evidence to prove facts relevant to the defender's liability.

The question may hereafter arise whether it would be open to an obligant to prove a verbal agreement that a bill should be renewable for a definite time, or that the debt should subsist for a definite time, the bill being treated as a mere security for its ultimate payment. I offer no opinion on the competency of proving such an agreement qualifying the obligation on the bill. But, on the most liberal reading of the enactment, it cannot be held to authorise the admission of proof to set aside the bill altogether, which, as I think, is the effect of this defence. I am accordingly of opinion that the Lord Ordinary's interlocutor should be recalled, that the defence should be repelled, and that decree should be granted in favour of the pursuers for the principal sum and interest at the rate of 5 per cent.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, repelled the defences, and decerned in favour of the pursuer for payment of £200, with interest at the rate of 5 per cent from 1st September 1894.

ANDREW GORDON, Solicitor—G. BROWN TWEEDIE, Solicitor—Agents.

No. 82.

Jan. 22, 1896. Stewart's Trustees v. Stewart.

ROBERT ALEXANDER KENNEDY AND ANOTHER (Miss Helen Love Stewart's Trustees under Trust-deed of 1852), First Parties.—*James Reid.*

MISS MARGARET STEWART, Second Party.—*Balfour—Macfarlane.*

JOSEPH ROBERT MACLAGAN WEDDERBURN (James Stewart's Trustee), AND OTHERS, Third, Fourth, and Seventh Parties.—*D.-F. Asher—J. H. Millar.*

WILLIAM NORMAN STEWART AND OTHERS (Miss Helen Love Stewart's Trustees under Will of June 1895), Fifth Parties.—*Johnston—D. Dundas.*

JAMES STEWART KENNEDY AND OTHERS (Children of Mary Stewart or Kennedy), Sixth, Eighth, and Ninth Parties.—*Rankine—E. H. Robertson.*

Succession—Vesting—Fee and Liferent—Liferent allenarly, with fee to issue.—A testator directed his trustees to convey his whole estate to his children "equally among them, share and share alike," the conveyance "to be made at the periods and subject to the conditions following . . . and if a daughter or daughters, upon her or their severally attaining majority, but my said trustees are in this last case hereby directed and required to reinvest the share or shares of my estate coming to her or them . . . taking the conveyances or securities thereof in favour of my said daughter or daughters in liferent for their liferent use allenarly, and to their child or children to be lawfully procreated of their bodies in fee." The trustees conveyed to trustees nominated by a daughter, who had reached majority, her share for her liferent use allenarly, and to her children in fee. She died without issue, leaving a will, which disposed of her share.

Held that the daughter's share had vested in her, and was carried by her will.

Lindsay's Trustees v. *Lindsay*, 8 R. 281; *Dalglish's Trustees* v. *Bannerman's Executors*, 16 R. 559; *Logan's Trustees* v. *Ellis*, 17 R. 425, *followed.*

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2D DIVISION.

JAMES STEWART, of Clydebank, Greenock, died on 11th November 1837, leaving two testamentary deeds, the first dated 19th July 1827, and the second dated 2d June 1830. By the first deed he left his whole estate to trustees. The deed provided,—"In the fifth place, after setting aside such a sum of money as will secure the payment of the foresaid annuity to my wife, I hereby direct and appoint my said trustees to redispone, convey, and make over to the issue of my present marriage the whole of my means and estate, heritable and moveable, in the event of there being only one child of the said marriage; but in the event of there being more than one, then to the said children, equally among them, share and share alike; and in either case, I appoint the said conveyance to be made at the periods, and subject to the conditions following, namely, if a son or sons, upon his or their attaining the age of twenty-five years complete, but not sooner, a reasonable yearly allowance being made to him or them by my said trustees for their education and support, from the time of my death, or after they shall have attained the age of ten years, until they shall have arrived at the age of twenty-five years,—and if a daughter or daughters, upon her or their severally attaining majority; but my said trustees are in this last case hereby directed and required to reinvest the share or shares of my estate, heritable or moveable, coming to her or them, on such security as they shall see proper, taking the conveyances or securities thereof in favour of my said daughter or daughters in liferent, for their liferent use allenarly, and to the child or children to be lawfully procreated of her or their bodies in fee, an allowance being also to be made by the said trustees for their support similar to the above, until they shall have attained majority as aforesaid. . . ."

By the supplementary deed the testator provided,—"In the third place, I hereby appoint and direct my said trustees, upon my daughters attaining majority or being married, or upon my sons attaining the full age of twenty-five years, to denude themselves of their my said daughters' and sons' respective portions of my estate, in terms of the fifth proviso of the said deed of settlement; and in the event of any of my said children dying without lawful heirs of their own bodies, I direct and appoint the share or shares of the deceaser or deceasers to be equally divided among, or invested in the name and for the behoof of the survivors or survivor, share and share alike, in terms of the said deed of settlement. . . ."

The testator was survived by eight children. Of these, three died in minority prior to the periods of division, and it was held (13 D. 1386), that their shares had not vested in them. The following five children survived that date, viz., James Stewart of Blackhouse; Captain Daniel Shaw Stewart; Miss Helen Love Stewart; Miss Margaret Stewart; and Mrs Mary Stewart or Kennedy, wife of the said Robert Alexander Kennedy. In 1849 certain questions having arisen as to the division of the trust-estate, an action of multiplepoinding was brought by the trustees in the Court of Session. One of the questions then decided was that in investing in terms of Mr Stewart's deeds of settlement the shares provided to his daughters, no substitution could competently be added to the truster's directions to invest said sums in favour of his daughters "in liferent for their liferent use allenarly and to the child or children to be lawfully procreated of their bodies in fee."—(14 D. 298.)

In the course of the action Miss Helen Love Stewart in 1852

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nominated trustees, to whom her father's trustees conveyed her share for her behoof in liferent for her liferent use allenarly, and the child or children to be lawfully procreated of her body in fee.

Miss Helen Love Stewart died unmarried on 17th June 1895, leaving a will, dated 10th June 1895, by which she appointed William Norman Stewart and others trustees, and directed them to divide among her surviving nephews and nieces her whole estate, including her share of her father's estate.

The trustees under the trust-deed granted by Miss Stewart in 1852 refused to pay over the trust funds without judicial authority.

This special case was accordingly presented, in order to ascertain whether Miss Stewart had power to dispose by will of her share of her father's estate. There were nine parties, of whom the first were the trustees of Miss H. L. Stewart under her trust-deed of 16th December 1852. The second was Miss Margaret Stewart, the last surviving child of the testator. The third, fourth, and seventh parties represented brothers and sisters of Miss H. L. Stewart, and the fifth parties were the trustees under Miss H. L. Stewart's will of June 1895.

The fifth parties maintained that the testator gave an absolute gift of a share of his estate to each of his children, which vested in each of them respectively, not later than the period of division of the estate, that the destination in favour of a child's children was a mere burden on the fee which flew off upon her death without leaving issue, that, in any view, Miss Helen Love Stewart having survived the period of division, to which alone the destination to children's children was referable, was entitled to dispose of the fee of her share, and that the said fee was therefore validly conveyed by her to the fifth parties to be administered by them in terms of the said trust-deed in their favour.

The third and fourth parties maintained that the testator made no absolute gift of a share of his estate to each of his daughters in fee, but that their right in such shares was confined to a mere liferent; that Miss Helen Love Stewart had no power to dispose of the share of her father's estate liferented by her; that the said share, upon Miss Helen Love Stewart's death, fell into intestacy of the testator, and must be divided among his next of kin as at the date of his death.

The first question was,—"Had Miss Helen Love Stewart power to dispose by will of the share of her father's trust-estate bequeathed to her by his trust-disposition and settlement?"

Argued for the fifth parties;—There was conferred on Helen an absolute gift in the event, which happened, of her dying without issue.[1] A contrast was presented by the case of *Muir's Trustees*,[2] where the terms of the deed were very clearly those of a gift, qualified by such restrictions as to exclude vesting. The case of *Fulton's Trustees*[3] appeared hostile, but it was overruled by *Lindsay's Trustees*.[1] This also appeared from Lord Lee's opinion in *Dalglish's Trustees*.[1]

Argued for the third, fourth, and seventh parties;—There was no

[1] Lindsay's Trustees v. Lindsay, Dec. 14, 1880, 8 R. 281; Dalglish's Trustees v. Bannerman's Executors, March 6, 1889, 16 R. 559, *per* Lord Lee, 564; Logan's Trustees v. Ellis, Feb. 7, 1890, 17 R. 425.

[2] Muir's Trustees v. Muir's Trustees, March 19, 1895, 22 R. 553.

[3] Fulton's Trustees v. Fulton, Feb. 6, 1880, 7 R. 566.

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valid disposition of the fee of the share to Helen. It was limited to a liferent, and at her death this share became the intestate succession of her father. They did not need to question the authority of the cases cited, for it was clearly settled that a fee was only recognised when there was a conveyance of the fee to the beneficiary first of all. So in the cases of *Lindsay*,[1] *Dalglish*,[2] and *Logan*[3] there were absolute gifts, subsequently modified by some provisions which did not take effect. Besides, in these cases, there was present the feature of repugnancy, which did not occur here. The case of *Muir's Trustees*[4] was applicable to this case, for the only right given to his daughters by the testator was a liferent. *Fulton's Trustees*[5] should be followed.

At advising,—

LORD JUSTICE-CLERK.—If this question were open there would be great room for argument on both sides, but I have no doubt that it is already decided by the case of *Lindsay's Trustees*,[1] and the other cases following it which have been cited. I think therefore that we should answer the first question in the affirmative.

LORD YOUNG.—I think so too. The question in the case of *Lindsay*[1] and following cases was one which was at that time reasonable to raise, argue, and have decided, but it has been settled, and, if I may be permitted to say so, in my opinion reasonably decided. At any rate we must follow these decisions. I think that Miss Stewart's share was so vested in her as to be liable for her debts and deeds, and it must go according to her will. I think we shall best dispose of the case by answering the first question in the affirmative, and leaving the other questions unanswered.

LORD TRAYNER.—I agree. I think this case is ruled by the decisions in the case of *Lindsay's Trustees*,[1] and the cases following it, which have been cited to us.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the first question in the affirmative.

CARMENT, WEDDERBURN, & WATSON, W.S., Agents for all the Parties.

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MISS JANET YOUNG, Complainer (Respondent).—*C. J. Guthrie*—*W. Thomson.*
LEOPOLD GORDON, Respondent (Reclaimer).—*W. Campbell*—*Graham Stewart.*

Bill of Exchange—Value—Promissory-notes granted for one day's delay in exacting payment of debt.—On 5th June 1895 a money-lender lent a lady £104, in return for two promissory-notes for £100 and £24, 16s. respectively, payable on demand. On 3d July 1895, the borrower being called on to pay, and being unable to do so, the lender induced her in consideration of twenty-four hours' delay, to grant him three additional promissory-notes payable on demand, for a further sum of £250. On 23d July the lender registered protests for non-payment of the five notes, and charged for payment of £200, the amount of two of the notes. In a suspension of

[1] 8 R. 281. [2] 16 R. 559. [3] 17 R. 425.
[4] 22 R. 553. [5] 7 R. 566.

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the charge, in which the above facts were admitted, the suspender tendered payment of the first two promissory-notes for £124, 16s.

In respect of this tender, and of the fact that no value had been given for the three promissory-notes for £250, the Court *suspended* the charge, and found the respondent liable in the whole expenses of the cause, and directed the Clerk of Court to deliver to the complainer the five promissory-notes.

2D DIVISION.

MISS JANET WOODBURN YOUNG, who was formerly a schoolmistress, and who lived at Claremont, Bridge-of-Allan, where she kept furnished apartments, presented this note of suspension and interdict against Leopold Gordon, a money-lender, at 144 Bath Street, Glasgow, praying for suspension of a charge for payment of £200, contained in certain promissory-notes.

The complainer stated:—(Stat. 2) On 5th June 1895 the complainer granted to the respondent two promissory-notes, payable on demand, for £100 and £24, 16s. respectively, and received in exchange £104, the balance of £20, 16s. representing interest. "This sum of £124, 16s. the complainer has already offered in full of the respondent's demands, and the same is again tendered." (Stat. 3) On 3d July 1895 the complainer was unable to pay, and she called upon the respondent, and asked for delay. In return for a delay of twenty-four hours the respondent prevailed on the complainer to grant him three promissory-notes, one for £100, and two for £75 each. (Stat. 6) "On 23d July respondent protested the whole of the notes for non-payment, registered the protests, and thereafter charged the complainer thereupon to the extent of £200, and has threatened to charge on the remaining registered protests."

The complainer pleaded, *inter alia*;—(3) The said bills, with the exception of the bill for £100, dated 5th June 1895, and the bill for £24, 16s. of same date, having been granted for no value received, the suspension craved should be granted.

The respondent stated;—"On 2d July 1895 the respondent wrote the complainer for payment of the £124, 16s. contained in the promissory-notes mentioned in article 2 of the statement of facts for the complainer. The complainer replied asking for an extension of time. On 3d July 1895 the complainer called on the respondent and pressed for delay, which the respondent at first refused to give . . . The complainer then offered the respondent, as an inducement to him to give the delay asked, to grant him new promissory-notes for £250, on the footing that, if payment was not made by her to the respondent of the said sum of £124, 16s. by noon of the following day, the respondent would have an absolute right to insist on payment of the sum of £250 contained in the said three bills, in addition to the said sum of £124, 16s. The respondent agreed to this, and the complainer accordingly granted to the respondent the three promissory-notes bearing that date, which are herewith produced. . . . The complainer at the same time, along with said three promissory-notes, delivered to the respondent the holograph letter dated 3d July 1895, in the following terms:—'144 Bath Street, Glasgow.—I have this day granted to Mr Leopold Gordon, Glasgow, three bills, one for £100, and two (each) for £75, and making the total £250, that I have granted him bills for this day, payable on demand, which I read over, signed, and clearly understood; that I have granted him those three bills as further security and in consideration of him, the said Leopold Gordon, having granted me an extension of time till 12 o'clock noon

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to-morrow, Thursday 4th now next July 1895, to pay him the £124, 16s., being the amount of my two bills I have granted him on Wednesday, the 5th of last month, which I am duly and justly indebted to him, and which is due and payable to him this day; but if default shall be made by me in paying him the £124, 16s. by the time named above to-morrow, I hereby authorise and empower him, the said Leopold Gordon, to proceed against me forthwith for the recovery of all the five bills that I have granted him, amounting to altogether £374, 16s., to receive and to share an equal dividend on my estate in the case of bankruptcy, cessio, or sequestration, without any hindrance or prejudice to him, and without any objections either by myself, my trustees, or trustee. Dated this 3d day of July 1895. Written and signed by myself. (Signed) JANET WOODBURN YOUNG.' The complainer failed to implement the said agreement to pay the sums contained in said promissory-notes, dated 5th June 1895, on the following day, and the respondent thus became entitled to payment of £374, 16s."

The respondent pleaded;—(2) The complainer's statements are irrelevant, and insufficient to support the prayer of the note. (3) The present action is excluded by the said letter of 3d July 1895 granted by the complainer to the respondent. (4) The sums contained in the said promissory-notes being due by the complainer to the respondent, the note ought to be refused.

On 3d December 1895 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that the respondent is entitled (1) to the sum of £100 contained in the promissory-note dated 5th June 1895; and (2) to the sum of £24, 16s. contained in the promissory-note of like date, and that the complainer is not bound to pay, and the respondent is not entitled to recover, the amounts in the bills dated 3d July 1895 for £100, £75, and £75 respectively, mentioned on record, and in respect of the offer made by the complainer in her second statement of facts, and of the consignation by the complainer of £100, suspends the charge and warrants thereof *simpliciter*, and decerns: Grants warrant to the Bill-Chamber Clerk to pay to the respondent the sum of £100 consigned in his hands on 7th October last, and that on production of a certified copy of this interlocutor, to be applied by him in payment *pro tanto* of the foresaid bills, dated 5th June 1895: Finds the complainer entitled to expenses," &c.

The respondent reclaimed. Counsel for the complainer were not called upon.

At advising,—

LORD JUSTICE-CLERK.—This is a case of a somewhat extraordinary kind. The complainer admits that she signed two promissory-notes, one for £100, and one for £24, 16s., payable on demand, and that the cash she received from the respondent for these two bills was only £104. After that the respondent induced her, in consideration of his giving her twenty-four hours' delay in repayment of that sum, to sign other bills amounting to £100, £75, and £75,—£250 in all. The Lord Ordinary has found that the respondent is entitled to £100, and £24, 16s., and that is not disputed. This is a most unconscionable and a most disgraceful transaction altogether, but there is no dispute about that part of it. There is no doubt that the complainer got value to the extent of £104, and that the rest was stipulated for to the advantage of Gordon. The Lord Ordinary has held that Gordon is not entitled to

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recover the sums contained in the three bills for £250. I entirely agree with the Lord Ordinary. It cannot be said that the complainer received anything for these bills, and the Lord Ordinary is right in holding that the reclaimer has no right to enforce payment under them.

LORD YOUNG.—The case before us discloses very startling conduct on the part of a man who says he is a financial agent in a business which he carries on in Glasgow. The financial business consists in lending money to persons who will deal with such a person. He took two names, one being Leopold Gordon, and the other B. Edwards, and he gives no explanation of his doing so. A poor lady, formerly a schoolmistress at Bridge of Allan, unfortunately applied to this man. I do not like to introduce the term which in my opinion would best describe him. It was in the month of June last, and she got from him in loan a sum of £104. For that he took from her a bill for £100, and another bill for £24, 16s., payable on demand. In the month of July he demanded payment, and she was not able to give it. He then induced her to subscribe three more bills, one for £100, and two for £75 each, making the bills or promissory-notes which he had received from her amount in all to £374, 16s. He got these in the month of July, she having got the £104 in the month of June, about four weeks before. Then he wrote out and made her copy, or dictated to her, a letter which is a most scandalous letter for any man to dictate to or write out for a poor woman to whom he had lent a small sum of money—the most scandalous letter I ever saw. Then he proceeded to do diligence upon these three bills amounting to £374, 16s., for which he had only advanced £104. It is entirely out of the question to expect that this Court, or any Court of law, will aid such a creature in recovering payment of these bills for £250. He gave nothing in return for these bills, although the letter bore that they were for delay in exacting payment of the bills for £100 and £24, 16s. for twenty-four hours. I agree that diligence must be suspended upon the bills for £250.

The bills for £100 and £24, 16s. are in a different position. These bills were given by the borrower, who received £104, upon which the lender only charged £20, 16s. of interest. I should have been very much disposed to have refused the aid of this Court to recover upon the £24, 16s. bill, beyond a reasonable interest for a month's use of the £100 which was lent, but I have not to consider that, because payment has been offered not only of the £100 but also of the £24, 16s. I therefore agree that while this creature should have that money, the diligence which he got on the other three bills should be suspended. The expenses of these proceedings however, must be paid by the respondent, and while he gets the £124, 16s., that sum will be available to the debtor for the expenses in which the respondent will be found liable here. I think the Court should also order that the whole five promissory-notes which are in the hands of the Clerk of Court, together with the letter of 3d July, should be handed over to the complainer.

LORD TRAYNER.—I agree. Putting out of view the complainer's statement, and simply taking that of the respondent, I find in it a confession of a most iniquitous transaction. I cannot but regard the demand for payment

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of these bills as a most impudent attempt to defraud this poor woman of money to which the respondent was not entitled. The only regret I have is that this gentleman's conduct did not go just a little further, and lead him into the audience of a different Court, and prevent him, at least for some time, from carrying on a business which is disgraceful. I agree that the bills should be handed over to the complainer, and the respondent found liable in the whole expenses of the case.

THE COURT adhered to the interlocutor of the Lord Ordinary, with additional expenses, and directed the Clerk of Court to deliver to the complainer the five promissory-notes and the letter of 3d July 1895.

MARCUS J. BROWN, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

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LORD BELHAVEN AND STENTON, Petitioner.—*Mackay*—*D. Dundas.*
DOWAGER LADY BELHAVEN AND OTHERS, Respondents.—*Balfour*—*C. K. Mackenzie*—*Don Wauchope.*

Entail—Restriction of provisions to Widow and Children—5 *Geo. IV. c.* 87 (*Aberdeen Act*), *secs.* 1 *and* 4—*Free yearly rent—Mineral Lease—Royalties—Approaching exhaustion of minerals.*—*Held* by a majority of seven Judges, *diss.* Lord M'Laren, that in estimating the provisions which an heir of entail is entitled under sections 1 and 4 of the Aberdeen Act to make for his widow and children, the royalties payable under mineral leases during the year current at the date of the granter's death fall to be taken as part of the "free yearly rent" of the entailed estate, irrespective of the fact that the minerals are nearly exhausted.

Wellwood v. *Wellwood*, 10 D. 1480, and *Douglas* v. *Scott and Yorke*, 8 Macph. 360, *overruled.*

Christie v. *Christie*, 6 R. 301, *commented on.*

1ST DIVISION. with three consulted Judges. Lord Low.

ON 28th December 1892 James Hamilton Lord Belhaven and Stenton, heir of entail in possession of the entailed estates of Wishaw, in the county of Lanark, granted a bond of annuity and provision under the powers conferred by 5 Geo. IV. c. 87 (the Aberdeen Act), sections 1 and 4,* whereby he provided to his widow an annuity of

* The Aberdeen Act (5 Geo. IV. c. 87), sec. 1, enacts,—"That it shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made, in that part of Great Britain called Scotland, under the limitations and conditions after mentioned, to provide and infeft his wife in a liferent provision out of his entailed lands and estates by way of annuity; provided always, that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children hereinafter specified, and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor."

Sec. 4, which empowers heirs of entail to grant provisions to children, contains a proviso that the provisions shall not exceed certain proportions of the free yearly rents or free yearly value.

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£6000, or such other sum as should not exceed one-third part of the yearly rental of the estates, and to his children, if three or more, a sum not exceeding three years' free rent or value of the estates. Lord Belhaven died upon 6th September 1893, survived by his wife and by seven daughters.

On 6th November 1894 Alexander Charles Hamilton Lord Belhaven and Stenton, who succeeded as heir of entail to the Wishaw estates, presented a petition to the Junior Lord Ordinary under section 7 of the Aberdeen Act, in order to have the provisions granted by his predecessor restricted so far as they exceeded the amount authorised by the statute, and for authority to charge the entailed estate with the provisions so restricted.

The petitioner stated that the free rental of the estate was £4424, and that the utmost amount with which this predecessor could competently under the statute burden the entailed estate was (1) £1297, 17s. by way of annuity to his widow, and (2) £9379, 18s. 6d. by way of provisions to his children.

Answers were lodged by the Dowager Lady Belhaven and the children, in which they averred that, in addition to the rental of the lands given in the petition, there were mineral rents and lordships amounting to between £8000 and £9000 a year, which fell to be taken *in computo* in fixing the amount of the provisions. "The respondents submit that the proper and correct mode of computing the said provisions is by taking the average of rental of a number of years previous to the date of the death of the granter, and in the present case five years is a reasonable period to take for this purpose. The statute does not take into consideration the probable value of the mineral field, and of the estate generally, in the future, but directs attention to what is the existing free yearly rent or value of the estate at the date of the granter's death, and it is on this income that the widow's annuity and provisions to children must be computed."

The petitioner did not dispute that the coal had in the past been, and was at Lord Belhaven's death being, worked to a large amount under current leases; but he averred, by reference to a minute,* in

* The following reference to the minute is taken from the opinion of the Lord Ordinary:—

"1. Green Colliery.—The last lease of this colliery expired at Whitsunday 1893, and the tenant is now sitting from year to year. There is no fixed rent, only lordships. The minerals will be exhausted in the present year. The amount of the lordships paid for the year during which the late heir died was £666. If an average of years prior to that was taken the amount would be considerably larger.

"2. Clydesdale Colliery.—There is a lease of this colliery which does not expire until 1911, but there is a break every third year after 1893. The fixed rent is £500, and the lordships 7d. per ton. It is estimated that only 370,000 tons of coal remain in this colliery, which, at the average rate of working during the last four years, will be exhausted in seven years. The return for the year 1893-94 is stated at £2225, but in previous years the amount was less, in 1890-91 being only £247.

"3. Glenclelland and Knownoble.—It is stated that a lease of these collieries and also of part of the adjoining mineral field of Ravenscraig was executed in 1893 for a period of twenty-one years from Whitsunday 1892, with a break every third year in the tenant's favour. There is a fixed rent and also lordships. The rent is to be £1000 for the first two years of the lease, and then £750 until the Knownoble coal and the main and splint coal in Glenclelland are exhausted, when the rent is to be reduced to £500.

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which the position of the different collieries on the estate was set forth, that the minerals in most of them were nearly approaching exhaustion.

In these circumstances the petitioner maintained "that the claim made by the respondents, that the said mineral rents and lordships must be computed as part of the free yearly rent or value of the said estate, is entirely untenable, as such a claim might well result in the exhaustion of the whole rental by the jointure and interest on children's provisions, leaving nothing whatever for the heir of entail. Lord Belhaven submits that if the mineral returns are to be taken into account at all in computing the amount of provisions for widow and children, the fairest way of dealing with an exhaustible subject of that kind is to include in the rental of the estate interest at a fair and reasonable rate on the capital value of the minerals let at the date of death. But if and so far as it may be found necessary to base any calculation upon the mineral rental, he submits that the rental to be taken is that for the year from Whitsunday 1893 to Whitsunday 1894, being the year current at the date of the death of the said late James Hamilton, Lord Belhaven and Stenton."

On 25th June 1895 the Lord Ordinary (Low) reported the petition and answers to the First Division of the Court.*

It is estimated that the Knownoble coal will be exhausted about 1897, and as the main and splint coal in Glenclelland are said to consist only of pillars containing some 48,000 tons of coal, it cannot be long before they also are worked out. It is also estimated that the whole coal in Glenclelland will be exhausted in seven years.

"4. Over Johnston, Nether Johnston, Meadowhead, and Ravenscraig.—There seem to have been difficulties in regard to these collieries. They were let to a Mr Cameron in 1892 upon a lease of nineteen years, with half-yearly breaks. The lease was terminated at Whitsunday 1893, when the collieries were again let upon a lease of nineteen years to the Messrs Watson. There was, however, a break at Martinmas of the same year, which was taken advantage of. Since that date the collieries have been in petitioner's own hands.

"It is stated that Over Johnston contains coal sufficient to last for sixteen years at the same rate of output as in the years 1890-92, and that Nether Johnston and Ravenscraig will be exhausted in thirteen years at the average rate of working for the last five years. No information is given in regard to the amount of coal in Meadowhead, and probably that colliery has been worked all along with some of the others which I have mentioned.

"5. The remaining collieries upon the estate are North and South Netherton, Shieldmuir, Station, and Sunnyside. These collieries appear to have been worked together under a lease until 1889. South Netherton, Shieldmuir, and Station are said to be now exhausted. North Netherton and Sunnyside are now being worked by the Glasgow Iron and Steel Company, and it is said that at the average rate of output the former will be exhausted in six years, and the latter in five years."

* "OPINION.— . . . In these circumstance, the petitioner contends that if the method which has hitherto been adopted of ascertaining the free yearly rental or proceeds of an estate in minerals, namely, taking the average returns for a certain number of years prior to the death of the granter of the provisions, was adopted, there would not be secured to the heir of entail in possession the two-thirds of the free rental or proceeds, to which under the Aberdeen Act he is in all circumstances entitled. The petitioner therefore suggests that the amount to be brought *in computo* in fixing the provisions should be arrived at by ascertaining the capital value

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On 18th July the First Division pronounced this interlocutor:—"Having considered the report by Lord Low, and heard counsel, appoint the case to be argued before the Judges of this Division, with the assistance of three Judges of the Second Division."

Argued for the petitioner;—The first question which arose was whether the minerals in an entailed estate could be taken into account at all in ascertaining the free yearly rent of the lands and estate in the sense of the Aberdeen Act. On principle there was much to be said in support of the negative of the proposition, and useful analogies tending in this direction were to be found in other rights of a similar nature.[1] In face, however, of the judgments in *Wellwood's*,[2] *Douglas'*,[3] and *Christie's*[4] cases, the petitioner did not press the Court to decide the point, although he reserved right to state it in the House of Lords if so advised. Assuming then, in the second place, that the proceeds of collieries were to be treated as part of the annual rent or produce of an entailed estate, the petitioner submitted that looking to the fact that the minerals were more or less nearly approaching exhaustion, it was equitable, in order to avoid

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of the minerals unexhausted at the time of the late Lord Belhaven's death, and allowing interest at a fair rate upon the capital sum.

"The respondents, upon the other hand, contend that it is incompetent to inquire what is the life of the coalfield, and that it being admitted that at the date of Lord Belhaven's death, and previously, rents and lordships were being received from the collieries, the mineral rent must be fixed at the average amount actually received during a reasonable period of years prior to the date of death.

"In the well-known case of *Wellwood* (10 D. 1480 and 11 D. 248), it was settled that the produce of a coal mine is for the purposes of the Aberdeen Act a part of the rents and proceeds of the entailed lands and estates. It was also held that where lordships are paid—the amount of which varies from year to year, and depends upon the quantity of coal which the tenant chooses to put out in any year—the yearly value may be fixed by taking the average returns over such a period of years as in the circumstances may be reasonable.

"The respondents argued that although the judgment in *Wellwood's* case allowed an average of past years to be taken, it did not authorise any investigation as to what the mineral yield would be in the future. That view apparently was taken by Lord Benholme (in a case to which I shall presently refer), but taking the case of *Wellwood* alone, I find nothing to sanction the idea that the probability or certainty of the exhaustion of the minerals in the immediate future cannot be taken into consideration. It was there laid down that where the proceeds of an entailed estate varies from year to year as in the case of mineral lordships, the duty of the Court is to ascertain what is the yearly value of these proceeds taking one year with another. *Prima facie* it is difficult to see how the yearly value can

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[1] Duke of Roxburgh v. Duchess of Roxburgh, Jan. 19, 1816, F. C.; Galbraith v. Minister of Bo'ness, Oct. 27, 1893, 21 R. 30; The Lady Lamington, Feb. 14, 1682, M. 8240; Belschier v. Moffat, June 30, 1779, M. 15,863; Guild's Trustees v. Guild and Others, June 29, 1872, 10 Macph. 911.

[2] Wellwood v. Wellwood, July 12, 1848, 10 D. 1480, 20 Scot. Jur. 554, and Dec. 20, 1848, 11 D. 248, 21 Scot. Jur. 64.

[3] Douglas v. Scott and Yorke, Dec. 17, 1869, 8 Macph. 360, 42 Scot. Jur. 159.

[4] Christie v. Christie, Dec. 10, 1878, 6 R. 301; *vide* also Campbell v. Wardlaw, &c., July 6, 1883, 10 R. (H. L.), *per* Lord Blackburn, at pp. 65 and 66.

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perfectly obvious hardship to the petitioner, that the calculation should be made by ascertaining the capital value of the minerals unexhausted at the date of his predecessor's death, and by allowing interest at a fair rate upon the capital sum. Now, in previous cases, the Court had held that it was not bound in all circumstances to consider the amount of the royalties in "the year of the death of the granter," as expressed in the statute. While in *Wellwood's*[1] case the Court took an average of the lordships for seven, and in *Douglas'*[2] case for three preceding years, the case of almost total extinction of the minerals was foreshadowed by Lord Jeffrey[1] in *Wellwood's* case, by Lord Cowan and Lord Neaves[2] in *Douglas'* case, and by Lord Shand and Lord Adam[3] in *Christie's* case. The cases in regard to the produce of minerals in questions of testamentary succession depended on the intention of the testator as appearing from a construction of the particular deed in each case. Little light, therefore, was to be derived from them on the question here. The decision, however, in *Ferguson's*[4] case formed a direct analogy to the petitioner's argument, and Lord M'Laren's observations in *Strain's* case[5] (which, though

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be fixed upon that basis without considering the future in a case in which it appears that there will soon be no estate from which any proceeds can be derived. And I find that in the earlier report of *Wellwood*, Lord Jeffrey did refer to the possibility of minerals being almost exhausted when the granter of the provisions died. He said,—'The annual value is a mere measure, and in such a case we must reduce it to something like the average production of an ordinary year. If the coal has been almost wrought out when the provision was made, and it was offered to be proved that a year afterwards there was a final cessation of all profit in working it, it would be hard to put upon the Act so rigorous a construction as to hold that we were bound to take it as producing that last rent for all the years that the widow might survive, and, as if we had goggles on, look neither behind nor before, but fix our regards upon the one year alone.'

"In the case of *Douglas* (8 M. 360), the method of taking an average of years prior to the date of death was also followed. Various methods of fixing the yearly value, and among others a valuation by a man of skill, appear to have been suggested. The Lord Justice-Clerk (Moncreiff) said that although *Wellwood* settled that the question might be solved by an estimate, it did not follow that that estimate is necessarily to be calculated by an average. 'I could imagine,' his Lordship added, 'cases in which it would be right to arrive at the result by a valuation conducted on ordinary principles.' His Lordship, however, did not indicate what kind of case he had in view.

"Lord Cowan expressed the opinion that where minerals, extensively worked up to the date of death, were almost or altogether exhausted, they should not be taken *in computo* in ascertaining the amount of the provisions.

"Lord Benholme, on the other hand, said (and this is the opinion to which I have already referred):—'After some doubt as to the applicability of a valuation by scientific men to a question of this kind, to fix the value of

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[1] Wellwood v. Wellwood, *per* Lord Jeffrey, 10 D. 1488.

[2] Douglas v. Scott and Yorke, *per* Lord Cowan and Lord Neaves, 8 Macph. pp. 362 and 363.

[3] Christie v. Christie, *per* Lord Shand and Lord Adam, 6 R. pp. 309, and 303 and 304.

[4] Ferguson v. Ferguson's Trustees, Feb. 23, 1877, 4 R. 532.

[5] Strain's Trustees v. Strain, July 19, 1893, 20 R. 1025, *per* Lord M'Laren, p. 1031.

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difficult to reconcile with *Ferguson's* case, did not expressly overrule it), might fairly be appealed to as justifying the introduction into the law of Scotland of a principle well established in England[1] as regards wasting subjects. The cases regarding the fixing of the amount payable as composition for an entry in respect of minerals under the old Statute of 1469, c. 36, formed an analogy directly in point, shewing that the Court was at liberty to use any means in its power to do justice in the particular case.[2]

Argued for the respondents;—It being conceded that for the purposes of the Aberdeen Act going collieries formed part of the entailed estate, section 1 of the Act required in unequivocal terms that their "yearly rent" should be calculated as it happened to be at the death of the granter. The fact that the rents might fluctuate from year to year was not taken into account by the statute, which laid down as a standard the amount actually obtained during a given year without any consideration as to permanency or exhaustion of the subjects. Such a method of calculation, although rough-and-ready, was prefer-

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the minerals as at the date of the granter's death, I am unable to see that such a principle of valuation could in any case be applicable. The elements on which the average to be struck depends are what is, and in time past has been, the annual value of the mineral yield, and I do not think that the Court is entitled to give effect to a valuation, for that would be to introduce considerations of what the value of the minerals will be in time to come. There are doubtless questions in the solution of which the element of prospective rent may be taken into account, but I cannot think that such an element can be allowed to influence us in a case like this. To do so would be to supersede a calculation intended by the statute to be founded on events that had happened by a calculation proceeding on events that were to happen.'

"There is next the case of *Christie* (6 R. 301) which is a most important decision as regards the present question.

"In that case a lease was current at the death of the granter of an annuity to his widow under the Aberdeen Act of the freestone in the lands at a yearly rent of £200. The lease continued, and the rent was paid for five years after the granter's death, and during that year the heir in possession paid to the widow an annuity equal to one-third of the rental including the mineral rent. He subsequently, however, presented a petition to have the annuity restricted, on the ground that the lease had come to an end; that as matter of fact no stone had ever been worked under it, as it was found that it could not be worked to a profit, and that there were not then, and never had been, stone or minerals in the estate capable of being worked to a profit. He therefore asked that the old mineral rent should be struck out in fixing the amount of the widow's annuity.

"The Lord Ordinary (Adam) took the view that, assuming the petitioner's averments to be true, to take the mineral rent *in computo* would be to give to the widow and to deprive the heir in possession of more than one-third of the free yearly rent or proceeds. His Lordship therefore reported the case to the First Division, with the opinion that there should be inquiry in regard to the alleged impossibility of working the minerals to a profit.

"The learned Judges of the First Division, however, took an opposite

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[1] Howe v. Earl of Dartmouth, 1802, 2 Tudor's Leading Equity Cases, 6th ed., p. 321.

[2] Allan's Trustees v. Duke of Hamilton, Jan. 12, 1878, 5 R. 510; Sivright v. Straiton Estate Co., July 8, 1879, 6 R. 1208; Sturrock v. Carruthers' Trustees, May 21, 1880, 7 R. 799, *per* Lord Ormidale, p. 802.

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able to the large field of inquiry which would be opened by the petitioner's proposal. If the heir of entail thought he was being unfairly treated, he could appeal to the 13th section, and ask the Court to reduce the provisions so far as they deprived him of more than one-third of the estate. Accepting the authority of *Wellwood*, *Christie*, and *Douglas*, as shewing that the Court had in some cases allowed a computation on the basis of an average of past years, these cases were no authority for the proposition of the petitioner (which was outside any decided case), that future years were to be taken into account. The concession allowed by these cases must not be extended further. The cases founded upon by the petitioner regarding wills, and which were of course questions of the intention of the testator, had no application in a case regarding the interpretation of a statute. *Ferguson's Trustees*[1] could not stand in face of the judgment in *Strain's Trustees*.[2] The English rule, as deduced from *Howe* v. *Earl of Dartmouth*[3] had no application in Scotland.[4] In England it applied to wasting subjects, such as terminable annuities, which could have no analogy to minerals, the fruits of an estate. The considerations involved in the composition cases were entirely different. These cases were based

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view, and held that as the lease continued and rent was paid under it for five years after the granter's death, the mineral rent had at that date such a reasonable permanence that inquiry was excluded, and the rent fell to be taken *in computo* in fixing the amount of the widow's annuity.

"If it was the case that the minerals were not workable to a profit, the rental of the estate was only £700 a year, and yet the result of the judgment was that the heir in possession was compelled to pay the widow £300 a year during her life.

"I may observe that Lord Shand, in his opinion, expressly saved the case of minerals which had been worked, being exhausted at the time of the granter's death.

"I do not think that there is any difference in principle between a case in which there are no minerals which can be made available and one in which all the minerals have been taken out. It therefore seems to me that the case of *Christie* is an authority for saying that the question whether the annual proceeds of the collieries which were being worked, or capable of being worked, when Lord Belhaven died, should or should not be brought in *computo*, depends upon the degree of permanency of the proceeds. In such a case as the Green Colliery, which the petitioner avers had only a life of two years at the date of the death, it may be clear enough that the necessary degree of permanency is not present, while the reverse may be equally clear in the case of Over Johnston which has admittedly sixteen years to run. But between the two there are a variety of cases in which it is very difficult to find any principle upon which to determine what is a reasonably permanent source of annual proceeds and what is not so.

"I am unable to assent altogether to the view pressed either by the respondents or the petitioner. The respondents argued that, as there was admittedly a large return from minerals when Lord Belhaven died, and as, upon the petitioner's own shewing, the minerals in the estate will continue to be of an annual value for many years to come, it is incompetent to inquire as to the state of the mineral field, and that all that can be done is

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[1] Ferguson v. Ferguson's Trustees, Feb. 23, 1877, 4 R. 532.
[2] Strain's Trustees v. Strain, July 19, 1893, 20 R. 1025.
[3] Howe v. Earl of Dartmouth, 1802, 2 Tudor's Eq. Cases, 321.
[4] Ferguson v. Ferguson's Trustees, *per* Lord Rutherfurd Clark, 4 R. 533.

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not upon the construction of a particular statute, but on "use and wont." In estimating casualties it was the custom always to rate as low as possible, while provisions relative to a widow's annuity were to be construed as liberally as possible for her.

At advising,—

LORD PRESIDENT.—The minerals to which the present question relates form part of the entailed estate of Wishaw. When the late Lord Belhaven died, on 6th September 1893, these minerals were being wrought by tenants under leases of various terms of duration. In each case the return actually made to the landlord was in the form of lordships. It was not maintained in argument by the petitioner that in no case are the minerals of an entailed estate, which are actually worked by the heir in possession or his lessees, to be taken into account in ascertaining the amount of the provisions which may be made by him under the Aberdeen Act. The nature of mineral property, which is consumed by use, gave rise, in former days, to the contention that the proceeds of collieries were not to be treated as part of the annual produce of an entailed estate. The learned counsel for the petitioner expressly stated that they could not ask the Court to adopt that conclusion, and accordingly we heard no argument on the subject. If, then, the yield of going collieries is not to be left out of account in questions under the Aberdeen Act, the mode of dealing with it must be found in the first section, and no other section has been pointed to. The section distinguishes between lands let and lands unlet. If the lands are let, then it is the free yearly rent that is to be taken; if they are unlet, then it is the free yearly value. In either case certain deductions are to be made from rent or value alike, and the whole is to be calculated as things may happen to be at the death of the

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to take the average of the proceeds for a suitable number of years prior to Lord Belhaven's death.

"Now, if that course was adopted, and the petitioner's averments are true (as at this stage they must be assumed to be), the result would be that almost immediately the widow's annuity would become, by reason of the exhaustion of coal, more than one-third of the free rental, and would be increasingly greater than one-third of the free rental as years went on, until at last it might absorb the whole free rental. I do not think that a course which would probably lead to that result can be within the statute.

"On the other hand, the petitioner's proposal that the annual value should be taken to be the interest upon the capitalised value of the coal remaining, is one for which there is no authority. Further, I doubt if it would be within the provisions of the statute, because the result would probably be that at first the widow would get much less than one-third of the actual annual proceeds, while as time went on she would get a great deal more.

"The case appears to me to be one of great difficulty. It is also a case of importance, not only to the parties, but as a question of law and practice which is not unlikely to occur again, seeing the extent to which the minerals have been worked out in many parts of Scotland. Further, if the view taken by the respondents is sound, nothing more will be necessary than to take an average of the lordships for a suitable number of years, while if the petitioner's averments are relevant, a wide and expensive inquiry will be necessitated.

"In these circumstances I have thought it right to follow the course adopted by Lord Adam in the case of *Christie*, and to report the matter to the Inner-House."

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granter. Now, assuming, what is conceded, that for the purposes of the Aberdeen Act collieries form part of the entailed estate, this is the rule, and the only rule applicable. The collieries in question were let, and therefore it is the rent that is to be taken, and it is the rent as it happens to be at the death of the granter. That the word "rent" covers royalties has been decided, and the decision seems clearly sound, as the system of royalties is merely the way of calculating the rent to be paid. If this be so then I see no other difficulty in the way of the application of the statutory rule to the case in hand. The petitioner's argument is rested on the fact that while all the collieries now in question were actually being worked at the time of the death of the granter, under current leases, yet, in all, or at least in some, the minerals were more or less nearly approaching exhaustion. Striking illustrations were given of the unfairness of calculating an annuity which might burden the estate for many years by a rental on the eve of disappearing. It is probable that equally glaring anomalies may occur in the opposite direction, and several were suggested, some of these are incidental to mineral estates, and others are common to all landed estates. But the real answer to this objection lies in the terms of the statute, which, by the words "all as the same may happen to be at the death of the granter," seems to make a frank confession that the rule prescribed is more or less rough and ready, but that it is to be followed through all vicissitudes. The safeguard provided by the 13th section seems a further recognition of the risks of the heir in possession. I fully appreciate the hardships of particular cases. But all the arguments *ab inconvenienti;* all the instances of the last year of the lease, where the coal is all but worked out; all the cases of no reasonable permanence (so far as these are peculiar to mineral rents and do not apply to all rents),—are really arguments against coal being ever treated as part of the annual proceeds of the entailed estate. They furnish no warrant for the establishment of a separate rule for ascertaining the yearly proceeds of a colliery, when the statute has prescribed but one rule for all subjects falling within its scope.

The First Division appointed this case to be heard before seven Judges, because in two reported cases, *Wellwood*[1] and *Douglas*,[2] a mode of calculation different from that expressed in the statute had been adopted, viz., an average of years; while in a third, *Christie*,[3] it had been assumed, in the opinions of the learned Judges, that the statute permitted that course. The present petitioner does not propose an average of years previous to the death of the granter, because, as it happens, the last year of the granter's life is more favourable to him. His proposal is to take into account years subsequent to the granter's death. What we are asked to do seems a wider departure than has yet been made from the terms of the statute. While the point thus raised is therefore new, it seems to me that the true answer to the petitioner's demand is to be found in the fact that the terms of the statute warrant no departure in either direction from the condition of things as they happen to be at the death of the granter. Upon that ground my present judgment is based, and, in my opinion, the lordships payable during the year of the leases in which the late Lord Belhaven died must be held

[1] 10 D. 1480. [2] 8 Macph. 360. [3] 6 R. 301.

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to form part of the rents of the entailed estate, for the purposes of the present application.

LORD ADAM.—It was decided in the case of *Wellwood*[1] that the annual rent or annual value of coal mines was to be taken *in computo* in estimating the amount of the annuity which an heir of entail was entitled to provide for his widow under the Aberdeen Act,—that is to say, that mines and minerals formed part of the entailed lands and estates to which that Act applied; and no argument was offered to us that that decision, so far, was not well founded.

Assuming that to be so, it appears to me that, in estimating the annual rent or annual value of mines and minerals which is to be taken into consideration in fixing the amount of the widow's annuity, the rule, which must be followed, is that which is prescribed by the statute with reference to the entailed lands and estates generally, of which they form a part. There is no authority for estimating the rent or value of one part of the entailed lands and estates in one way and another part in another way.

Now, the Act appears to me to lay down a clear rule. It declares that the widow's annuity shall not exceed one-third part of the free yearly rent of the lands and estates where the same are let, or of the free yearly value thereof where the same are not let, after deducting public burdens, &c., all as the same shall happen to be at the death of the granter.

It is the free yearly rent or the free yearly value, as that may happen to be at the granter's death, and nothing else, which is to be taken into consideration in estimating the amount of the widow's annuity.

The Judges who decided the case of *Wellwood*[1] seem to have thought that this was not an equitable rule when applied to such subjects as the rents or lordships derived from mines and mineral, looking to their great variation from year to year, and that a more equitable rule would be to endeavour to find out what, *communibus annis*, the free rent or value of such subjects was, and to take that as giving the measure of the widow's annuity. Accordingly, in *Wellwood's*[1] case, they took an average of the lordships for the seven preceding years, and in *Douglas'*[2] case of the three preceding years. It appears to me that if the amount so arrived at was greater or less it could not possibly be the yearly rent or value of the subject, as that happened to be at the granter's death.

This may or may not be a more equitable way of proceeding than the rule of the statute, but it appears to me that the case is not one into which equitable considerations enter at all. The statute has relaxed the fetters of the entail, and empowered the heir of entail in possession to provide an annuity to his widow of a certain amount, to be ascertained in a certain way prescribed by statute, but no further. It appears to me that the way prescribed by statute must be followed, whether it be equitable or not, and that the Court has no power to authorise any deviation from it.

In this case, as I understand, the coalpits were all let at the time of the granter's death; that being so, I think that the rent which has to be taken into consideration in fixing the widow's annuity is the amount of the lordships received during the year then current.

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[1] 10 D. 1480. [2] 8 Macph. 360.

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LORD M'LAREN.—As my opinion has no influence on the decision of the case, I shall not elaborate it, but will indicate the steps of the argument by which I conclude that the widow's annuity ought to be calculated upon the actuarial or present annual value of the existing minerals.

I observe, first, that the Aberdeen Act makes no express reference to mineral estate, and that the case contemplated in the statute is the ordinary case of an estate producing an annual return, whether in the shape of rent to a proprietor who lets his estate, or of annual value to a proprietor who occupies his own land.

I hold, in common I believe with the other members of the Court, that the Aberdeen Act was rightly held to extend to the case of returns from minerals. But then I take note of the fact that the return which is received by a proprietor of minerals in the shape of royalty is not a consideration for the mere usufruct of the lands, as in the case of agricultural rent, but is a payment or consideration for the right of removal of part of the subject. Such royalties, I conceive, ought to be treated as being in part payments made for the use of the land or the privilege of removing the mineral, and in part for the value of the mineral or corporeal subject which is removed.

Now, as the Aberdeen Act contains no special provisions with respect to mineral estates, I think that, in applying the Act to such a case, it is necessary to ascertain how much of the payment, made in the shape of royalty, is to be regarded as annual rent or annual value. In the case which we are considering, we are informed that some of the coal mines held under leases from the late Lord Belhaven will be exhausted in a very few years. I cannot hold that the royalties to be received during such a short period are of the nature of rent or annual value within the meaning of the Aberdeen Act. As to how the true annual value is to be ascertained I do not wish to anticipate. But, supposing the whole capital value of the remaining minerals to be ascertained by the report of an expert, I should say that the interest at the rate of 5 per cent on the capital value so ascertained would be the fair annual value of the mineral estate; at least it would be a much nearer approximation to the true value than what is given by the crude proposition that the actual return within the year is always and necessarily the annual value.

We are familiar with actuarial calculations in other branches of the law of entail. These are not expressly required by statute. In the case of compulsory disentail, the Court is required to value the "expectancy" of the heirs-substitute whose interests are considered, and it has been held without doubt or question that the algebraic value of the heir's chance of succession is the "expectancy" to be considered. It is just as easy, or rather very much easier, to compute the present value of a tract of unwrought coal capable of measurement, and thence to find the annual value to the proprietor of this capital sum, supposing it to be put into a proper state of investment.

I understand that the Court attach importance to the words of the Aberdeen Act, "all as the same may happen to be at the death of the granter." There is a question whether these words apply to the immediate antecedent, viz., the deduction of public burdens, annuities, and interest on

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debt, or whether the expression qualifies the whole clause, including the ascertainment of annual value. But, waiving this question, I hold that the mode of valuation which I propose is a true valuation as at the death of the granter, because my proposition is that the coal remaining unwrought at the death of the granter is to be valued; that is, its capital value is to be ascertained at the granter's death, and the annual return which that capital sum is capable of producing is to be taken as the annual value of the subject.

I agree with your Lordships in holding that it is open to this Court to reconsider the decisions of the Inner-House in this branch of the law; that is, in virtue of the statutory provision by which cases of "difficulty and importance" may be referred to a Court of seven Judges. But then the result of my consideration of the cases is, that I find that the Court has recognised a distinction between wasting subjects and subjects which produce a return in perpetuity, and as I think that this is a well-founded distinction, my view is that it should be recognised, and, if necessary, extended.

I may also say that I disclaim all intention of introducing equitable considerations to modify the construction of the Aberdeen Act. My view is, that royalty for minerals, especially in the case of a mine which is approaching exhaustion, is neither annual rent nor annual value, but is inclusive of these elements, and that the sum paid by the tenant for the *corpus* of the mineral, or for the privilege of removing it, is only one of the elements from which the true annual value is to be deduced. In the case of a coal-field of great extent, and which is not likely to be exhausted within the lifetime of the annuitant, the royalties paid might be taken as a sufficient approximation to the true annual value for practical purposes. In the case of a field which is approaching exhaustion, I think that they cannot be so treated, and that the heir is not bound in payment of a provision for life which he has not the means of satisfying out of the estate.

The LORD JUSTICE-CLERK, LORD YOUNG, LORD KINNEAR, and LORD TRAYNER, concurred with the LORD PRESIDENT and LORD ADAM.

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of this case with the assistance of three Judges of the Second Division, and heard counsel for the parties upon the minute for the petitioner and answers thereto and the whole cause, after consultation with the said three Judges, and in conformity with the opinion of the majority of the seven Judges present, Find that the lordships payable during the year in which the late Lord Belhaven died formed part of the rents of the entailed estate for the purposes of the present application, and remit to the Lord Ordinary to proceed: Find neither party entitled to expenses in the Inner-House, and decern."

DUNDAS & WILSON, C.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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ARCHIBALD YOUNG AND ANOTHER (Chancellor's Marriage-Contract Trustees), Pursuers and Real Raisers.—*Cullen.*
REV. ERNEST ORDE-POWLETT AND ANOTHER (Sharples' Marriage-Contract Trustees), Claimants and Reclaimers.—*Macfarlane.*
MISS ELIZABETH BLANCHE CHANCELLOR, Claimant and Respondent.—*D. Dundas—Pitman.*
EDWARD CHANCELLOR AND ANOTHER (Chadwick's Marriage-Contract Trustees), Claimants and Respondents.—*D. Dundas—Pitman.*

Succession—Vesting—Trust—Marriage-Contract—Entail—Provision by heir of entail for younger children.—C, an heir of entail in possession, by his marriage-contract, in the exercise of a power under the deed of entail, bound the succeeding heirs to pay to the trustees a sum equal to three years' rent of the entailed estate, in trust for behoof of the children of the marriage not succeeding to the entailed estate, in such shares as C should appoint, and failing appointment, to be held by the trustees for the younger children alive at C's death equally, or their issue. As a further provision for his younger children, he assigned to his trustees certain policies of assurance on his life under similar conditions as to apportionment.

In contemplation of the marriage of R, his third son, C executed a deed appointing to R or his lawful issue or assigns £1500 as his share of the total trust funds. This deed was declared to be delivered on execution, and to be irrevocable, and R was taken bound to assign his rights under it to his marriage-contract trustees. R predeceased his father.

Held (*rev.* judgment of Lord Kyllachy) that R's right to the £1500 was not contingent on his surviving his father, and that it vested at the date of the appointment in his favour.

2D DIVISION. Ld. Kyllachy.

JOHN GEORGE CHANCELLOR, of Shieldhill, who died on 15th March 1894, was heir of entail in possession of that estate in terms of a bond of tailzie, dated 11th April 1727. This deed provided, *inter alia*,—"And also excepting and reserving full power and liberty to the said Alexander Chancellor and the other heirs of tailzie and provision above mentioned to provide their younger children to three years' free rent of the said lands and estate, so far as the same is free, unaffected for the time with liferents and real debts, and after deduction of annual rents of personal debts that may affect the same, as said is."

By his contract of marriage, dated 22d June 1847, Mr Chancellor narrated this deed and the liberty therein given to the heirs of entail "to provide their younger children with three years' free rent of the entailed lands," and bound the heirs and substitutes of tailzie who should succeed him to pay to his marriage-contract trustees the sum of £2000, or such other sum, less or more, as shall be equal to three years' free rent of the entailed lands, at the first term after his death, with interest, "in trust for behoof of the children of the said intended marriage not succeeding to the said entailed estate, and that in such shares or proportions, and subject to such conditions, if more than one such child, as the said John George Chancellor shall appoint by any writing under his hand, and failing such appointment, said sum shall be held by the trustees for behoof of the said younger children who shall be alive at the death of the said John George Chancellor in equal shares or proportions, the issue of such other child or children as may have predeceased always coming in place of their parents, and being entitled to the share that would have fallen to their parent had he or she been alive."

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As a further provision for his younger children, Mr Chancellor assigned by the contract certain policies of insurance upon his life under similar conditions as to appointment.

Mr Chancellor's marriage was dissolved by the death of his wife on 22d February 1851.

In prospect of the marriage of his third son the Rev. Robert Blair Maconochie Chancellor to Miss Henrietta-Maria Orde-Powlett, Mr Chancellor, on 24th July 1888, granted a deed of appointment which, *inter alia*, provided,—"I hereby appoint to the said Robert Blair Maconochie Chancellor, or his lawful issue in the event of his death, or his or their assignees, such a sum out of the trust funds over which I have a power of appointment under the antenuptial contract of marriage between me and my said deceased wife . . . as shall make my said son's share of the total trust funds divisible among the younger children of my said marriage to amount to £1500 . . . And I declare that these presents shall be held as delivered to my said son immediately on the execution hereof, and shall not be subject to revocation or alteration by me in any way, . . . And also that he shall be bound to assign to the trustees, under the settlements of the said intended marriage, his whole rights and interests under these presents."

The Rev. Robert B. M. Chancellor, on 29th August 1888, assigned this sum to his marriage-contract trustees. He died on 3d January 1890 without issue, leaving a will by which he bequeathed his whole estate, real and personal, to his wife. His widow, in 1893, married the Rev. Henry Milner Sharples, and *inter alia* conveyed the sum of £1500 to her marriage-contract trustees.

Mr John George Chancellor was predeceased by his eldest son Major Alexander Chancellor, who died on 21st April 1893, leaving a daughter Miss Isabella Blanche Dora Chancellor. Mr Chancellor was succeeded in the entailed estate by his second son Hume Frederick Chancellor, and was also survived by his daughters Miss Elizabeth Blanche Chancellor and Mrs Mary Forbes Chancellor or Chadwick.

The provision of £1500, appointed to the Rev. Robert B. M. Chancellor, was claimed by the marriage-contract trustees of Mrs Sharples. Doubts were however expressed whether the provision vested in him, in respect he predeceased his father.

This action of multiplepoinding was accordingly raised by the marriage-contract trustees of the late Mr John George Chancellor. Claims were lodged (1) by the marriage-contract trustees of Mrs Sharples, (2) by Miss Elizabeth Blanche Chancellor, and (3) by the marriage-contract trustees of Mrs Chadwick.

Mrs Sharples' trustees claimed the whole sum of £1500, on the ground that it had vested in the Rev. Robert B. M. Chancellor.

The other claimants maintained that this sum had not vested, and claimed respectively one-half thereof.

On 5th August 1895, the Lord Ordinary (Kyllachy) found that the provisions in favour of the younger children of the late Mr Chancellor did not vest until his death, and repelled the claim for Mrs Sharples' trustees.*

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* "NOTE.—The Lord Ordinary has not been able to find grounds for holding that the shares of the younger children vested before the death of their father. The presumption, no doubt, is for vesting at the dissolution

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Mrs Sharples' trustees reclaimed, and argued;—The Lord Ordinary was wrong in holding that the provision to younger children did not vest till the granter's death. There was nothing to limit his power so to provide. It was in accordance with the powers contained in the bond of tailzie of 1727. The Aberdeen Act contained provisions substantially to the same effect.* The objection that the class of younger children could not be ascertained till the father's death was fallacious. The Aberdeen Act extinguished provisions in favour of a younger child if he succeeded to the estate. So if Robert had succeeded he would have required to refund the provision. But at the date of the provision he was an object of the power, and so continued till his death. Even had he lived he would still have been an object of the power. The eldest son would have been entitled to the position of eldest son, even although disinherited. So, conversely, a younger son, while he remained so, was entitled to the privileges accorded to that character.[1] The case of *Burnett*[2] was distinguishable. There was in that case a different scheme from the present, and the case was dealt with as if there had been no power of appointment. Here there was an appointment to one particular child. The provision produced not an expectancy but an immediate fund of credit.[3]

Argued for the respondents;—The fund provided for younger children did not come into existence until the death of John Chancellor. It was only at this date that the younger children were ascertainable.[4] The general rule must have effect here, that the pro-

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of the marriage, but the peculiarity of the case is that there is no gift except to the younger children of the marriage—(that is to say—to the children not succeeding to the entailed estate); and until the death of the father (the heir of entail and granter of the provisions) the class of younger children cannot be ascertained. That, in the Lord Ordinary's opinion, excludes vesting at the earlier period, especially when taken along with the destination-over to the issue of predeceasers, which, although not conclusive, is always in such cases an element.

"It was argued that there might be vesting at birth in the whole children other than the first born son, subject to defeasance in the case of any child coming to succeed to the entailed estate. But vesting subject to defeasance can hardly operate when there is no original gift. It was also argued that there is in the marriage-contract no reference to survivorship except in the case of failure of appointment. But it is not, in the Lord Ordinary's opinion, possible to construe the deed as giving a power to appoint to a class of objects larger than the class of objects taking in default of appointment. On the whole, the Lord Ordinary does not see his way to sustain the claim for the representatives of the predeceasing younger son, who died without issue."

* The Aberdeen Act (5 Geo. IV. c. 87), secs. 4 and 5, quoted in Lord Young's opinion.

[1] Clark v. Clark, Dec. 18, 1832, 11 S. 220, 5 Scot. Jur. 165; Dickson v. Dickson, June 12, 1854, 1 Macq. 729, 26 Scot. Jur. 529.

[2] Burnett's Trustees v. Burnett, March 4, 1854, 16 D. 780, 26 Scot. Jur. 370.

[3] Oswald v. Oswald, Dec. 20, 1821, 1 S. (N. E.), 246; M'Laren on Wills and Succession, ii. 1032; Menzies' Conveyancing, 3d ed. 742; Bell's Conveyancing, 3d ed. ii. 888.

[4] Burnett's Trustees v. Burnett, March 4, 1854, 16 D. 780, 26 Scot. Jur. 370; Catton v. Mackenzie, March 1, 1872, 10 Macph. (H. L.) 12, *per* Lord Chelmsford, p. 23, 44 Scot. Jur. 191.

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vision lapsed by the predecease of the grantee.[1] Further the appointment must fail, because *quoad* Robert's children it was *ultra vires*.[2]

At advising,—

LORD YOUNG.—The question argued before us deals with a sum of money, being a provision made by the late Mr Chancellor, of Shieldhill, in his marriage-contract, in favour of his younger children. It is a sum of £2800, being three years' rent of the entailed estate of Shieldhill, which by his marriage-contract he bound the heirs of entail of that property to pay to his marriage trustees. The provision, speaking generally, in the marriage-contract is that the marriage-contract trustees shall hold this sum for behoof of his younger children—that is, as he explains, those not succeeding to the estate of Shieldhill—in such proportions—so much to each—as he may appoint; or failing any appointment, then equally. He died, and his marriage trustees have this sum in their hands now, and, as I have stated, it forms part of the fund *in medio*.

We are only concerned with the state of his family to this extent, that he left behind him a son—his second son, as it happened—who succeeded to the entailed estate of Shieldhill; therefore he makes no claim upon the funds. His eldest son predeceased him, leaving a daughter, but for whom no claim is made. The third son, Robert, married in his father's lifetime, and predeceased his father without leaving any issue. Mr Chancellor also left two daughters, one married, and, I think, the other not. On the marriage of his third son Robert he was, in effect—not quite formally, but in effect—a party to the marriage-contract, and undertook an obligation that Robert should have £1500 as his share of the sums in the hands, or which should come to be in the hands, of his marriage-contract trustees.

The question which was argued before us really regarded the claim of the deceased Robert's executors under his will, or the beneficiaries under his will, to the £1500 provided to him in his marriage-contract to be paid by his father's marriage trustees. It is claimed by them upon the ground that that was a good and binding obligation in favour of Robert, and had not lapsed in consequence of Robert predeceasing his father; and that being so, that upon his death without issue and leaving a will, it passed, according to his will, to those who are claiming under it. The answer made to this is that it was incompetent for the father to make a provision in favour of Robert otherwise than conditionally upon his surviving his father, that being the true construction of the language of his father's marriage-contract, and also being the true meaning of the provision in the deed of entail, that the heir in possession should be at liberty to burden the heirs of entail with provisions in favour of his younger children to the extent of three years' rent. The entail does contain that provision. It provides that the heirs in possession shall have full power and liberty to provide their younger children with three years' free rent of the lands, so far as the same are free

[1] Menzies' Conveyancing, p. 459; Wood v. Aitchison, 1789, M. 13,043.
[2] Baikie's Trustees v. Oxley & Cowan, Feb. 25, 1862, 24 D. 589; Wright's Trustees, Feb. 20, 1894, 21 R. 568.

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and unaffected at the time with liferents—and so on. The contention is—and that is the question which we have to decide—that the true meaning of this is that it is not in the power of the heir to make the provision a burden upon the heirs of entail succeeding to the entailed estate excepting in favour of younger children who survive. Now, the entail here says nothing upon that subject. It only says, in the words which I have read, that it shall be in the power of the heir in possession to burden the heirs succeeding in favour of his younger children to the extent of three years' free rent. It makes no express provision as to whether that shall be conditional upon younger children surviving the father. Whether or not the meaning is limited to those who survive the father so as to make the provision a burden upon the succeeding heirs of entail in the event of younger children surviving, I say the entail contains nothing express upon that subject. There is a provision, as we all know, in the Aberdeen Act to substantially the same effect. It is the fourth clause :—"Be it enacted that it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid to grant bonds of provision or obligations binding the succeeding heirs of entail in payment out of the rents or proceeds of the same to the lawful child or lawful children of the person granting such bonds or obligations who shall not succeed to such entailed estate, of such sum or sums of money bearing interest from the granter's death as to him or her shall seem fit; provided always that the amount of such provision shall in no case exceed the proportions following of the free yearly rents, or free yearly value of the whole of the said entailed lands and estates after deducting the public burdens, liferent provisions, including those to wives or husbands authorised to be granted by this Act, the yearly interest of debts" —and so on—"Provided always"—and this is what I referred to—"that such provision shall, except in the case of the settlement thereof by a marriage-contract as hereinafter mentioned, be valid and effectual only to such child or children as shall be alive at the death of the granter, or to the child or children of which the wife of the granter shall be then pregnant, and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever." Then section 5 enacts—"Provided always that if any child to whom any such provision as aforesaid may be granted shall marry, and that such provision or any part thereof shall, with the consent of the granter of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the granter of such provision, then, and in all such cases, the provision or any part thereof so settled in consideration of such marriage, shall remain and be effectual as if such child had survived the granter."

That is quite distinct language of the Aberdeen Act, that a provision in terms of the liberty given by it to the heir in possession should not be effectual except in favour of younger children who survive the granter, except in the case of a provision settled in a marriage-contract, but that it shall in that case be effectual in favour of the child although he does not survive the granter. I have pointed out that the entail here, which gives liberty to the heir in possession, contains no provision upon either subject, and if the question had arisen upon it only, we should have had to consider whether

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there was anything contained in the deed giving this provision which limited it to younger children not succeeding to the estate who survived the granter, and how that might have been decided I have not considered in this case, because there is no claim made here for any child who predeceased the granter, except the child for whom a provision was made in his marriage-contract, or fixed in his marriage-contract, viz., Robert.

Therefore we have only to consider whether in the case of an entail containing a liberty to provide three years' free rent, we shall read the power given by it as more limited than the power which the Aberdeen Act gives to the granter. Now, I should not be disposed to do that in any case or in any view, but I think that the Aberdeen Act is itself expressly applicable, for it gives a larger power, because the preamble of it signifies that it means to enlarge the powers which are given by existing entails which contain them. If existing entails contain any power, then the Aberdeen Act will not limit it; for the purpose of that Act is to extend the liberty, not to restrain it. I do not read the preamble, but I call attention to it to shew that that is the meaning and intent of the statute. Therefore if I had any difficulty in holding that the power which is given by this Shieldhill entail to the heir in possession to give three years' free rent to his younger children, may be construed as entitling him to make a provision in favour of a child who is about to be married—I say, if I read the entail as not extending the giving of liberties so far, I should hold that the liberty was so far extended by the Aberdeen Act, for the purpose and intention of that Act, as I have said already, is to extend to the extent which is specified in the Act the liberty which is contained in any deed of entail. Therefore I hold it to be clear that Mr Chancellor who made this provision was at liberty, so far as the obligation upon succeeding heirs of entail was concerned, to make a binding obligation upon them in the marriage-contract of his son Robert, although Robert predeceased him, it being provided that it should have effect although the married child in whose contract the provision was made or guaranteed by the father predeceased him. Now, that leads clearly to the decision of the only point which was argued before us, in favour of those claiming through Robert, to the effect that the provision made in his favour, and guaranteed by the father in his marriage-contract, is good, although Robert predeceased him, and that it must therefore go according to Robert's will.

I have stated that there was another child who predeceased the father, viz., his eldest son. He is now represented by a daughter, for whom, however, no claim is lodged. If a claim had been lodged on her behalf I must say I should have been very favourable to it. The only answer to it that occurs to me is that if the eldest son had survived he would have succeeded to the entailed estate, and that the provision in the marriage-contract is only in favour of the children who did not succeed to the entailed estate, or the children of those predeceasing who would not have succeeded had they survived, and that as the eldest son would have taken nothing if he survived, his child could take nothing. I am not very much impressed by that argument, because it would apply to the second, third, and fourth sons—to every one of them if he had survived and been at the father's death the heir. They would have taken nothing, so that one son after another might

have died leaving children, and none of them would have taken, because each of them in succession, if he had survived, would have taken the entailed estate. I think that is a kind of argument to which I would not give much favour; but we do not need to consider it at present at least, there being no claim put in for the daughter of the eldest son.

LORD TRAYNER.—The only question argued before us under this reclaiming note was, whether the £1500 appointed to Mr Robert Chancellor vested in him prior to his father's death. In dealing with this question I do not think it necessary to consider the distinction to which our attention was called between provisions to "children of the marriage" under a marriage-contract and to "younger children" under the powers conferred on heirs of entail by the Entail Statutes. The provisions made by Mr Chancellor under his marriage-contract are partly of the one character and partly of the other, inasmuch as the fund provided by Mr Chancellor, and over which he reserved to himself the power of appointment, consists of moveable estate belonging to him as an individual, and money to be provided out of the rents of the entailed estate of which he was the heir in possession. This question which we have to determine (which appears to be one as much of trust law as of entail law) is not affected by the distinction referred to, seeing that under Mr Chancellor's marriage-contract the terms "children of the marriage" and "younger children" are used to describe the same class, namely, the children of the marriage not succeeding to the entailed estate. It is in favour of "younger children" in this technical sense that Mr Chancellor reserved power to appoint, and it is in this view of his power that I deal with the question before us. The facts of the case need not be resumed. From them it clearly appears, I think, that Mr Chancellor intended that the £1500 appointed to his son Robert should vest at once. There is no intelligible explanation on any other ground why the deed of appointment should so carefully provide and declare that it was an irrevocable deed, to be held as delivered from the date of the execution, and still less why under it Robert should have been taken bound to assign the sum appointed to him to the trustee under his marriage-contract then about to be executed. Mr Chancellor evidently thought that he was providing, and intended to provide, his son not with a mere expectancy, but with a fund which that son could settle on his intended wife, and their children if they had any. Now, was there any reason why the vesting so plainly intended should not take effect? It is contended that such vesting could not take effect because the persons entitled to take the fund under Mr Chancellor's appointment could not be definitely ascertained until his death; before that event it was impossible to say who would be the heir of entail, and who younger children. The fact here stated is true, but the inference drawn from it does not necessarily follow. Robert might have been heir of entail no doubt. But at the date of the appointment to him, and at the date of his death, he was a younger child. Even had he survived his father he would still have held the same character, seeing that there was then surviving a son older than Robert. Accordingly, at the date when the appointment was made, Robert was an object of the power, and continued to be so as long as he lived. There was nothing in the

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Shieldhill entail or in Mr Chancellor's marriage-contract to prevent him dividing or apportioning the fund so as to make it vest during his lifetime. The only reference in the marriage-contract to any right to be conferred after Mr Chancellor's death is the equal division of the fund among the objects of the power, failing apportionment by Mr Chancellor himself. This provision cannot affect the question before us, seeing that *quoad* Robert, there had been no failure to appoint. Had Robert lived and succeeded to the entailed estate, the right vested in him by the deed of appointment would have been ineffectual, because then Robert would not have been an object of the power, and no claim could have been enforced by him in respect of it.

Nor should it be forgotten that Mr Chancellor was dealing with a fund of his own providing, of which he had the absolute disposal except in so far as limited by the terms of his marriage-contract. Seeing, therefore, that he intended Robert's share to vest at once, that nothing in the marriage-contract prevented such vesting, and that the appointment in favour of Robert was valid as in favour of an object of the power, I am of opinion that vesting took place in Robert, and that the claim of his executrix to the £1500 should be sustained.

The case of *Oswald*[1] cited to us, but not brought under the consideration of the Lord Ordinary, appears to be quite in point.

LORD JUSTICE-CLERK.—I concur in the opinions which your Lordships have expressed.

LORD RUTHERFURD CLARK was absent.

THE COURT recalled the Lord Ordinary's interlocutor, ranked and preferred the claimants Mrs Henrietta-Maria Orde-Powlett or Chancellor or Sharples' marriage-contract trustees in terms of their condescendence and claim to the extent of £1500 out of the fund *in medio*, and remitted the cause back to the Lord Ordinary to proceed.

DAVIDSON & SYME, W.S.—J. C. BRODIE & SONS, W.S.—J. & F. ANDERSON, W.S.—Agents.

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Jan. 30, 1896. Clarke v. Scott.

JOHN MARTIN CLARKE, Pursuer (Reclaimer).—*Salvesen—Sandeman.*
JAMES R. SCOTT, Defender (Respondent).—*C. N. Johnston—Abel.*

Ship—Charter-party—Agreement by owner to insure—Risk—Owner and charterer—Collision—Relief—Maritime lien.—A steam-trawler was hired out by her owner under a time charter, whereby the charterer was to find crew, stores, &c., and the owner was "to pay insurance only." The owner, *inter alia*, insured against loss from having to pay damages for injury which might be caused by the trawler to other vessels with the exception of one-fifth of three-fourths of such loss.

The trawler, through the fault of the charterer's crew, caused damage to another vessel, and the owner of the trawler, without notice to the charterer, settled the claim, and was reimbursed by the insurance company to the extent of his insurance.

In an action raised by the owner against the charterer for the balance of loss, *held* that as the pursuer had settled the claim without notice to the

[1] 1 S. (N. E.) 246.

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defender, he had no right of relief against him on the ground that it had been caused by his fault.

Observed that the owner of the trawler was not liable for damage caused by the charterer's fault to other vessels.

Question whether the owner of the trawler was bound, for the benefit of the charterer, to insure against loss from damage done by the trawler to other vessels.

1st Division.
Lord Low.

By agreement, dated 14th June 1894, John Martin Clarke, ship-owner, Leith, hired his steam-trawler "Rosslyn" to James R. Scott for three months, at £14 a-week. The agreement provided,—"The said James Scott to find crew, stores, &c., and all working expenses . . . the said J. M. Clarke to pay insurance only."

The charterer obtained possession of the boat, and worked her from Shields with his own crew.

In August 1894 the "Rosslyn" came into collision with the "Hugo Georg" of Stettin, admittedly through the fault of the charterer and his crew, and both vessels were damaged, the latter the more seriously of the two."

The "Rosslyn" was insured at the date of the agreement with two insurance associations to the extent only of four-fifths of her value, the rules of the associations providing that the owners must underwrite one-fifth of the value of the vessel insured. In the policy of assurance there was a collision clause in terms of which the insured was entitled to recover all damage done in collision to another vessel which the insured might be found liable to pay, with the exception of one-fifth of three-fourths, for which the insured was liable.

After the collision Mr Clarke, the owner of the "Rosslyn," without consulting the charterer, settled with the owners of the "Hugo Georg" for the injury done to the vessel. The amount was fixed at £264, 18s. 6d., of which the insurance associations paid £225, being the total amount, less one-fifth of three-fourths. The balance of £39, 14s. 9d. was paid by Clarke.

On 31st December 1894 Clarke raised an action against Scott for payment, *inter alia*, of the sum of £39, 14s. 9d.

The pursuer averred,—(Cond. 2) "The said vessel was taken over by the defender on 21st June, and was then, and continued to be until the expiry of the charter, entirely in the charge and under the control of the charterer and his crew. At the time of the said agreement being made, the 'Rosslyn' was insured to the extent of four-fifths of the value of said vessel, this being the highest amount for which vessels of the class of the 'Rosslyn' can be insured. This was well known to the defender, who has himself effected insurances on vessels of the same class on exactly the same footing. The pursuer duly paid the premiums of insurance on said vessel, in terms of the agreement. It was the understanding of both parties that the clause as to the payment of insurance had reference to the existing insurance on said vessel by which she was covered as fully as vessels of her class can be when insured in the ordinary clubs in which all trawlers of her class are insured. The said clause, if it implied any obligation on the pursuer to insure at all, implied only that the said vessel should be insured in the manner usually adopted in the case of trawlers, and did not impose on the pursuer any obligation, as now maintained by the defender, of covering the whole vessel by insurance. Had the pursuer attempted to insure the remaining one-fifth not already covered by insurance, the policies then current on the

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vessel would have been liable to immediate forfeiture, in terms of the club rules. This was well known to the defender." The defender answered,—(Ans. 2) "Admitted that the vessel was taken over on the 21st June and worked by the defender in terms of the charter-party. *Quoad ultra* denied. Explained that it was distinctly understood that the pursuer was to fully insure his vessel against all risks, and that this was the understanding of the parties in reference to the clause as to insurance in the charter-party. The pursuer could without difficulty have insured the vessel to the full amount of her value."

The pursuer pleaded;—(1) The pursuer having suffered loss and injury to the amount concluded for, through the fault of the defender or of those for whom he is responsible, he is entitled to decree therefor, with expenses.

The defender pleaded;—(2) The action is irrelevant.

At a proof the facts above narrated were proved. It was also proved that while the practice was to insure vessels of the "Rosslyn" class with such associations as she had been insured with by the pursuer, she might have been insured at Lloyds' for full value. The defender knew nothing about the pursuer's insurance with or the rules enforced by the associations. There was no evidence of the extent of the injuries sustained by the "Hugo Georg," and the pursuer, the material parts of whose evidence are quoted by Lord Kinnear, settled with the underwriters without any communication with the defender.

On 29th June 1895 the Lord Ordinary (Low) assoilzied the defender from the conclusions of the action.*

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* "OPINION.— . . . The 'Rosslyn' was insured by the pursuer in two insurance and indemnity associations or clubs, the one at North Shields and the other at Sunderland. It appears that under the rules of these associations it is impossible to insure for the full value. . . . The pursuer had insured for the greatest amount possible with the associations. It is also proved that the practice is to insure vessels of the description of the 'Rosslyn' with such clubs, as otherwise a very high rate of premium is demanded. It is not, however, in my judgment, proved that the vessel could not have been insured otherwise for full value. The evidence on the point is somewhat conflicting, but Mr Armit, who has had great experience, says that there is no doubt that the vessel could have been insured at Lloyds' for full value.

"After the collision the associations settled with the owners of the 'Hugo Georg' for the injury done to that vessel. The amount was fixed at £264, 18s. 6d., of which the associations paid £225, being the total amount less one-fifth of three-fourths. The balance of £39, 14s. 9d. was paid by the pursuer, and that is the first sum which he seeks to recover from the defender. The pursuer admits that no communications passed between him and the defender in regard to the claim of the 'Hugo Georg,' and that the defender had nothing to do with the settlement.

"It is clear from the agreement that the insurance of the vessel was left with the pursuer. But he says that he was under no obligation to insure the vessel to her full value, and that having insured her in the usual way and to the usual amount, he is entitled to recover from the defender the uninsured balance of the loss, which was occasioned by the defender's fault. The pursuer argues that the £39 which he has paid to the owners of the 'Hugo Georg' is money which he has lost through the fault of the defender, and which the latter must therefore repay.

"I do not think that it is necessary to determine whether the pursuer came under an obligation to the defender to insure the vessel, or to insure her for the full value. But however that may be, I cannot read the con-

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The pursuer reclaimed, and argued;—(1) The agreement left the pursuer free if he chose not to insure the vessel, but to take the risk himself, and at most it meant that he must insure to the extent to which vessels of the class of the "Rosslyn" were usually insured. In ordinary practice trawlers were not insured so as to cover the whole risk, and the defender was quite aware that the pursuer had insured the "Rosslyn" on these terms. As the pursuer then was admittedly free from liability for the collision, he was entitled to recover from the defender, who was liable, the loss not covered by insurance. (2) Alternatively, the pursuer was bound by the agreement to insure not only for his own interest, but also as agent for the defender. He was consequently entitled in the same capacity to make the best settlement for the defender he could with the underwriters, and the defender must abide by the settlement.[1] (3) Lastly, had the pursuer not made this settlement, he could not have escaped the operation of the English law of maritime lien, for the vessel had proceeded to an English port after the collision.[2]

Argued for the defender;—The charterer was entitled to rely on the pursuer fulfilling his obligation under the agreement to insure the "Rosslyn." The pursuer might have insured the vessel to the full value, but as he chose to take the risk in regard to one-fifth of three-fourths the loss must fall on him alone.[3] (2) The defender was

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tract otherwise than as meaning that the pursuer was to take the risk of the vessel being uninsured either in whole or in part.

"I therefore do not think that the £39 can be claimed from the defender *ex contractu*, and if the claim is well founded at all, it must be *ex delicto*.

"The claim appears to me to be one of relief, the pursuer seeking to be relieved of the sums which he has paid in respect of the injuries to the 'Hugo Georg' over and above the amount covered by his insurance. Now, I do not think that the pursuer was liable to the owners of the 'Hugo Georg' at all. The 'Rosslyn' was hired or demised to the defender, and he had the sole control of her, and worked her by his own crew. In these circumstances it appears to me that it was the defender (whose servants were in fault), and not the pursuer, who was responsible to the owners of the 'Hugo Georg' for the injuries caused by the collision. The pursuer, however, elected through his underwriters to settle the claim of the owners, and he did so, as I have said, without any communication with the defender. He did not intimate to the defender that he proposed to hold him liable in relief; and the defender was given no opportunity of considering or objecting to the claim. Further, the amount paid by the underwriters and the pursuer was not fixed by any decree, but was apparently adjusted between the underwriters and the claimants. No doubt the probability is that the underwriters made a prudent settlement of the amount, but it cannot be assumed against the defender that if the claim had been enforced against him a smaller amount than that for which the underwriters settled might not have been awarded.

"In these circumstances I do not think that the pursuer has any claim of relief against the defender. The grounds of judgment in the case of *Gardiner* v. *Main*, Nov. 29, 1894, 22 R. 100, appear to me to be directly applicable. . . ."

[1] Fraser v. Galloway, June 9, 1809, F. C.; Moore v. Mourgul, 1776, Cowper's Report, 2, 479.

[2] Marsden on Collisions, pp. 90 and 91.

[3] Watson & Co. v. Shankland *et al.*, Nov. 27, 1871, 10 Macph. 142, *per* Lord Cowan, p. 158, 44 Scot. Jur. 87, and May 16, 1873, 11 Macph. (H. L.) 51, *per* Ld. Ch. Selborne, p. 54, 45 Scot. Jur. 179.

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primarily liable to settle with the owners of the "Hugo Georg" in the collision; and as the pursuer had without consulting him taken upon himself to settle the claims he could not recover from the defender.[1] (3) The pursuer's contention that he was the defender's agent to insure the vessel was inconsistent with the view that if he had pleased, he as owner was at liberty not to insure at all, and to take the risk. (4) Any settlement made by the pursuer in order to escape the operation of maritime lien must be made on the footing that it freed the charterer. But, further, it was settled that maritime lien only attached to a vessel when there was personal liability on the part of the owner.[2]

At advising,—

LORD KINNEAR.—The facts of the case are correctly stated in the first two paragraphs of the Lord Ordinary's opinion:—"By agreement dated 14th June 1894 the pursuer hired his steam-trawler 'Rosslyn' to the defender for the period of three months at the sum of £14 per week. It was provided as follows—'The said James Scott to find crew, stores, &c., and all working expenses, the boat to be handed over in good order and condition, and to be returned in the same good order and condition, fair wear and tear excepted, the said J. M. Clarke to pay insurance only.' The defender accordingly obtained possession of the boat, and worked her from Shields with his own crew. In August 1894 the 'Rosslyn' came into collision with the 'Hugo Georg' of Stettin, and both vessels were damaged, the latter the more seriously of the two. It is not disputed that the 'Rosslyn' was in fault."

Were it not for the stipulation that the pursuer should pay insurance, there can be no question as to liabilities arising from the fault of those in charge of the "Rosslyn." The pursuer had abandoned for the period of the contract all power and authority over the vessel. The charterer was the owner for the time being; the master and crew were his servants, he was in exclusive possession through them, and he was responsible for their negligence. It cannot be disputed that, but for the stipulation as to insurance, he would have been liable to make good to the pursuer the damage done to the "Rosslyn," nor that he, and not the pursuer, was responsible to the owners of the other vessel.

The first question is, whether his liability to the pursuer has been modified or discharged. I think with the Lord Ordinary that it was a term of the contract that the insurance which it was for the interest of the owner or for the common interest of both parties to make should be made by the pursuer, and therefore that he must be held to have relinquished any claim against the defender in respect of risk which might have been covered by insurance. The defender cannot be made liable for loss against which he might have protected himself and his owner by insurance had he not been entitled to rely upon such insurance being effected by the pursuer. It appears that at the time of the agreement the vessel was insured with certain mutual insurance societies, and that no new insurance was effected

[1] Struthers v. Dykes, July 7, 1847, 9 D. 1437, 19 Scot. Jur. 589; Gardiner v. Main, Nov. 29, 1894, 22 R. 100.

[2] Morgan v. Castlegate Steamship Company, L. R. [1893], A. C. 38.

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by the pursuer. But by the rules of these societies the pursuer could recover damage done in collision to another vessel with the exception of one-fifth of three-fourths, and he maintains that the defender must make good the balance. If the construction I have put upon the contract is sound, he cannot require the defender to supplement a defective insurance. But it is said first that a steam-trawler cannot be insured except to the extent of four-fifths of the value; and secondly that the existing insurance was known to both parties, and therefore that the contract must be construed with reference to its conditions. I think the evidence is against the pursuer on both of the points. I do not doubt that vessels of that class are commonly insured in mutual societies, the rules of which impose the limitation upon which the pursuer relies. But it is proved that they may also be insured at Lloyds' for their full value, and there is no evidence that the defender knew anything about the pursuer's insurance, or that he knew the rules of the mutual assurance associations. I see no ground, therefore, for holding that it was agreed or understood between the parties that the insurance should be restricted so as to throw upon the charterer the obligation of making good the damage which might have been covered. I think with the Lord Ordinary that the sound and reasonable view of the contract is, that the pursuer undertook to protect himself by such insurance as he might think fit, and therefore that he took upon himself the risk of the vessel being uninsured in whole or in part.

The second question depends upon somewhat different conditions. The pursuer was not responsible to the owners of the "Hugo Georg"—the vessel which was injured by collision with the "Rosslyn"—for the fault or negligence of the charterer or his servants. But he seems to have assumed that he was responsible as owner of the "Rosslyn." By the rules of the associations with which he was insured he was entitled to recover a proportion of any loss or damage for which he might become liable to the owners of any other ship or boat which might be injured by collision with the steamer insured; and he says that the damage done to the "Hugo Georg" was paid in the first instance by his underwriters—"In a question between me and the underwriters I assumed that I was the owner of the ship, and I communicated with them on that understanding. The amount of the claim by the 'Hugo Georg' was £264, and there was recovered a sum of £225, leaving £39 which I could not recover under the conditions of the policy"; and this sum he now seeks to recover from the defender. But he settled with the owners of the "Hugo Georg" through the underwriters without any notice to the defender. He says,—"I had no correspondence with the defender on the subject of the claim which the owners of the 'Hugo Georg' made against me. He had nothing to do with the settlement." There is no evidence of the grounds on which this settlement was made. It may be presumed that the insurers in their own interest would pay no more than was reasonable. But the fact remains that there is no evidence of the extent of the injury to the "Hugo Georg," and that the claims of her owners were settled by agreement without notice to the defender.

In these circumstances I agree with the Lord Ordinary that the pursuer has no claim to be relieved by the defender of payments which he made voluntarily and extrajudicially. But it was argued that the pursuer was

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bound to meet the claim of the owners of the "Hugo Georg," or at all events that he was entitled to step forward and take the settlement into his own hands, because he might have been compelled to satisfy their demand through the operation of a maritime lien by which his vessel might have been attached. There are decisions by which this argument might have been supported, but these decisions have been overruled by the judgment of the House of Lords in *Morgan* v. *Castlegate Steamship Company*,[1] where the true doctrine is laid down by Lord Watson to the effect that "inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability." It follows that if another ship has been injured by reason of the negligence or want of skill of those in charge of the "Rosslyn," that vessel cannot be made the means of compensation if those in charge of her at the time were not the servants of the owner.

Again, it is argued that by the stipulation with reference to insurance the defender had made the pursuer his agent for settling any claims which might be brought against him for damage done by the collision of the "Rosslyn" with other vessels. I am unable to see any ground for this inference. I do not think it necessary to determine whether the contract imposed any obligation on the pursuer to insure against risks in which he himself had no interest, and, in particular, whether it obliged him to insure the defender against any loss arising from his own fault, or from the carelessness or want of skill of his master or crew. I think this very doubtful. But if the contract has any bearing on this liability it is only by imposing an obligation on the pursuer to insure. I am unable to see how an obligation to insure the defender against certain risks can be held to create a right to be indemnified by the defender for loss arising from risks insured against, and as such obligation existed, he was either bound to effect additional insurance so as to cover the entire risk, or else he was bound to do nothing more than to give the defender the benefit of the existing insurance. In the one case he can have no claim against the defender, because he has not performed his own obligation. In the other case, his obligation was to assign the partial insurance, and he had no right or duty to interfere with the settlement, and no relation with the defender from which any authority can be inferred to fix the amount payable by him without notice and without inquiry. It was no doubt a very convenient method of fixing the amount of the claim to leave the settlement to the underwriter, and if the defender had been consulted, it might have been a very prudent thing for him to consent to that arrangement. But that was for him to consider, and not for the pursuer, unless the pursuer had agreed to take the risk upon himself. I must own I should have been well pleased if it had been possible to come to a different conclusion, because it seems to me very possible that the pursuer has paid what was really the defender's debt. But the defender, on the other hand, cannot be compelled to make good a debt which has not been proved. No evidence has been adduced of the damage for which he is said to be liable, and he is not bound by an agreement, of which he knew nothing, effected by persons whom he had not authorised to act for him.

[1] Morgan v. Castlegate Steamship Co., L. R., 1893, A. C., at p. 52.

The only remaining question is one of fact, on which I see no reason for interfering with the Lord Ordinary's judgment. No. 86.

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The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

THE COURT adhered.

SNODY & ASHER, S.S.C.—T. & W. A. M'LAREN, S.S.C.—Agents.

THOMAS BOSTON MURDISON, Pursuer (Reclaimer).—*Dickson—M'Lennan—Cooper.*
THE SCOTTISH FOOTBALL UNION, Defenders (Respondents).—*Ure—Cullen.*
MATTHEW CLARK M'EWAN AND OTHERS, Defenders (Respondents).—*Ure—Cullen.*
JAMES DICK Junior, Defender (Respondent).—*Ure—Cullen.*

No. 87.

Jan. 30, 1896. Murdison v. Scottish Football Union.

Reparation—Slander—Letter—Complaint to committee of association for sport—Privilege.—In an action of damages for slander the pursuer averred that the defender had acted as referee at a football match between members of two clubs belonging to a football union at which the pursuer was one of the players, that the defender had complained by letter to the committee of the union that the pursuer had during the match made offensive remarks about the defender, that the defender had at a meeting of the committee held to investigate the matter, given evidence in support of his complaint, and stated that the pursuer had called him "a bloody little brute,"—and that the pursuer had not used the language complained of. The pursuer set forth several innuendoes as to the import of the same words. The pursuer averred generally that the statements were made by the defender calumniously and maliciously. The Court *dismissed* the action as irrelevant, *holding* (1) that the statements complained of were not *per se* defamatory, and that the pursuer had not set forth a proper innuendo of a different and libellous meaning; and (2) that even if the words were defamatory, the defender, in the circumstances disclosed in the pursuer's statements on record, was privileged in making the complaint, and in supporting it before the committee, and that the pursuer had made no relevant averment of facts from which malice could be inferred.

Reparation—Slander—Association for sport—Resolution of committee—Publication in newspapers—Privilege—Issue.—The pursuer of an action of damages for slander called as defenders (1) "The Scottish Football Union and the members of the Committee of the Union" as such committee and as representing the said Union, and (2) certain members of the committee as individuals. The pursuer averred that the committee in consequence of a complaint by a referee as to pursuer's conduct at a football match between members of two clubs belonging to the Union, in which the pursuer was a player, arranged for a meeting of committee to inquire into the complaint, that it was *ultra vires* of the committee to hold such an inquiry, that the meeting was attended by the members of committee called as defenders individually, that the committee so composed adopted a finding that the pursuer had used offensive language to the referee, and passed a resolution that he should be severely censured and ordered to apologise to the referee, and that the finding and resolution were published in certain newspapers containing football intelligence throughout Scotland upon the instruction of the members of committee who attended the meeting. The pursuer also made averments to the effect that the inquiry had been conducted in an unfair and irregular manner. *Held* (1) that the pursuer was

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not entitled to an issue against the Union and its committee as representing it, the ground of his complaint being that the committee had acted outwith the authority of the Union; and (2) that the pursuer was entitled to an issue of slander against the members of the committee individually, and that having regard to the averments as to the publication in newspapers, and to the conduct of the inquiry, the pursuer's record did not necessarily imply privilege, and that it must be left to the presiding Judge, after hearing the evidence, to direct the jury whether the defenders were privileged.

Form of issue approved.

Reparation—Association for sport—Suspension from playing football—Patrimonial loss — Issue — Relevancy.—Held (*rev.* judgment of Lord Kincairney) that a resolution of a football union suspending a member of a club belonging to the union from playing did not entitle the member to an issue that the resolution had been "wrongfully, incompetently, and unwarrantably passed and caused to be published by the committee to his loss, injury, and damage," in respect that the alleged resolution was not one which affected any question of property or patrimonial interest, the appropriate issue, so far as the resolution affected reputation, being an issue of slander.

Blasquez v. *The Lothians Racing Club*, June 29, 1889, 16 R. 893, *distinguished.*

Process—Expenses—Amendment of Record in Inner-House.—An amendment of record in the Inner-House which did not involve any radical alteration of the pleadings, or a change of the ground of action, *allowed* on payment of expenses in the Inner-House.

Morgan, Gellibrand, & Co. v. *Dundee Gem Line, &c., Co.*, Dec. 9, 1890, 18 R. 205, *distinguished.*

1st Division. Lord Kincairney.

In March 1895 Thomas B. Murdison, residing at Earlston, raised an action of damages against (1) The Scottish Football Union and their office-bearers, and certain individuals named, being, with the office-bearers, the committee of the union, as such committee and as representing the union; (2) M. C. M'Ewan and others, members of the committee, as individuals; and (3) James Dick junior. The action concluded for payment of £1000 from the first defenders "as committee foresaid, and as representing the said union," and the second defenders, as individuals, and of £500 from the third defender, Dick.

The pursuer averred;—(Cond. 1) "The pursuer is a member and vice-captain of the Gala Football Club, which is a member of the Scottish Football Union. The said Union is composed of all such clubs in Scotland playing the game of football under Rugby Union rules as apply for and are admitted to its membership. . . . The affairs of the Union are conducted by a committee, . . . the first defenders . . . presently constitute the committee." (Cond. 2) "On 27th October 1894 a football match was played on the Gala Football Club's ground at Mossilee, Galashiels, between a fifteen of the Gala Football Club and a fifteen of the Watsonian Club, the headquarters of which are in Edinburgh. The Watsonian Club is also a member of the Scottish Football Union. The match was played under Rugby rules, and the third defender acted as referee. The pursuer was present, and played in said match for the Gala Football Club. In the course of the game the third defender gave several judgments as referee of which the crowd of spectators did not approve, and of which they expressed their disapprobation by shouts, groans, hooting, hissing, and other means. None of the players took any part in these demonstrations against the third defender's judgments."

(Cond. 3) "On the day of the said match, namely, 27th October

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1894, the third defender wrote and dispatched to the defender James Aikman Smith, secretary of the Football Union, for the purpose of being laid before the committee of the said Union, a letter containing a general complaint with reference to his treatment at the said match, and on 29th October he wrote and despatched another letter containing an accusation against the pursuer. In the said letter of 29th October the third defender falsely, calumniously, maliciously, and without probable cause, wrote of and concerning the pursuer's conduct at the said football match on the 27th of October as follows:—'I can give the name of one player who was probably the worst offender, both in questioning my decisions and in making offensive remarks. I refer to T. Murdison, one of the Gala forwards.' The letters are referred to for their terms.* The said accusation was entirely unfounded. Even if the pursuer had actually acted as stated, and had used the language complained of, the third defender had no right or duty, under the laws of the Scottish Football Union in force at the time, to lay the said accusation against the pursuer before the Committee of the Scottish Football Union, nor had the said Union, or the said committee or any of its members, jurisdiction to deal in any manner of way with the said accusation on its being made. The third defender maliciously, and without probable cause, in the knowledge that he was making an unwarranted accusation, and with the express design of injuring the pursuer, laid the accusation before the said committee. He knew that the said committee had no right or duty to deal with the said charge, and he wrongfully made it for the purpose of gratifying his animus against the pursuer, and with the express purpose of in-

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* James Dick junior to Secretary of the Football Union.—Edinburgh, 27th October 1894.—"Dear Sir,—As referee in the match, Watsonians *v.* Galashiels, at Galashiels, to-day, I regret that I find it my duty to report the treatment I received there. During the match, which was a fast and exciting one throughout, my decisions were repeatedly questioned by members of the Galashiels team, and I was the object of several offensive remarks. The spectators hooted and hissed every decision of mine which was not in favour of the local team—this I may say the Galashiels team made no effort to prevent. Immediately on the call of time I was surrounded by the entire crowd of spectators, and but for the prompt action of Messrs Gordon Cochrane, W. S. Brown, and a few members of both teams, would have fared badly. We had to fight our way to the pavilion, and after leaving the field were pelted with mud, &c., and followed by hundreds of men and boys till safely within Mr Cochrane's house. Beyond a few kicks on the legs, and a blow from a stone on the back of the head, I sustained no injury. The Watsonians were similarly treated during their drive to the hotel. As to a reason for the demonstration I am at a loss. If I was glaringly unfair, I presume the Galashiels team will appeal to the Union Committee regarding my decisions, otherwise the matter is more inexplicable and unwarranted. I make no further comment, but simply leave this letter in your hands, to be dealt with as you see fit."

James Dick junior to Secretary of the Football Union.—Edinburgh, 29th October 1894.—"Dear Sir,—I am in receipt of your letter of to-day's date. I can give the name of one player who was probably the worst offender, both in questioning my decisions and in making offensive remarks; I refer to T. Murdison, one of the Gala forwards. He is perhaps unfortunate in being singled out, as I could have mentioned others had I known their names. I regret that I should have to mention names at all, but I believe in doing so I am furthering the best interests of football."

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ducing them to take the incompetent course of considering it, and taking such action with regard to it as would injure the pursuer in the eyes of the public at large, and more especially of Rugby football players."

(Cond. 4) "The said letter of 29th October 1894, written and dispatched by the third defender, as set forth in the preceding article, was in part of and concerning the pursuer, and falsely, calumniously, and maliciously represented, and was intended to represent, the pursuer as having used coarse and improper language unbecoming a gentleman and a member of a club in the Scottish Football Union, as being a person who did not play the game of football fairly in accordance with the laws of said game, and, in particular, as being a person who, in defiance of said laws, openly challenged and repudiated the authority of the appointed referee, and as being a person unworthy to play football with the members of clubs composing the said Union, and with whom the members of said other clubs ought not to play football; and further, represented the pursuer as being a person who had falsely and calumniously imputed gross partiality and unfairness, or at least gross incompetency to the said third defender in his actings as referee at said match, and had falsely and calumniously represented that the said defender was unfit for the post of referee, and was a dishonest umpire. These imputations were wholly unfounded, and have led to the pursuer being wrongfully excluded, as after mentioned, from playing in clubs and with clubs belonging to the Union. The pursuer through this exclusion has been greatly injured, not only in his feelings but in his reputation."

(Cond. 5) "On receipt of the letters, the defender J. A. Smith arranged for a meeting of the committee of the Scottish Football Union, called here as the first defenders, to be held on 9th November 1894, at which the said accusation preferred against the pursuer by the third defender in the said letter of 29th October was to be submitted and considered. It was *ultra vires* and quite out of the competence of the said committee to hold such an investigation regarding the said accusation, and the whole inquiry, so far as it related to the pursuer, was wrongful and improper, and known by the first and by the second defenders to be so. The arrangements for the said meeting were made in a grossly partial and irregular manner, and in defiance of the most elementary ideas of fair play and justice to a person accused of any serious act of misconduct. The committee's officials resolved at said meeting of 9th November to investigate also the disturbances alleged to have been caused by members of the general public at the said football match held at Galashiels on 27th October 1894. The pursuer believes that the investigation of said disturbances by the committee of the Scottish Football Union was also *ultra vires* and incompetent. In any view the said disturbances were quite distinct from, and had no connection with, the third defender's accusation against the pursuer. Notwithstanding this the said committee, through their said secretary, communicated with the officials of the Gala Football Club and of the Watsonian Club, requesting them to send certain representatives of their respective clubs, selected by the said committee to attend an inquiry relative to said disturbances, to be held by the committee in Edinburgh on the said 9th of November 1894, but they did not, in the notice sent to the Gala Club, make any reference whatever to the accusation against

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the pursuer. The pursuer, as vice-captain of his club, and as having seen part of said disturbances, was one of the persons whom said committee requested to attend their inquiry. Neither when the pursuer was invited to attend, nor at any time prior to said inquiry, was intimation made to him that any accusation had been made or was to be investigated relating to himself personally, and no opportunity was given him of bringing witnesses to prove his innocence of such accusation." (Cond. 6) "As requested by said committee the pursuer attended the said inquiry on 9th November. The second defenders called in the summons constituted the members of committee who were present, and conducted said inquiry. . . . Thereafter the said defender, J. A. Smith, and the remanent members of the committee then present, quite illegally resolved that they could not sit in committee with Mr Mabon. Mabon, who is a press correspondent, was thus induced not to sit on the committee. The said committee conducted their inquiry in private. . . ."

The third defender Dick was examined as a witness, and "in the presence and hearing of the second defenders, or one or more of them, he falsely, calumniously, maliciously, and without probable cause, not only read and reiterated the charges against the pursuer contained in his said letters of 27th and 29th October, but further charged the pursuer with having, at said match on 27th October, called him (the third defender) 'a bloody little brute.' Said charges were absolutely unfounded." In the course of pursuer's examination as a witness, "the letter of 29th October, written by the third defender, as stated in cond. 3, was read to the pursuer, and he was asked if the accusation it contained was true. He replied that it was absolutely untrue, and gave all explanations sought by the committee. This was the first time he had heard of said letter, or had learned its contents. Neither prior to his examination nor at any stage was it explained to him that he was on trial regarding the charge against him contained in said letter, nor was any indication given that the explanations given by him were not accepted by the committee, or were in conflict with statements made by other witnesses. He was left in entire ignorance that other witnesses had been examined regarding said charge; no specific words alleged to have been used by him at the match were put to him as having been spoken to by the third defender or other witnesses; no opportunity was given him of hearing and cross-examining said witnesses; and no suggestion was made that he should bring forward evidence to corroborate his own statements, or that he incurred any risk of censure or suspension." (Cond. 7) "After this grossly unfair, misleading, and partial inquiry, . . . the committee, on or about 9th November 1894, falsely, calumniously, maliciously, and without probable cause, adopted and published a pretended finding in the following terms:—'That T. Murdison used offensive language to the referee,' the third defender; and further, adopted and published a pretended resolution in the following terms:—'That T. Murdison be severely censured and be ordered to apologise to the referee.' . . . . The said committee specially instructed their secretary to communicate their decision to the press. The pursuer declined to apologise for what he had not done. . . . . On or about 6th December 1894 the members of committee, who are the second defenders, *or some of them*,* falsely, calumniously, maliciously,

* Deleted on amendment, see *infra*, p. 459.

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and without probable cause, adopted and published a pretended resolution in the following or similar terms:—'That T. Murdison be suspended from playing until the committee withdraw the suspension.' All the said pretended findings and resolutions were published in newspapers containing football intelligence throughout Scotland with the first and second defenders' knowledge and sanction, and thus obtained wide publicity among football players and among the general public. The pursuer's suspension and all the said pretended findings and resolutions were *ultra vires* of the said defenders, and incompetent and illegal." (Cond. 8) "The suspension thus pronounced has never been withdrawn. Though utterly illegal and incompetent, its effect is to prevent the pursuer from playing in any club or against any club which is a member of the Football Union. Such clubs refuse to play along with or against any person who has a professional stigma set against him, and in consequence of the jurisdiction asserted by the first and second defenders, members of clubs composing the union decline to play with or against the pursuer, for fear that the said defenders should treat their doing so as an offence. The defenders' finding, to the effect that the pursuer had used offensive language to the third defender, was without foundation or warrant. The first defenders, as committee foresaid, and the second defenders, as the individual members concerned in passing the said resolution, in coming to the said finding, proceeded on partial and defective information, and were influenced by partial and improper considerations, and their whole proceedings, which led up to the finding and consequent resolution, were incompetent, irregular, and highly injurious to the pursuer. By the said finding, and by the censure and pretended suspension of the pursuer, the first defenders and second defenders falsely, calumniously, maliciously, and without probable cause, represented the pursuer as having, during the progress of said football match on 27th October 1894, used coarse and improper language, unbecoming a gentleman and a member of a club included in the Scottish Football Union, as being a person who did not play the game of football fairly in accordance with the laws of said game, and, in particular, as being a person who, in defiance of said laws, openly challenged and repudiated the authority of the appointed referee, and as being a person unfit to take part in the sports of gentlemen, and as a person whom all respectable football players should avoid; and further, as being a person who had falsely and calumniously imputed gross partiality and unfairness, or at least gross incompetency to the third defender in his actings as referee at said match, and had falsely and calumniously represented that the said defender was unfit for the post of referee, and was a dishonest umpire. The finding and resolution of the first and second defenders, and the letters and statements of the third defender were intended to injure the pursuer, and to hold him up to public hatred and contempt, and the pursuer was thereby injured, and calumniously and injuriously exposed to public hatred and contempt. He has suffered, not only in his reputation as an individual, but also as a football player, and, in consequence thereof, he has been excluded from playing the game of football in clubs and against clubs which are members of the Union. . . ."

All the defenders pleaded that the action was irrelevant and incompetent. The first and second defenders also pleaded;—(4) No libel. (5) Privilege. The third defender also pleaded;—(3) This

defender not having libelled the pursuer; *et separatim*, having acted in good faith and in the performance of his duty as referee, is entitled to be assoilzied, with expenses. (4) *Veritas.*

The pursuer proposed thirteen issues. The first eight were directed against the third defender, and the ninth to the twelfth against the first and second defenders.* The thirteenth issue was as fol-

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* Issues 1 to 4 were laid on the letters. Whether the letters falsely and calumniously represented that the pursuer had at the football match—

(First issue)—"Used coarse and improper language unbecoming a gentleman and a member of a club in the Scottish Football Union, and as being a person who did not play the game of football fairly in accordance with the laws of said game, and, in particular, as being a person who, in defiance of said laws, openly challenged and repudiated the authority of the appointed referee, and as being a person unworthy to play football with the members of clubs composing the said union, and with whom the members of said other clubs ought not to play football. . ."

(Second issue)—"Misconducted himself in such a way as to merit punishment at the hands of any person or persons entitled to inflict it . . ."

(Third issue)—"Falsely and calumniously accused the defender James Dick of gross partiality and unfairness, and of incompetence and dishonesty, when acting as referee in said match . . ."

The fourth issue was—"Whether the statements in the said letters are in part of and concerning the pursuer, and are, in so far as concerning the pursuer, false; and whether they were made of and concerning the pursuer with the intention of exposing, and did expose, him to hatred and contempt . . ."

Issues 5 to 8 were laid on the statements made at the meeting of committee by the defender, as follows:—"Whether, on or about 9th November 1894, at a meeting of the committee of the Scottish Football Union held at Edinburgh, and in presence and hearing of the second defenders, or one or more of them, the defender James Dick junior falsely and calumniously stated of and concerning the pursuer that he (the pursuer) had used offensive remarks towards and in particular had called the said defender, at a football match played at Mossilee, Galashiels, on 27th October 1894, 'a bloody little brute,' or 'a dirty little beast,' or had used similar language towards him, and whether the said defender thereby falsely and calumniously represented the pursuer as having at the football match referred to":—

(Fifth issue)—"Used coarse," &c., as in the first issue.

(Sixth issue)—"Misconducted," &c., as in second issue.

(Seventh issue)—"Falsely and calumniously," &c., as in third issue.

(Eighth issue)—"And whether," as in fourth issue.

Issues 9 to 12 had in common the following:—"Whether, on or about 9th November 1894, the Scottish Football Union, through its committee, and the said committee and the second defenders, or one or other and which of them, or one or more and which of the second defenders, acting in concert, made a finding and passed a resolution in name of the said committee, and directed the defender James Aikman Smith to transmit the said finding and resolution to Mr William Wintrup, honorary secretary of the Gala Football Club, and to publish the same in the newspaper press, and whether the said James Aikman Smith did, on or about 10th November 1894, acting as secretary of the first defenders, and on the instructions of the first and second defenders, or one or other and which of them, or one or more and which of the second defenders, in name of the said committee, send a letter to the said Mr William Wintrup, and insert a statement in the newspaper press, in which the said finding and resolution were set forth as follows, *videlicet*:—'That T. Murdison used offensive language'; 'that

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lows:—"Whether the Scottish Football Union, through its Committee, and the said Committee and the second defenders, or one or other and which of them, or one or more and which of the second defenders, in name of the first defenders, on or about 6th December 1894, wrongfully, incompetently, and unwarrantably passed, and thereafter caused to be published in the newspaper press, a resolution —'That T. Murdison be suspended from playing until the committee withdraw the suspension,' to the loss, injury, and damage of the pursuer?"

The pursuer apportioned among the several issues the sums concluded for as damages.

The Lord Ordinary (Kincairney), on 26th July 1895, pronounced an interlocutor refusing all the issues proposed except the 13th, which he approved of as the issue for the trial of the cause, and dismissing the action against the defender Dick as irrelevant.*

T. Murdison be severely censured, and be ordered to apologise to the referee'?

"Whether the said finding and resolution are of and concerning the pursuer, and falsely and calumniously represent . . ."

Issues 9 to 12 were in their order *quoad ultra* in the same terms as the portions of issues 1 to 4 respectively above quoted.

* "OPINION.—(After narrating the facts)—I am not prepared to dismiss the action as incompetent. The charges against the Football Union, and the committee, and its individual members are, it is true, quite different from those made against the third defender, Dick; but that defender is sued for a separate sum of damages. The charges, however, involve much the same inquiry, and it does not seem to be incompetent—although I doubt whether it is convenient—to combine with the action against him, the separate and different claim against the Union and the committee, and its members. But the defenders maintained that the incompetency of the action arose from this, that a slump sum of £1000 was claimed against two defenders, distinguished in the summons as being different parties, viz:—the Union and the committee in the first place, and, secondly, the individual members of the committee; and it was said that the action was therefore incompetent on the authority of the cases of *Barr* v. *Neilson*, 20th March 1868, 6 Macph. 651, and *Taylor* v. *M'Dougal & Son*, 15th July 1885, 12 R. 1304. The objection is strict and technical, and I rather think that these cases do not apply, because all of these defenders, supposing them different, appear to have been participant in the acts of which the pursuer complains, and the question raised by the action is whether all or any of the defenders are chargeable with and liable in damages for acts in which they are all said to have been participant. There is no decision that such an action is incompetent.

"The cases of *Somerville* v. *Rowbotham*, 27th June 1862, 24 D. 1187, and *The Renton Football Club* v. *M'Dowall*, 13th March 1891, 18 R. 670, seem to meet any objection to the manner in which the Football Union has been called.

"Holding then that it is not necessary to dismiss the action as incompetent, it is necessary to consider its relevancy, and the issues which have been lodged, on which, indeed, the argument mainly turned.

"The first eight issues are directed against the defender Dick, and the other defenders have no concern with them. Dick, on the other hand, has nothing to do with the remaining five issues. The first four issues are laid on his two letters to the secretary of the Union above quoted, and the fifth, sixth, seventh, and eighth, on the evidence which he gave at the inquiry instituted by the committee of the Union.

"Now, speaking generally, it appears to me that the letters are temper-

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The pursuer reclaimed.

During the debate in the Inner-House the pursuer proposed to amend his record by deleting the words "or some of them," in cond. 7 above quoted, and by adding to the same condescendence the following averments:—"Upon the said committee's instructions the finding and resolution of 9th November 1894 were communicated to, *inter alia*, the following newspapers, viz., the *Edinburgh Evening Dispatch* and the *Glasgow Herald*, and on or about 7th December 1894 the resolution of 6th December was also communicated to the said *Edinburgh Evening Dispatch* newspaper. These newspapers and others published the said finding and resolution of 9th November so communicated in their issues of the following dates, viz., the *Edinburgh Evening Dispatch* on the 12th November 1894, and the *Glasgow Herald* on the 12th November 1894. Subsequently the said resolution of 6th December was published in the issue of the *Edinburgh Evening Dispatch* on the 7th."

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ately and moderately expressed, and bring before the Committee a legitimate complaint, without the use of exaggerated or defamatory language. Further, I think that, supposing Mr Dick had reason, as referee, to make a complaint at all, his complaint was addressed to the proper quarter, and that altogether independent of any special rules on the subject.

"It was argued that, according to the rules of the Union, complaints, when competent, fell to be made to the Union, not to the committee. But the Union is a body of such a nature that it must of necessity act through a committee; and I think that a complaint to the Union could only be made to it through the committee, and that every complaint to the Committee was also a complaint to the Union. Further, I consider that the power to take cognisance of the conduct of the clubs which were members of the Union during their matches, and to entertain complaints about such conduct, was necessarily inherent in such a body as the Union, and in the committee by which its affairs were carried on.

"Such letters as those under consideration, being letters bringing definite charges before the appropriate body or tribunal, are not readily to be extended beyond their natural meaning by innuendo, so as to make them embody charges which their words do not fairly express. The two letters read together import no more than that the pursuer used language which was offensive to the referee, and that he questioned his decisions.

"Coming to the issues, I am of opinion that the innuendo in the first goes far beyond what the letter, according to any reasonable interpretation, will bear. Perhaps the innuendo that it represented the pursuer as having used at the match coarse and improper language unbecoming a gentleman, and as being a person who, in defiance of the laws of the game, repudiated the authority of the referee, might be laid before a jury as a meaning which the letters might possibly bear. But all the innuendo beyond that must be disallowed. I am, however, of opinion that the letters so innuendoed are not actionable. They challenge the pursuer's manners and behaviour, but not his character. The pursuer referred to *Murray* v. *Campbell*, 25th July 1833, 11 S. 1031, but the language there held actionable was very much more objectionable and defamatory than these letters are according to any possible interpretation. In *Jex Blake* v. *Craig*, 7th July 1871, 9 Macph. 973, on which also the pursuer founded, a letter was held to be actionable which embodied a charge of using foul language; but that charge did not stand alone, but was coupled with a charge of drunkenness. I think these cases do not warrant this issue, and that it must be disallowed.

"The second issue puts a somewhat different innuendo on the letter. I am of opinion that the innuendo in this issue is not extractable from the record nor deducible from the letters; and that, besides, it would not

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The defenders maintained that the amendment should only be allowed on condition of payment by the pursuer of expenses since the closing of the record, and argued;—If the amendment was unnecessary, it should not be allowed; if it was necessary, that shewed that the action was irrelevant without it.[1]

LORD PRESIDENT.—The question at present before us is, What are the conditions upon which we should allow the pursuer's proposed amendments. It seems clear that the party proposing to amend must pay the expenses incurred in the Inner-House, inasmuch as the expense of the discussion here has been wasted. Quite possibly he may ultimately be found liable to pay a proportion of the expenses in the Outer-House subsequent to the date of closing the record; but that is a complicated question, which it would be extremely difficult, if not impossible, for us to determine at this stage. Accordingly, the safe course seems to be to allow the proposed amendments conditionally upon payment of expenses in the Inner-House. With reference to the cases cited by Mr Ure, I do not read them as laying

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support an action of damages. There is no authority for the proposition that it is actionable to say that a man's conduct merits punishment. Further, I should, in any case, disallow this issue as calculated to confuse and mislead a jury.

"The third issue puts the question whether the letters accuse the pursuer of having calumniously accused the defender Dick of partiality and unfairness and of incompetence as a referee. The innuendo is not very easy to follow, and it requires a great deal of ingenuity to torture Mr Dick's letters into any such meaning. The issue is based on the assumption that an accusation of slander is itself a slander. I think that there may be cases when it would be so—such as *Milne* v. *Smith*, 23d November 1892, 19 R. 95, and *Waugh* v. *Ayrshire Post*, 22d December 1893, 21 R. 326, but that there is no such general rule. I think that cases of that kind are special, and even exceptional. They must depend on the nature and gravity of the initial slander; and it savours of absurdity to affirm that it is defamatory and actionable to accuse a man of having said of another man that he had on a particular occasion shown partiality and incompetency as a referee in a football match. There is no precedent for an issue such as that.

"I am further of opinion that Mr Dick, in writing these letters to the committee of the Union, was unquestionably in a strong position of privilege; and further, that this is a case in which a general averment of malice is insufficient, and that the record contains no sufficient averment of particulars from which malice can be inferred. I think that there is really no such statement. The cases on this point were quoted and commented on at the argument. I have carefully considered them, and find it difficult to extract from them any very clear principle and distinction. I think they are consistent with the conclusion I have expressed.

"The fourth issue is, I suppose, alternative, and is suggested to meet the case of the issues proper to an action for defamation not being allowed. It is an issue founded on what is called verbal injury. The pursuer argued that it received support from the recent case of *Paterson* v. *Welch*, 31st May 1893, 20 R. 744, which was commented on in *Waddell* v. *Roxburgh*, 9th June 1894, 21 R. 883, in which latter case an issue of this kind was not allowed. I am, however, of opinion that the present is not such a case

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[1] Morgan, Gellibrand, & Co. v. Dundee Gem Line Steamship Co., Dec. 9, 1890, 18 R. 205; Gallagher v. Pattison, Nov. 10, 1891, 19 R. 79; Haughton v. North British Railway Co., Nov. 29, 1892, 20 R. 113.

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down, as an inflexible rule, that no amendment of the record is allowed in the Inner-House except upon payment of expenses from the closing of the record. Our practice is more discriminating, and has regard to the quality of the amendment. The rubric of the report in *Morgan, Gellibrand, & Company*[1] has very well caught the spirit of the principle,—"Amendment of record, involving considerable alteration of the pleadings, or a change of the ground of action, will be allowed in the Inner-House, either in reclaiming notes or in appeals, only on payment of the expenses in the cause from the date of closing the record, and the account of expenses must be paid before further hearing by the Court."

The true principle of the rule is that the expense occasioned by some defect in the record, which is to be remedied by the amendments proposed, must be borne by the party amending, and if such defect be of a radical nature, then the date for fixing the term when expenses become due is the date of the closing of the record. But this rule does not preclude the Court from making less onerous conditions in allowing less radical amend-

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as was contemplated in *Paterson* v. *Welch*, and that that case does not apply; and that the fourth issue ought also to be disallowed.

"The fifth, sixth, seventh, and eighth issues are also directed solely against Mr Dick, and relate to his evidence before the committee. They differ from the previous issues only so far as they refer to the abusive words which Dick charged Murdison with using about him at the match. Now, the assertion that Murdison had used such words, although an exceedingly unpleasant assertion, was no attack on his personal character. It was only an assertion that, on a particular occasion, Murdison had shewn a great want of good manners. Assuming, as I assume, that Murdison did not use the vulgar language imputed to him, the assertion that he did so was undoubtedly exceedingly provoking and disagreeable. But there is, I think, no authority for making the imputation of having used such unmannerly language the ground of an action of damages. The law does not give a remedy by an action of damages for every uncivil or derogatory remark. Unless such remarks are calculated to injure character or credit, a man must, generally speaking, put up with them and disregard them as best he can. On this point, I refer to the case of *M'Lachlan* v. *Orr, Pollock, & Company*, 6th November 1894, 22 R. 38. On the whole, I think that these four issues are substantially in the same position as the first four, and fall, like them, to be disallowed as not based on any truly defamatory statements, and besides, as not supported by any adequate averments of malice. I am therefore of opinion that there is no relevant case against Mr Dick.

"The next four issues are directed against the union, the committee, and the members of the committee. They relate to the first deliverance of the committee by which it was found 'that T. Murdison used offensive language to the referee.' . . . 'That T. Murdison be severely censured, and be ordered to apologise to the referee.'

"These issues are framed on the same plan as the others. The first three are issues proper to an action of damages for defamation, and the fourth is an issue for verbal injury. The deliverance is not put forward as in itself defamatory or actionable. It is innuendoed, and the innuendoes are much the same as those which have been already considered, and on the grounds which have been already stated I think that they are inadmissible; and on the whole, I am of opinion that these issues should be disallowed on the ground that it is not actionable to say of a man that he used offensive language and is severely censurable, and also on the ground that the com-

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[1] 18 R. 205.

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ments, or amendments the scope of which is uncertain and may be elucidated by further discussion. In this case I do not wish to prejudge the question as to whether, at a subsequent stage, the pursuer may not also be found liable in the expenses in the Outer-House.

LORD ADAM.—I am of the same opinion. The true principle is that the expenses caused by amendments should be put upon the party desiring to make those amendments. There is, however, no general rule, such as that propounded by Mr Ure, to the effect that expenses should always be found due from the date of closing the record. That would be a dangerous rule, because it might prevent a party from making a judicious amendment, which would not have the effect of rendering nugatory all the expense already incurred by the parties.

LORD KINNEAR.—I agree. It is quite possible that an amendment may be proposed which is a proper and even a necessary one, but which, in

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mittee and the members of it were in a position of privilege, and that no particulars inferring malice are averred.

"There are, it is true, a number of statements with reference to the manner in which the inquiry was conducted which are founded on as evincing malice, or at least such disregard of the pursuer's rights as might be held equivalent to malice. I do not think it necessary to advert to these in detail. I think the complaint as to the exclusion of a newspaper correspondent is absurd; the reason for such exclusion, whether a good or a bad one, being plainly in no way indicative of animus against the pursuer. Assuming the truth of the pursuer's averments as to the procedure of the committee, I cannot say that I think they indicate recklessness or carelessness, but rather deliberation. I do not mean to say that they were in all points to be commended, or that the pursuer's interests, assuming his averments, were safeguarded as they would have been in a Court of justice. But that was hardly to be expected, and I am not prepared to regard the defects in procedure averred as indicative of malice, or of carelessness equivalent to malice.

"The statement that the committee published their resolution in the newspapers caused me at first some difficulty. It is denied, but (although very unlikely to be true) must be accepted in a judgment on relevancy. If the committee did publish their resolution, that would certainly be, to my mind, a highly reprehensible act. But, if the resolution itself be not defamatory, I do not see that the publication of it can be actionable.

"There remains the thirteenth issue, which is different from all the rest. It refers to the second deliverance, which purported to suspend the pursuer from playing until the committee withdrew the suspension. Under this issue damages are claimed as for a legal wrong, and the case of *Blaymire v. Lothians Racing Club and Reid*, 29th June 1889, 16 R. 893, was referred to as a precedent. In that case the third issue adjusted was whether 'the defenders, the Lothians Racing Club, wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the "Lothians Racing Club and Edinburgh Meeting" at Musselburgh, to the loss, injury, and damage of the pursuer,' which appears to warrant an issue for a wrong of a kind not very dissimilar to that complained of here.

"The pursuer maintains that the sentence was wholly *ultra vires*. The defenders maintain that power of suspension is expressly conferred by the rules of the Union. They refer to a rule at page 31 of a book of bye-laws and laws of the game, bearing date 1890-91, No. 9 of process. But the pursuer does not admit that these rules were in force at the date in question, and he points to a book of bye-laws and rules bearing date 1894-95,

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cases where the record is already clear and explicit, involves no further expense at all. Accordingly, the rule laid down by your Lordships seems to me to be a sound one.

LORD M'LAREN was absent.

THE COURT allowed the amendment, on condition of the pursuer paying the expenses of the discussion in the Inner-House.

The pursuer proposed four additional issues. The first of these issues was,—"It being admitted . . . whether the said letters are in whole or in part of and concerning the pursuer, and in so far as of and concerning the pursuer are false and calumnious, to the pursuer's loss, injury, and damage?"

The second was,—"Whether, on or about 9th November 1894, at a meeting of the Committee of the Scottish Football Union held at Edinburgh, and in presence and hearing of the second defenders, or one or more of them, the defender James Dick junior falsely and calumniously stated, &c., or used similar language towards him, to the pursuer's loss, injury, and damage?"

The third of those issues was in the following terms:—"Whether, on or about 9th November 1894, the Scottish Football Union,

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which does not contain the rule in question. If the defenders shall prove that the rule on which they found was in force, they may thereby completely meet the pursuer's case. But I do not see how the pursuer's averments that the rules in force are all contained in the later handbook can be disregarded. It seems a point which cannot be cleared without inquiry.

"Now, if a wrong has been done to the pursuer in this matter, I am not disposed to regard it as other than a serious wrong. It does not affect his patrimonial interests, nor necessarily or directly his character, but it puts him in a position of great disadvantage, obloquy, and discomfort. It was, if it have the effect which both parties attribute to it, a sentence of extreme severity, not (whether the committee have power or no) to be lightly pronounced; and I cannot help thinking that it is a wrong—if a wrong at all—for which redress against those who did the wrong cannot be refused without denial of justice. I think it much the most serious wrong averred.

"But the pursuer has stated this part of his case in such a manner as to make it very difficult to allow the issue he proposes. For he avers in condescendence 7 that this wrong was done not by the first defenders—that is, the Union and the committee as such—but by the second defenders, *i.e.*, the individual members of the committee or some of them, while the issue proposed is whether the wrong was done by the Union through its committee and the said committee (*i.e.*, the first defenders), and the second defenders, or one or other and which of them, or one or more and which of the second defenders, in name of the first defenders.

"It is right to say here that the pursuer craved leave to amend the record, and that one of the amendments which he desired to make was to delete from this part of his record the words 'or some of them.' He was not, however, prepared to pay the expenses which I was prepared to award as a condition of allowing the amendment. Besides, the amendment did not fully meet the difficulty.

"Having regard, however, to the averment that the findings and resolutions were published with the knowledge and sanction of the first defenders, as well as of the second, and also the express adoption of the sentence by the Union, I am inclined to think that the difficulty raised by the pursuer's record, though troublesome, may be got over, and that the last issue may be approved of."

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through its committee, and the said committee and the second defenders, or one or other and which of them, or one or more and which of the second defenders, acting in concert, made a finding and passed a resolution in name of the said committee in the following terms, *videlicet*:—'That T. Murdison used offensive language to the referee,' the third defender; 'that T. Murdison be severely censured, and be ordered to apologise to the referee'; and sent a copy of the said finding and resolution to Mr William Wintrup, honorary secretary of the Gala Football Club, on or about 10th November 1894, and published, or caused it to be published, in the following newspapers, *videlicet*:—*The Edinburgh Evening Dispatch* and *The Glasgow Herald*, on 12th November 1894? Whether the said finding and resolution are of and concerning the pursuer, and are false and calumnious, to the pursuer's loss, injury, and damage? Damages laid at £500."

The fourth issue was in the same terms as the issue allowed by the Lord Ordinary, with this difference, that in place of the words "in the newspaper press," the words "in the *Evening Dispatch* newspaper on 7th December 1894" were substituted."

Argued for the pursuer;—

I. Against the defender Dick,—(*a*) The letters were *per se* slanderous, and therefore the pursuer was entitled to an issue without an innuendo. They were addressed to a body which thought them so serious that the pursuer was called upon to explain or suffer suspenpension. In any view it was for the jury to say whether, in the circumstances, they were slanderous or not. (*b*) Alternatively, issues with the innuendoes should be allowed.[1] If not *per se* slanderous, it was enough if they had a slanderous meaning among football players, and the pursuer so averred. (*c*) There was at least verbal injury; the pursuer averred that the statements complained of were false, that they were intended to injure, and in fact had injured him.[2]

II. Against the first and second defenders,—(*a*) As to the finding that the pursuer had used offensive language, the same argument applied as against Dick. (*b*) The pursuer had suffered a legal wrong by the publication of these defenders' resolutions, in respect he was prevented from playing football with clubs belonging to the Union. He was in the same position as a man who had been wrongfully expelled from a club. His patrimonial interest had been injured. The cases of *M'Millan* and *Forbes* relied on by the defenders were different, for there the pursuers did not aver membership of a body from which they had been expelled. (*c*) The plea of privilege was unsound in the case of both defenders. Dick had no right to complain, and the committee had no right to listen to his complaint. The Union had no power over individuals, but only over clubs belonging to the Union. Even if the committee had an interest to discuss the pursuer's conduct, they had no right to publish their conclusions to the world.[4]

Argued for the defenders;—(1) No issue should be allowed against

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[1] Home v. Lundie, March 19, 1832, 10 S. 508; Mackay v. Campbell, July 25, 1833, 11 S. 1031; Dunbar v. Skinner, March 3, 1849, 11 D. 945, 21 Scot. Jur. 322.

[2] Paterson v. Welch, May 31, 1893, 20 R. 744; Waddell v. Roxburgh, June 9, 1894, 21 R. 883.

[3] Blasquez v. Lothians Racing Club, June 29, 1889, 16 R. 893.

[4] Rankine v. Roberts, Nov. 26, 1873, 1 R. 225.

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either of the defenders. The pursuer did not complain of being accused of general discreditable conduct.

(2) The pursuer had not averred any patrimonial loss, nor the invasion of any right, of which the Court would take cognisance.[1] Accordingly the issue approved by the Lord Ordinary should be disallowed.

(3) It was clear on the pursuer's record that both sets of defenders were privileged, and there were no averments from which malice could be inferred.

At advising,—

LORD KINNEAR.—I agree with the Lord Ordinary that, in so far as regards the defender James Dick, there is no issuable matter on record. None of the various innuendoes which the pursuer proposes in the separate issues can in my opinion be allowed. The object with which they are framed seems to be to put to the jury a variety of arguments more or less forcible for holding that the language of which the pursuer complains is in its normal acceptation libellous. But that is not the purpose of an innuendo. I mean that an innuendo ought to be an averment that words which in their ordinary acceptation are not libellous had, in the circumstances in which they were used a specified libellous meaning, or that they had a libellous application not otherwise obvious. The pursuer must therefore define with precision the specific meaning which he ascribes to language not obviously libellous, and I think it was a fair criticism that was made upon the pursuer's innuendo that he proposes to put a great variety of somewhat vague meanings on the same words. But when the innuendoes are examined, which I do not think it necessary to do in more detail, it appears to me that none of them are legitimate innuendoes in the sense I have described. In so far as they do more than suggest arguments upon the construction of the language used, they either add to the defender's words something which he did not say, or else they put in more violent language what he has expressed in perfectly moderate and reasonable language.

I agree with the Lord Ordinary that none of the eight issues which were proposed in the Outer-House should be allowed. The question remains whether the new issue which the pursuer proposes without an innuendo can be sustained. Now, I agree with the Lord Ordinary that the statements made by the defender Dick, of which the pursuer complains, are not a fit subject for an action of libel. The pursuer's own averments disclose a condition of things of which any umpire who was treated as the defender is said to have been treated was entitled to take notice. I entirely agree with what the Lord Ordinary has said upon this matter,—"It appears to me that the letters are temperately and moderately expressed to bring before the committee a legitimate complaint without the use of exaggerated or defamatory language. Further, I think, that supposing Mr Dick had reason as referee to make a complaint at all, his complaint was addressed to the proper quarter, and that altogether independent of any special rules

[1] Forbes v. Eden, Dec. 8, 1865, 4 Macph. 143, 38 Scot. Jur. 48, 5 Macph. (H. L.) 36, 39 Scot. Jur. 411; M'Millan v. Free Church, July 19, 1861, 23 D. 1314, 33 Scot. Jur. 655; Rigby v. Connol, 1880, L. R., 14 Ch. D. 482.

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upon the subject." But notwithstanding that the defender might be entitled to express an honest opinion to the effect contained in his letters, and afterwards in his evidence before the committee, he might nevertheless be liable in damages if it could be shewn against him that he was not acting honestly and in the exercise of the privilege which the occasion gave rise to, but dishonestly for the malicious purpose of injuring the pursuer; and accordingly we must consider whether the pursuer has not made sufficient averment of malice to entitle him to an issue. I think that he has not. I agree with the Lord Ordinary that this is one of those cases in which it is necessary that a specific averment of facts and circumstances from which malice is to be inferred ought to be made before the pursuer can be allowed to have an issue. Malice must always be a matter of proof. It may in many cases be inferred from the violence of the language used; or it may be inferred from some improper method of publication. But in the present case it cannot be suggested that either of these grounds exists for inferring malice, and therefore it must be inferred from extrinsic circumstances which ought to have been averred. But there is no such averment. It is not said that the pursuer and defender knew anything of one another before the occasion which gave rise to the complaint, and no relation whatever is averred as existing between them except that of player and umpire. It seems to me that there is nothing on record to rebut the presumption which arises from a privileged occasion, nor to displace the honest and proper motive of the defender, and to shew that he was acting dishonestly and maliciously. I am therefore of opinion that, in so far as regards this defender, the action ought to be dismissed.

There remains the question whether there is any case against the other defenders, the Scottish Football Union and its committee, and the individual members of the committee. The case against the committee stands in a somewhat different position from that in which it stood before the Lord Ordinary. His Lordship thought that the committee also was privileged, and that there was no averment from which it could be inferred that they were acting maliciously. But the pursuer has amended his record in the Inner-House, and he now alleges that the committee, after making a certain inquiry, which was conducted, according to his statement, in an exceedingly partial, unfair, and irregular manner, came to a certain conclusion against him; and then he goes on to say that, upon the instructions of the committee, the finding and resolution of 9th November,—which were that the pursuer had used offensive language to the referee, and that he should be severely censured and be ordered to apologise,—and subsequently the resolution of 6th December, were communicated to the *Edinburgh Evening Dispatch* and the *Glasgow Herald*; and it is added that the resolutions so communicated were published by these newspapers in November and December.

Now, it appears to me that a statement by such a body published to the world in newspapers may be injurious to the reputation of the person affected, and I am not prepared to say that, if such a body as this publishes to the world that a particular person has used offensive language to a referee which is severely censurable, and that he ought to be called upon to apologise

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such a statement cannot be so injurious to the person charged that if he is charged falsely he should not be entitled to damages. The defenders are not in a position to say that such a statement could not cause the society of the pursuer to be shunned by those with whom he was accustomed to associate in playing the game of football. If it had that result, then, according to the ordinary rule, it is a statement on which he is entitled to ask the verdict of the jury, whether it was or was not defamatory or injurious to him. I do not express any further opinion than that I think this statement so published is one which the pursuer is entitled to lay before the jury; but if it is in itself injurious the same question arises with reference to the defenders who were charged with the responsibility of making it, as with reference to the case against the other defender Dick, whether they were not in a privileged position; and if so, whether any sufficient averment of malice is made against them. When the case was before the Lord Ordinary his Lordship thought, in the first place, that their position was clearly privileged; and, in the second place, that there was no sufficient averment of malice with reference to the committee any more than with reference to the other defender. In the aspect which the case has now assumed I am not prepared to assent to either of these conclusions. I think it is very possible that it may turn out that the members of the committee who were chargeable with this publication were privileged, but I think that may depend upon facts and circumstances which are not fully known to us at present. It may depend upon the rules of the society, and upon the extent to which the pursuer has submitted himself to the censure and discipline to be exercised by the governing bodies of the society. These are circumstances as to which we are not fully informed. It is enough to observe in the first place that the pursuer has averred against the committee conduct with reference to their treatment of him, and to the extent to which these averments are proved he is entitled to say that it was unfair and irregular; and secondly, it must be observed that there may be a privilege in a society of this kind to discuss matters, and to promulgate opinions with reference to them, as among the members of the society itself which would not necessarily carry with it a right to publish them to the world,—that is to say, to publish injurious matter to persons in respect to whom no such privilege can exist. It appears to me, therefore, that in the first place there is a sufficient case upon this issue to go to the jury; and secondly, that it ought to be left to the Judge at the trial to direct the jury, according as the facts turn out, whether the case is one of privilege or not, and therefore whether it will be necessary for that jury to find malice in order to entitle the pursuer to succeed. I should be disposed therefore to allow the pursuer the third issue which he proposes in his amended issues, but not in the terms in which he proposes it. It is proposed to put to the jury,—"Whether, on or about 9th November 1894, the Scottish Football Union through its committee, and the said committee, and the said defenders, or one or other and which of them, or one or more and which of the second defenders, made a finding and passed a resolution in the following terms," then it quotes the resolution I have referred to and goes on—"and published or caused it to be published in the following newspapers, &c."

Now, I think, the pursuer has averred no case upon which he is entitled

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to complain of this finding and publication, except against the individual members against whom he may prove that they made the publication. There is no case against the Scottish Football Union upon this matter. If the pursuer was injured, the persons liable for it are those who did the wrong. The pursuer does not aver, and I think his averments exclude the idea, that the Scottish Football Union as a body, if it be a body liable to be sued in such a matter at all, is answerable for the wrong of which he complains. On the contrary, he says that the committee had no authority from the Football Union to act in the manner of which he complains. Therefore I am of opinion that the action must be dismissed against the first called defenders as well as against the private defender Dick, and that the only case that remains is one against the individual members of the committee. In the working out of the case against them it will of course be necessary to prove against each of them that he individually was responsible, first, for the passing of the defamatory statement of which he complains, and secondly for its publication. It is not a complaint which can be established against the committee generally, or against such a society as the Football Union generally. It must be proved against each particular wrongdoer who is said to be answerable for the wrong, if wrong there was.

There remains a question of a somewhat different kind, whether the pursuer is entitled to the issue which the Lord Ordinary has allowed. (His Lordship here quoted the issue.)

Now, I am unable to ascertain from anything stated on record, or from any argument which we had the advantage of hearing, what is the legal right of which the pursuer complains that he was deprived, as he says in his issue. It appears to me from the statement that if a resolution in these terms were published in the newspapers, and if it had induced persons who would otherwise be willing to play football with the pursuer to refuse to do so, it might possibly support an issue for defamation. But the pursuer disclaims any intention to take an issue of slander upon this resolution. He says that he desires only an issue which would give him reparation for the substantive wrong done to him. I confess I am unable to see what the substantive wrong was. All that he says about it is that it was illegal and incompetent, and that its effect is to prevent him from playing in any club or against any club which is a member of the Football Union. Now, how does it prevent him from doing so? It must either mean that the Football Union as a body decline to play, or that they advise their members not to play. If the latter is the true meaning that is just an innuendo of defamation, and nothing else. If he complains not of the defamation but of the fact that people would not play football with him, that does not appear to me to be a legal wrong or an invasion of any legal right. Nobody has a right which he can enforce at law to compel other people to play a game of football with him. If there be an agreement between them to play a game together, that is not an agreement which the law will enforce. The general rule is that such agreements are personal. Agreements to associate for purposes of recreation, or an agreement to associate for scientific or philanthropical or social or religious purposes, are not agreements which Courts of law can enforce. They are entirely personal. Therefore, in order to establish a civil wrong from the refusal to carry out such an agreement, if

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it can be inferred that any such agreement was made, it is necessary to see that the pursuer has suffered some practical injury either in his reputation or in his property. No averment of that kind is made. As to the first kind of injury, as I have already stated, the pursuer disclaims the idea of putting an issue upon that ground of charge.

The Lord Ordinary has referred to the case of *Blasquez* v. *The Lothians Racing Club*[1] as an authority for the issue which he thought it right to grant in this case. That appears to me to be a case entirely distinct, because what was complained of there was that the pursuer had been expelled from a public place—that is, a place to which presumably he would have been entitled to resort unless he had been wrongfully turned out of it by the persons of whom he complained. The complaint was that he had been wrongfully expelled from the ring of the Lothians Racing Club's Edinburgh Meeting at Musselburgh, to his loss, injury, and damage. Now, that is a totally different kind of complaint from that which the pursuer makes here. It appears to me, therefore, that upon this ground there is no cause of action which can be sustained, and I should be disposed to suggest to your Lordships that we ought to recall the Lord Ordinary's interlocutor, and dismiss the action as against the defenders first called, and also as against the defender third called, and to allow the one issue which I referred to as amended in the manner I have suggested against the defenders second called, and against them only. Supposing that issue is allowed, I do not understand that the defenders make any motion that they should be allowed a counter issue.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT recalled the Lord Ordinary's interlocutor, dismissed the action as against the first and third defenders, and allowed an issue against the second defenders in the following terms:—"Whether, on or about 9th November 1894, the defenders, or one or more and which of them, made a finding and passed a resolution in the following terms, *videlicet*:—'That T. Murdison used offensive language to the referee,' meaning thereby James Dick, the referee at a football match played at Galashiels on 27th October 1894; 'that T. Murdison be severely censured, and be ordered to apologise to the referee,' that is, to the said James Dick; and whether the defenders, or one or more and which of them, sent or caused to be sent a copy of the said finding and resolution to Mr William Wintrup, honorary secretary of the Gala Football Club, on or about 10th November 1894, and published the said resolution, or caused it to be published in the following newspapers, *videlicet*:—*The Edinburgh Evening Dispatch* of 10th November 1894, and *The Glasgow Herald* of 12th November 1894: Whether the said finding and resolution are of and concerning the pursuer, and are false and calumnious, to the pursuer's loss, injury, and damage? Damages laid at £1000."

RICHARD LEES, Solicitor—STRATHERN & BLAIR, W.S.—Agents.

[1] 16 R. 893.

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REV. JOSEPHUS LEISHMAN SKERRET, Pursuer (Reclaimer).—*Ure—Crabb Watt.*

REV. ALEXANDER OLIVER AND OTHERS, Defenders (Respondents).—*Shaw—Comrie Thomson—Younger.*

Church—Voluntary Church—Suspension of Minister—Reduction—Restoration to status.—A minister of the United Presbyterian Church was served with a libel for an alleged offence, and was suspended from the ministry till the decision of the case. After a proof, the Presbytery found the charge proved. The minister appealed to the Synod, who remitted the case to a commission. The commission found certain counts in the libel proved, and suspended the minister *sine die*.

The minister brought an action (1) for declarator that he had been libelled and suspended contrary to the rules of the Church; (2) "in case it may be necessary," for reduction of the decree of suspension pronounced by the commission; and (3) for interdict against the defenders proceeding to fill his charge, or deprive him of the status or emoluments of his office. He reserved his right to claim damages.

The pursuer having intimated that he did not insist in the conclusions for declarator and interdict, but only in that for reduction of the sentence of the commission, the Court *dismissed* the conclusion for reduction, on the grounds (1) that that conclusion was merely ancillary to the conclusions for declarator and interdict; and (2) that reduction of the sentence by the commission would leave the pursuer under the original suspension, and would not restore his status as a minister, or lead to the establishment of any patrimonial right.

Church—Voluntary Church—Contract—Suspension of Minister—Reduction—Specific implement—Restoration to office.—In an action by a minister of a congregation of the United Presbyterian Church against the Synod concluding (1) for reduction of a sentence of suspension pronounced against him by a committee of the Synod to whom the Synod had remitted the trial of a libel against him, on the allegation that it was *ultra vires* of the Synod to make the remit, and (2) for interdict against the defenders filling up his charge, *held* by Lord Kincairney (1) that the pursuer had relevantly averred a breach of contract, causing an injury which was of a patrimonial character, or of a character equivalent to patrimonial; (2) that the suspension by the committee being alleged to be *ultra vires*, appeal to the Court was not excluded by a provision in the contract that members should not have recourse to the civil Courts against judgments of the Courts of the Church; but (3) that reduction of the sentence of suspension, to the effect of restoring the pursuer to office, was not a remedy which the Court ought to grant, or was in use to grant, in similar cases, and that the action fell to be dismissed.

Process—Church—Voluntary Church—Action to reduce decree of suspension—Who must be called as defenders—Citation of Synod and Presbytery.—In an action by a minister of the United Presbyterian Church, for reduction of a decree suspending him from his office, and for restoration to his office, with its emoluments, *held* by Lord Kincairney (Ordinary), and acquiesced in, (1) that it was sufficient to call as defenders the prosecuting members of the Presbytery, the Synod, and a commission of the Synod by whom the sentence complained of had been pronounced; (2) that the Synod was validly cited by its office-bearers being called; and (3) that the Presbytery was not a proper defender, but was validly cited for its interest, by its office-bearers being called.

1ST DIVISION. Lord Kincairney.

THIS was an action at the instance of the Rev. Josephus Leishman Skerret, who designed himself "minister of the United Presbyterian Church, Cathedral Square, Glasgow," against (1) the Rev. Alexander Oliver and others, the moderator, clerks, agents, and treasurer of the

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Synod of that Voluntary Association of Christians calling themselves the United Presbyterian Church, as representing the said Synod or Association, and as individuals; (2) the Rev. David Kinnear and others (members of the commission of the Synod after mentioned) as representing said Synod, and as individuals; (3) the Rev. J. M. Cruickshank and others, the moderator, clerk, treasurer, and clerical members of the United Presbyterian Church Presbytery of Glasgow as representing said Presbytery, and as individuals; and (4) the Rev. David Woodside and others, the kirk-session, board of management, and trustees vested in the heritable property of the Cathedral Square United Presbyterian Church, Glasgow, for their interest.

The pursuer concluded (1) for declarator that the defenders were not entitled, by virtue of the provisions of the constitution, contract of association, rules, and laws of the United Presbyterian Church, to suspend the pursuer from his office of minister of the United Presbyterian Church, Cathedral Square, Glasgow, or from the status or emoluments of the said office, by reason of them, or any of them, alleging or finding it proved that on occasions specified he had met and walked with Miss A B; (2) that the libelling of the pursuer for alleged walking with Miss A B, with the view of suspending him from, or depriving him of his said office, or the status or emoluments of the same, was contrary to the said constitution, contract of association, rules, and laws; (3) and "in case it may be necessary," for decree of reduction of a pretended judgment or suspension, dated 24th May 1894, suspending the pursuer from his office as minister of the said Church *sine die*, dissolving his connection with the congregation of Cathedral Square, and declaring the charge vacant, passed by the defenders the Rev. David Kinnear and others, and restoration of the pursuer thereagainst; and (4) for interdict against the defenders proceeding to fill the place of the pursuer in his office of minister foresaid, or to deprive him of the status and emoluments of the said office or of his status of a minister of the Gospel.

The pursuer averred, *inter alia*;—(Cond. 2) "The rights of the members of the said association (the United Presbyterian Church) *inter se* are regulated by (1) a constitution or contract of association called "The Basis of Union," and (2) rules or laws.* The said rules and

* The following sections of the "Rules and Forms of Procedure" were referred to in the course of the case:—Chap. III.—The Synod.—Section 1.—Constitution and Officials.—"(1) The Synod is the supreme Court of the Church. . . ." (2) "The functions of the Synod may be described as judicial, legislative, and administrative. It gives judgment in cases which come before it by reference, complaint, appeal, or petition. It . . . makes rules for the regulation of its own procedure and that of the inferior Courts. . . . And in general it discharges all the functions that pertain to a supreme ecclesiastical Court." (6) "The Synod reserves to itself the right of sending any cause brought before it to a committee to consider the matter and recommend to the Court a finding for its adoption."

Chap. V.—Section 4.—Appeals and Complaints.—(10) "When the cause comes before the superior Court, the Court may, if it see fit, send it to a committee, which shall travel in the cause and prepare a deliverance which it shall recommend the Court to adopt."

Chap. VI.—Church Discipline.—Section 1.—Of Discipline in general, and the different kinds of Church censure.—(1) "The proper ground of Church discipline is a sin or offence, which, on account of its publicity, is a scandal, and is calculated to bring a reproach on religion. For those sins and offences which are not publicly known private admonition, counsel,

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laws are revised and added to from time to time, and become as from the date of their last revisal part of the constitution of the said association, superseding all previous rules or practice. The rules or laws No. 9 of process became part of the said constitution by resolution of Synod in May 1893, and superseded all the previous rules and practice of the association." (Cond. 4) The pursuer accepted a call from the congregation of the United Presbyterian Church, Cathedral Square, Glasgow, and was inducted by the Presbytery of Glasgow to the pastorate of that congregation. (Cond. 5) "By the said call, and the pursuer's acceptance thereof, and induction following thereon, a contract was entered into between the pursuer on the one hand and the said association on the other, whereby the pursuer became bound to perform the functions of the ministry to which he had been ordained on the terms and subject to the provisions of the said contract of association, rules, or laws, and the said association became bound to confer upon the pursuer the status of a minister of their association, and through and by the said congregation, who were also parties to the said contract, to supply him with suitable maintenance, and to maintain him in the enjoyment of the said status and the emoluments thereof." (Cond. 6) "In particular, it was a part of the said contract that the association should have power to deprive the pursuer of the said ministry and maintenance only if any of the sins and offences specified in the said contract, rules, or laws should be found proven under a libel against him. It was also part of the said contract that, in the event of the pursuer being libelled for any such sin or offence, he should have an appeal from the judgment of the Presbytery, before whom alone the libel could be tried, to the Synod of said association; that such appeal should be heard and disposed of by such Synod after the pursuer had been heard in his defence, and that he should have a judgment by the majority of the members of the association sitting in Synod before any sentence should be pronounced against him depriving him of his status and maintenance as aforesaid." (Cond. 7) The pursuer was, in breach of the said contract of association, served with a document which the prosecutors alleged to be a libel, which was in the terms quoted below.*

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and reproof, are in general the proper remedies." Section III.—Rules for the Trial of Office-Bearers.— . . . Prosecution by the Presbytery.—(7) "When a Presbytery resolves upon a libel it issues an interdict against the accused exercising any of the functions of his office until the case is issued. . . ."

* "Whereas, by the Word of God and the laws of the Church, the holding of private meetings by a married man with a young woman, and especially by a minister of the Gospel, with a female member of his church, whose relations with him have previously formed the subject of inquiry by his Presbytery, in places and circumstances exciting such suspicion on the part of members of his church and others as to lead to a complaint calling for the action of the Presbytery, and especially on the Lord's day or after religious services, is culpably and censurably imprudent, gives occasion for scandal, brings reproach on religion, and is fitted to destroy his usefulness as a minister of the Gospel.

"Yet true it is and of verity, that you, the said Reverend Josephus Leishman Skerret, have been guilty of the said offence by holding private meetings with Miss A B, . . . a member of your church, whose relations with you had previously formed the subject of inquiry by your Presbytery, in so far as—(1) On Sabbath, the 18th day of February 1894 years, after eight o'clock post meridiem, you did meet the said Miss A B in a close in Monteith

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(Conds. 8 and 9) The alleged libel affirmed no offence, and the pursuer objected to it as irrelevant, but the Presbytery remitted it to probation, and after a proof found the pursuer guilty of walking with the said member of his congregation on the occasions specified. (Cond. 10) "The pursuer protested and appealed to the Synod against the finding of the Presbytery in order that the Synod might exercise the rights of final judgment conferred upon them. On the 10th day of May 1894 the Synod took up the appeal, but instead of adjudicating upon it, as they were bound to do, they illegally and unwarrantably delegated the powers committed to them to an alleged commission, composed of forty-five of their own number, with power to them to consider and finally dispose of the said appeal. The said delegation was in breach of the said contract, and was *ultra vires* of said Synod. The said commission did not constitute any Court or authorised tribunal of the Church, and had no power, jurisdiction, or authority to deal with the case, or to pronounce any sentence thereon. . . ." (Cond. 11) "The said alleged commission, on the 24th day of May 1894, took up the functions incompetently delegated to them as aforesaid, and . . . found the first count of said libel not proven, and the second and third counts proven, and suspended the pursuer from performing the duties of his said office, and removed him from his said charge, at the same time appointing the said charge to be declared vacant on Sunday, the 27th day of May 1894 . . ." (Cond. 12) " . . . By and through the said illegal, incompetent, and unwarrantable proceedings, the pursuer has been deprived of his livelihood, and has sustained serious loss, damage, and injury in his profession, feelings, and reputation, for which he holds the defenders responsible, and he reserves all claims for such loss and damage . . ."

The pursuer pleaded, *inter alia*;—(5) The alleged judgment or suspension being *ultra vires* of the parties passing the same, in respect that the Synod had no authority to remit the case to the commission, the pursuer is entitled to decree of reduction, as concluded for.

The defenders lodged preliminary defences against satisfying the production, the nature of which sufficiently appears from the opinion appended to the Lord Ordinary's interlocutor of 19th January 1895,—*vide infra*, p. 474.

On 19th January 1895 the Lord Ordinary (Kincairney) repelled the defences as defences against satisfying the production, and appointed the Synod of the United Presbyterian Church, and the

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Row, and walked away with her up Green Street, along Millroad Street, East Rose Street, Waterloo Street, Crownpoint Road, Mountainblue Street, through a park into the park next the Celtic Park. (2) Further, on Wednesday, the 21st day of February 1894 years, after ten o'clock P.M., following on religious services, you did meet the said Miss A B at Claytoun Terrace, Dennistoun, and walked off with her up Craigpark and along Onslow Drive." (3) Here followed a similar charge. "All of which, or part thereof, being found proven against you, the said Rev. Josephus Leishman Skerret, by the Glasgow Presbytery of the United Presbyterian Church, before which you are to be tried, or, being admitted by your own confession, you, the said Rev. Josephus Leishman Skerret, ought to be subjected to such sentence as the gravity of the case, the rules and discipline of the Church, and the usage observed in such cases may require, for the glory of God, the edification of the Church, and the deterring of you, the said Rev. Josephus Leishman Skerret, and all others holding the same sacred office, from committing the like offences in all time coming."

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defenders called as representing Synod, to satisfy the production within ten days.*

* "OPINION.—(After narrating the conclusion of the summons his Lordship continued)—There is no conclusion for damages or other petitory conclusion. The only redress asked is restoration of status, with its 'emoluments.' It would have been convenient to consider the declaratory conclusions first; but the defenders have thought fit to lodge preliminary defences applicable to the reductive conclusions, and that step, according to our forms of process, necessitates the consideration, in the first place, of the conclusions of reduction, with the preliminary defences against satisfying production. It is now customary in practice to dispense with a preliminary defence in reductions, as, generally speaking, a merely formal and superfluous step of procedure, and to give in defences applicable to the whole cause, under reservation of right to maintain the pleas that purport to exclude consideration of the merits. That practice tends certainly to simplify and shorten procedure, and does not seem attended with inconvenience; and I think it to be regretted that the defenders could not see their way to adopt it. I think that all substantial objections to it might have been overcome by adequate reservation. They have, however, adopted the course of pleading which was followed in the well-known case of *M'Millan* v. *The Free Church of Scotland*, and which occasioned in that case so much unnecessary and regrettable delay and expense. The defenders were, however, in their right in lodging preliminary defences against satisfying the production, and the only question now to be decided—a question of form, not of substance—is whether they shall be ordained to produce the sentence pronounced on 24th May." (His Lordship then referred to the statements and pleas on record.)

"It was conceded on both sides that the case raised nothing but a question as to the contractual relations between the pursuer and the United Presbyterian Church, and depended on principles of law applicable to contracts. It was treated as now settled that the case must be considered on the footing that the tribunals of this Church were not, strictly speaking, Courts of law, and that they possessed no authority which could be correctly described as jurisdiction, and no authority over the pursuer, except what was conferred by the Constitution of the Church and the voluntary adhesion of the pursuer thereto.

"This view of the nature of the Constitution of the Church and of the relations of the parties, of course, limits the grounds of defence. It excludes the defence that the sentence is unchallengeable as the judgment of a supreme Court or of a spiritual Court. But it limits also the grounds of attack, because it is nothing to the purpose to say that the tribunal which pronounced the sentence committed an error of judgment, however extravagant. The judgment cannot be reviewed, for the reason—if for no other—that it is not the judgment of a Court, and cannot be impeached to any extent, unless to the extent to which it amounts to a breach of contract.

"Reverting for a moment to the grounds of this action, I do not know that it is disputed that among the offences of the office-bearers of the Church of which the tribunals of the Church have cognisance must needs be offences which amount to no more than acts of imprudence; they must be entitled to safeguard the reputation of the office-bearers of the Church, and in particular of the ordained ministers of the Church. If so, it must belong to these tribunals to judge whether any particular line of conduct be imprudent or no; and if a line of conduct be considered imprudent, *prima facie* it would seem to be for the tribunal to mete out the appropriate punishment. The libel is not happily expressed—very much the reverse—and it may be that a rigorous and technical criticism might give it the appearance of sheer absurdity. Still, it is at least debateable that it was for the tribunal to determine with what latitude it should be read, and

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The sentence on the pursuer, a copy of which was produced and accepted by the pursuer as satisfying the production, was as follows:—"That the commission, having found the second and third counts of the libel proven, and affirmed the judgment of the Presbytery,—

whether it fairly indicated—if it did not skilfully express—culpable imprudence.

"Again, it at first sight appears that suspension from the office of minister of his church was a very harsh punishment on the pursuer for conduct of which no more could be predicated than imprudence. But while that consideration may induce sympathy for him, can it entitle this Court to say that that punishment exceeded the powers of the tribunal—if the Commission was a tribunal of the Court at all—and on that account was a breach of contract?

"Again, when the pursuer's averments as to the irregularities of the procedure by the Commission are examined, a first impression suggests that they fall very far short of such irregularities as would warrant the interference of the Court.

"I do not think it out of place to indicate my present impressions on these points, although I do not mean to express any final judgment about them; because, in truth, it is not the pursuer's grounds of challenge that I have to decide on, but the defenders' pleas, by which they seek to exclude consideration of all grounds of challenge. I think it worth while to indicate that it appears to me that the pursuer's most formidable ground of challenge is his assertion that the commission by which he was sentenced was not really a tribunal of the Church which had, by his adherence to the Constitution, any authority over him. I have formed the opinion that this ground of challenge must be considered; and therefore, in further consideration of the case, I leave out of view all the pursuer's grounds of challenge except that one.

"With regard to that ground of challenge, I have to observe that I have not been able to find in the rules and regulations of the Church (No. 7 of process), any clear authority for the delegation by the Synod to a selected number of their members of the power and duty of reviewing the judgment of the Presbytery, and of pronouncing sentence on the pursuer. I have been referred to two clauses only.

"The one is in cap. 5, sec. 4, par. 10, and is quoted by the pursuer on record. It is—'When the cause comes before the superior Court, the Court may, if it see fit, send it to a committee, which shall travel in the cause and prepare a deliverance which it shall recommend the Court to adopt.'

"Under this clause, the power to be given to a committee is not a power to decide, but only to report; and the deliverance, whatever it might be, would be a deliverance of the superior Court, and not of the commission. The defenders did not maintain that that authorised the sentence on the pursuer.

"The other clause was referred to by the defenders. It is in cap. 6, sec. 4, par. 31, and is thus expressed:—'In special circumstances the Synod may originate proceedings against an office-bearer, and may either itself conduct the case to a termination or remit it to the Presbytery or to a commission of its own members.'

"The pursuer argued that that clause is equally inapplicable, because it is confined to proceedings originating with the Synod, while the proceedings against him originated with the Presbytery.

"But the defenders have averred that the appointment of and remit to the commission was in accordance with the practice of the Church, and was consented to by the pursuer; and I do not question the relevancy of these averments, all the less because this case raises no question about the jurisdiction of the tribunal which pronounced judgment, but only about the

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consent of the pursuer to submit to it, and that might be evidenced by his acts as well as by the Constitution of the Church.

"The defenders point out that there is no conclusion to reduce the remit; but I am not satisfied that that was necessary.

"Indeed, I am not satisfied, as at present advised, that it may not appear in the end that no reduction is absolutely necessary.

"I turn now to the defenders' pleas, by which they seek to exclude the case from the consideration of the Court. These pleas, which are numerous, seem to cover the whole defence, but only some of them are applicable at the present preliminary stage. Unless I have misunderstood the clear and able argument for the defenders, I think their positions may be summarised as follows:—

"They maintained that the defences against satisfying the production should be sustained, and that the conclusions for reduction should *de plano* be dismissed, (1) because all parties were not called; (2) because the action did not submit to the Court any question of civil right, seeing that the sentence sought to be reduced was an ecclesiastical act by a Court of the Church within its own sphere, and no damages were claimed and no patrimonial interest was involved; (3) because the Court was not competent to grant the only redress demanded, viz., restoration of status; and (4) because recourse to the Civil Courts was excluded by the contract.

"These are not the usual pleas in defences against satisfying the production. They do not involve an objection to title. Yet I think they are such defences as may be entertained at this stage, an opinion which seems warranted by the case of *Ramsay* v. *Bruce*, 30th November 1849, 12 D. 243, quoted by the defenders. I shall therefore proceed to consider these pleas as defences against satisfying the production.

"I. I am not prepared at this stage to sustain the plea that all parties are not called. A very large number of defenders are called, somewhat indiscriminately; and there may be some of these who need not have been called. It appears to me that the only necessary contradictors at this stage are (1) the prosecuting members of the Presbytery of Glasgow; (2) the members of the commission by whom the sentence complained of was pronounced; and (3) the Synod. There is no doubt that the prosecuting members of the Presbytery are among the defenders called; and I did not understand it to be disputed that the members of the commission are called, at least no member of the commission was named who is not called. But the defenders maintained that the Synod is not called effectually or competently, and that the Church and the Presbytery of Glasgow ought to have been called and are not duly called.

"I agree that the United Presbyterian Church has not been duly called. I think that this sufficiently appears from the judgment of Lord Jerviswoode in the third case of *M'Millan* v. *The Free Church*, 20th July 1864, 3 Macph. 1444, which appears also to shew that it is not possible to convene such a body. But if it be impossible to call it, it cannot be necessary to do so; and I see no reason to think that the pursuer was bound to call the United Presbyterian Church. It acts and is, I think, represented by its duly appointed tribunals and administrative and executive bodies.

"I am not prepared to dismiss the reductive conclusions at this stage on the plea that the Presbytery of Glasgow has not been duly called. The Presbytery is not at this stage the proper contradictor. The Presbytery did not pronounce the sentence sought to be reduced, has no control over it, and cannot produce it. It is fitting that the Presbytery should be called for its interest; but I think that in that view it is sufficiently represented by those

Dr Henderson, chairman of commission, to intimate this decision to the congregation on the forenoon of Sabbath first; and remits to the Presbytery of Glasgow to take Mr Skerret under supervision, according to the rules of the Church."

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who are called, and I do not know any authority for the proposition that, when a Presbytery is to be called for its interest, it is necessary to call all its members.—See *Clark* v. *Stirling*, 14th January 1839, 1 D. 955; Mackay's Practice, 1st ed., vol. I., 326. The moderator, clerk, and treasurer are called, and I think they may at this stage be held as sufficiently representing the Presbytery. It is true that they are not said to represent the Presbytery in their official capacity, but only as members; but I think it is dealing too strictly in a formal question of this kind to hold that they are not called as representing the Presbytery officially. A large number of members of the Presbytery are also called—I understand not the whole of them—but I think that at present the Presbytery may be held to have been adequately apprised of the action and invited to appear for its interests if that were thought proper.

"The defenders' principal point under this plea was that the Synod was not called. I agree that the Synod is the proper, perhaps the only essential, defender,—at least the only defender in a position to satisfy production. But I have come to be of opinion that the Synod has been sufficiently called. The moderator, the clerk, the treasurer, and the agents have been called as representing the Synod, and I think that the Synod may be called by calling its office-bearers as its representatives. In that manner the General Assembly of the Established Church sues and is sued.—*Cruickshank* v. *Gordon*, 10th March 1843, 5 D. 909. I do not see any good reason for refusing to apply the same rule to the Synod of the United Presbyterian Church. The Synod of the United Presbyterian Church is not, it is true, a legal *persona*, but it is a body consisting of definable individuals. It is not in all points similar to the General Assemblies of the Established and Free Churches, which are ephemeral bodies and fluctuating in their membership. I understand that the Synod is a permanent body, and although not in permanent session, capable of being convened whenever necessary for special business.—(Forms of Procedure, No. 7 of process, section 23.) It consists (see Forms of Procedure, cap. 3, section 1) 'of all the ministers on the roll 'of Presbyteries, the elders commissioned by sessions, and missionaries when 'at home who have been ordained under the formula of the home Church.' Thus its clerical members are not representative, and cannot vary very much from time to time, although it is possible that the lay element may fluctuate. Most of its members, at all events its clerical members, may be readily known, but some of the members may be difficult of ascertainment.

"I do not know the number of the members of the Synod, but the defenders aver that they were upwards of 1200. Now, it would be manifestly a cumbrous, difficult, and expensive process, besides being absolutely useless in a case like this, to call each member of that large body, and there are some members whom it might not be easy to ascertain; and I think that where the members of a voluntary association are very numerous, and especially where there may be difficulty in ascertaining the whole of them, a relaxation of the general rule, which requires that all the members be called, has been sanctioned; and it would be very unreasonable, inexpedient, and unjust if it were not so. There may be a necessity for calling all the members of such an association in an action of damages, but not in an action like this. *The General Assembly of the General Baptist Churches* v. *Taylor*, 17th June 1841, 3 D. 1030; *Somerville* v. *Rowbotham*, 27th June 1862, 24 D. 1187; and *Renton Football Club* v. *M'Dowal*, 13th March 1891, 18 R. 670, are cases in which strict adherence to the ordinary rule was not required.

"The defenders maintained that the point had been decided in their

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The production having been satisfied, defences on the merits were lodged. The defenders denied that the remit to the commission was illegal, and averred that it was in accordance with the practice and unwritten law of the Synod, and further, that the pursuer had acquiesced in this delegation of the Synod's powers.

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favour by Lord Jerviswoode in the case of *M'Millan* already referred to. But that is not so, for that judgment related to the calling of the Free Church, and not of the General Assembly of that Church, and the reasons in the Lord Ordinary's note do not apply to this case. In *Aitken* v. *Harper*, 16th November 1865, 4 Macph. 36, an action against the moderator, clerk, and house committee of the United Presbyterian Synod as such and as individuals, concluding that they should pay an assessment, was dismissed, because they were not called as representing the Synod, which was held to be liable for the assessment. There are observations in the opinion of Lord Neaves which are apparently to the effect that these officials could not represent or bind the Synod in an action for money. These observations appear to have been *obiter dicta*, and are not directed against the competency of a device for avoiding the great inconvenience of calling all the members, by calling the officials of the Synod, in an action like the present, not concluding for payment of money.

"In the final advising of *M'Millan* v. *The Free Church*, the Lord President expressed the opinion that it was not competent to convene the General Assembly of the Free Church in an action of damages, but he does not say—nor do I think he implies—that the General Assembly could not be called in an action of declarator or reduction. I think that the fair implication of the latter part of his judgment is the reverse. Lord Curriehill does not adopt that ground of judgment, and Lord Deas dissents from it. It may be that if this had been an action of damages the Synod could not have been convened by calling its officials, but not being so, I am of opinion—following, as I think, the cases to which I have referred—that the action should not be thrown out at this stage in respect of defective instance.

"II. I have always felt the defenders' second point the most formidable. I hold that it has been decided that an action against an ecclesiastical body, concluding for reduction of a sentence of suspension or deposition, with an averment of consequent pecuniary loss and a conclusion for damages, may be entertained by the Court, and that redress might be given in such an action by reduction of the sentence and damages. I hold that so much was decided by the first and second advisings in *M'Millan* v. *The Free Church*, 23d December 1859, 22 D. 219, and 19th July 1861, 23 D. 314. That is the purport of the opinions of all the Judges, and none of them expressed any change of opinion in the final advising. These judgments do not, however, decide that the reduction of these sentences would do anything but clear the way for the claim of damages.

"But then this case differs from the case of *M'Millan*, inasmuch as that there is here no claim of damages; and it was very plausibly urged that the final judgment of *M'Millan* is a conclusive authority in favour of the defenders, because when it was discovered that the claim of damages could receive no effect, the case of *M'Millan* became the same as this case, and then the whole action was at that stage dismissed. But while this argument is of weight, I am unable to regard that judgment as conclusive of this question. For the Judges in the majority, the Lord President and Lord Curriehill, did not treat the conclusions of reduction separately, nor regard them as independent, but treated them as merely ancillary to and dependent on the conclusions for damages. Lord Deas, holding that the conclusions for reduction were not necessarily merely ancillary to the conclusions for damages, dissented, and was of opinion that there ought to be inquiry. I am disposed to think that that judgment leaves this question,

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They pleaded that the action was incompetent and irrelevant, and on 18th July 1895 the Lord Ordinary pronounced this interlocutor:—"Finds that this action concludes for reduction of a sentence suspending the pursuer from his office of minister of the United Presbyterian

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viz., whether the conclusions of reduction can be entertained without a conclusion for damages, undecided.

"Further, the defenders maintained that this case differed from that of *M'Millan* in this also, that Mr M'Millan alleged, and indeed certainly suffered, a pecuniary loss by the sentence inflicted, and that here there was no pecuniary loss. In support of this last assertion it was stated that the pursuer had no manse, which was admitted, and also that he had no right to stipend. In proof of this latter statement the defenders referred to the rule iv. 9, 6, which provides that a minister shall have no right to prosecute for stipend in the civil Courts, 'it being a principle recognised in the Church that the high and sacred claim which Christ has given ministers on the consciences of their people for a suitable maintenance is a security perfectly adequate, and excludes any appeal to a civil Court for enforcement.'

"The pursuer has averred that the Church had, through his call and induction, become bound to supply him with suitable maintenance.

"The form of the call is given in the rules at pp. 131-2, and it bears that the congregation promised 'to contribute to your suitable maintenance as God may prosper us.' There are also in the rules provisions as to the manner in which insufficient stipends are to be augmented (p. 108), and also as to the provision of annuities for aged ministers.

"I suppose that the pursuer's call was in the usual terms, and it might be a question whether it conferred on him an enforceable right to a stipend.

"The defenders referred to the case of *Arneil* v. *Robertson*, 6th July 1841, 3 D. 1150, 9th June 1843, 5 D. 400, as deciding that it did not. But that case was decided by the verdict of a jury after an inquiry into the practice of a different voluntary association, viz., the United Secession Church, and evidently it cannot be safely applied in this case.

"The position of a minister of a church in connection with the United Presbyterian Church as to this matter seems to be this, that he has a moral right to a stipend from his congregation, but cannot recover it by action. He is able, however, to affirm, with almost absolute certainty, that his position will secure him a livelihood. His deprivation of that office deprives him of that chance or moral certainty of emolument.

"So the position of a minister without a church is that he is eligible for offices or engagements from which pecuniary emoluments in fact result. In that respect he is in no different position from a member of the bar, who exercises a profession from which pecuniary benefits arise, although he also cannot enforce payment of his fees by a law-suit. But who would say that on that account the professional status of an advocate was not of pecuniary value, or that his interest in it was not a patrimonial interest?

"The pursuer maintains further that even if no legal or enforceable right to a stipend is attached to his office, still his professional status is, apart from its pecuniary advantages, a patrimonial interest of tangible and considerable value, and that loss of it is a patrimonial loss capable of being roughly measured in money. This is a position which has been a good deal canvassed, and different opinions have been entertained about it. I confess that I cannot doubt that the pursuer's view on this matter is correct, and I think that a relevant statement by a minister that he had been illegally deprived of his professional status might warrant an action of damages.

"I consider that the balance of authority is in favour of that view. In the case of *Forbes* v. *Eden*, 8th December 1865, 4 Macph. 143, the Lord Justice-Clerk (Inglis) observed,—'The possession of a particular status, meaning by that term the capacity to perform certain functions or hold certain offices, is a thing which the law recognises as a patrimonial interest,

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Church, and dissolving his connection with the congregation of Cathedral Square, Glasgow, and for interdict against proceeding to moderate in a call to fill the place of the pursuer, or deprive him of the status and emoluments of the said office, or his status as a

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and no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy.' In the House of Lords (5 M., H. L., 47) the Lord Chancellor (Chelmsford) expresses his concurrence in this opinion. These important *dicta* were challenged by the defenders as merely *obiter*. They were not, perhaps, essential to the judgment, but bore on it closely, and, apart from the great authority they necessarily carry, I venture to think they commend themselves as consistent with reason, justice, and law.

"In *Forbes* v. *Eden*, Lord Neaves, in less absolute language, indicates a like opinion, and throughout the very lengthy opinions delivered at the three advisings of *M'Millan* v. *The Free Church*, there are, I think, expressions of opinion to a like effect (see in particular 23 D. 1229, *per* Lord President Colonsay), and I confess I find it very difficult to conceive that the Court would give redress for the illegal deprival of an office to which a salary of a few pounds was attached but not for deprival of a professional status enabling the holder of it to earn perhaps ten or a hundred times as much, besides affording him credit and respect in the community.

"Take the case of an advocate disbarred through some mistake or some false accusation, could it be maintained that the Court would refuse to remedy that wrong because no right to recover money attached to the status, although his livelihood depended on it, and it made him eligible for lucrative and honourable offices? I cannot think so.

"So, to take an example put for the pursuer, if a ship captain were illegally deprived of his certificate, the Court would certainly remedy that wrong, although the ship captain had at the time no appointment, and was deprived of nothing but his position in his profession and his eligibility for an appointment.

"I cannot see the slightest difference in principle between these cases and the case of a minister, whether of the Established Church or of a voluntary Church, illegally deprived of orders or his charge.

"I am disposed to think that even if it could be proved that a man could suffer no loss of money by illegal deprivation of office or status, yet, if he thereby lost consideration or respect, the Court would be slow to refuse redress.

"III. The defenders, however, maintain that, whether the pursuer had relevantly averred pecuniary injury, or patrimonial injury, or not, and whether or not such loss of status as this case involves would warrant a claim of damages, this action must be dismissed *de plano*, because the only redress which the pursuer asks is restoration of status and a corresponding interdict, and because restoration cannot competently be given by the Court. There is certainly a great deal to be said in favour of this contention, and there are not wanting opinions, or at least indications of opinions, of great authority in favour of it; and if it can be affirmed to be sound, I think it follows, from the final judgment in *M'Millan's* case, that decree of reduction cannot be pronounced, and that the action will have to be dismissed. I have felt, and still feel, much difficulty on this point, but it seems to me that I cannot safely decide it at this stage. I am not sure that restoration, either total, or, if not total, partial, cannot be given. It may, perhaps, be out of the power of the Court to restore the pursuer to his charge in Cathedral Square, and yet it may conceivably be possible to restore his eligibility for office.

"The pursuer's case, as already observed, is this, that the commission by which he was sentenced was not a tribunal of the Church sanctioned or authorised by the Constitution by which he admits he is bound. He is

minister of the Gospel, or from following forth the said suspension, and that the object of the action is the restoration of the pursuer to the position in which he was in regard to the said United Presbyterian Church and to the said congregation before the said sentence was

ready to be judged by, and to submit to, the judgment of the Kirk-Session, or of the Presbytery, or of the Synod, but not the sentence of some other body. Seeing that I cannot find any contradiction of the pursuer's statements in the documents forming the Constitution of the Church, I must assume them to be true. Doing so, the pursuer has been deprived of his office by a number of persons who have no power over him at all. If this were distinctly made out I think it maintainable—it is unnecessary to go further at present—that the apparent sentence could not really affect his status, and that if it were reduced as null his former status would remain to him, or be restored to him unaffected by the sentence. It is as if a number of the members of the Synod had met ultroneously and deposed him without any authority. It seems the same in principle as if it were alleged that the vote had been miscounted. If that had been so, and if the Church had refused, or had by its Constitution been unable to give redress, could it be maintained that the Court could not do so? To do so would not be to challenge but to confirm the authority of the Church, and I suppose that if such a case should occur, and if it were shewn in such a case that the vote had been erroneously counted, the Church would gladly give effect to the judgment of the Court. It may be impossible that such a case should occur. I put it only for the purpose of illustration.

"Suppose it should appear in this case that the commission was without any authority under the Constitution of the Church, and if the sentence of 24th May was on that account reduced, I see no reason for assuming that the United Presbyterian Church would disregard that judgment, especially if, on giving it dispassionate consideration—which all the members of it would certainly do—they should come to agree with it. These suppositions are, of course, on the assumption that the pursuer's averments are true and the defenders' averments untrue, which is necessarily the condition of the argument.

"If, on the contrary, the defenders' averments are found to be true—and they have a high probability in their favour—then, of course, these consequences would not follow.

"The defenders referred to a class of cases which it is necessary to notice. I allude to cases in which a member of a trade union sought redress on account of his alleged illegal expulsion. These are *M'Kernan* v. *The United Operative Miners' Association*, 9th February 1874, 1 R. 453; *Shanks* v. *The United Operative Miners' Association*, 11th March 1874, 1 R. 823; *Aitken* v. *The Associated Carpenters and Joiners of Scotland*, 4th July 1885, 12 R. 1206; *Rigby* v. *Connol*, 1880, 14 Ch. Div. 482. These cases may seem to favour the contention that the Court will not entertain an action which complains of anything but injury to civil rights or loss of money, and the defenders naturally founded especially on the important opinion of Lord Lee, who decided the case of *Aitken* as Lord Ordinary. Still, I think that these decisions turn mainly on the provisions of the statute by which trades unions were legalised; and I consider also that there is not attached to the position of a member of a trade union a status of the same character as is here in question.

"The pursuer, on the other hand, referred to certain English cases, as to which I do not require to express an opinion—I mean cases in which the aid of the Court has been invoked by and accorded to individuals unduly expelled from clubs,—*Forbes* v. *Keen*, 2d December 1878, 11 Ch. Div. 353; *Labouchere* v. *Wharncliff*, 13 Ch. Div. 346; *Dawkins* v. *Antrobus*, 23d June 1879, 17 Ch. Div. 615; *Seton*, 22d November 1889, 5 Times Law Reports, 309; and *Andrews*, 27th April 1888, 4 Times Law Reports,

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pronounced: Finds that, assuming that the sentence complained of involved a breach of contract between the pursuer and the United Presbyterian Church, yet the pursuer is not entitled to the remedy craved: Therefore dismisses the action, and decerns: Finds the compearing defenders entitled to expenses," &c.*

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were referred to. Generally speaking, the bearing of these cases is in favour of the pursuer's argument, but I reach the conclusion which I have expressed without their aid. I would feel some difficulty in following them, because it may be doubted whether their application is sufficiently close, and also whether the earlier cases did not go further than it would be safe to follow.

"For the reasons expressed, I am unwilling to hold the pleas which I have discussed sufficient to support the defence against satisfying the production.

"IV. The defenders further plead that this action is excluded by the provisions in the rules of the association prohibiting appeal to the civil Courts. By rule ii. 9, 2, it is declared that every minister 'is bound to submit, in the matter of temporal support, as in all other matters connected with his office, to the decision of Presbytery or Synod, and has no right to prosecute for stipend in the civil Court'; and rule iv. 1, 6, provides that 'members are not to have recourse to the civil authorities against the decisions of the Courts of the Church or against resolutions adopted at congregational meetings.' These rules are perfectly lawful, and might exclude consideration by the Court of any decision of a Church tribunal within the scope of its authority. But here it is said that the act complained of was not the act of any Church Court, and was wholly outwith the contract. To acts and judgments of that kind I am of opinion that these rules cannot apply, and that if it be established that the sentence complained of was unauthorised by the contract or by the practice of the Church, or by the pursuer's consent, such remedy against it may be granted as may be suitable and possible in the circumstances."

* "OPINION.—By interlocutor of 19th January the preliminary defences to this action were repelled as such, and it was decided that the judgment called for, in order to its reduction, must be produced and considered. In compliance with this interlocutor, the defenders have produced an excerpt of a 'Minute of Synodical Commission of the United Presbyterian Church, containing sentence on the pursuer.' The pursuer was content with this production, and accordingly, by interlocutor of 13th February, the production was held to be satisfied. A new record has been prepared and closed, and parties have been heard in the Procedure Roll. The pursuer moved for a proof. The defenders maintained that, on the pleadings and without inquiry, they were entitled to judgment.

"The principles and questions involved are in my opinion of extreme importance, and if proof before answer were allowed, it might happen that the necessity of deciding them might be avoided. But I have come to think that the defenders are entitled to ask a judgment on their pleas; and, although with considerable hesitation, that my judgment should be in their favour.

"In my opinion, expressed when disposing of the preliminary defences, I adverted to the various questions which had been discussed. It is possible that I then said more than was then necessary, and therefore more than was expedient. But what was then said must be read with reference to the stage of the cause which had then been reached.

"From the excerpt produced it appears that the Synodical Commission recalled the judgment of the Presbytery so far as it found the first count in the libel against the pursuer proven, and *quoad ultra* affirmed the judgment of the Presbytery finding the second and third counts of the libel proven; and that, further, the Synodical Commission resolved 'that Mr Skerret be

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The pursuer reclaimed, but before the case was called for hearing in the Inner-House a new minister was inducted to the pastorate of the Cathedral Square Congregation. At the hearing the pursuer stated that he did not insist in any of the conclusions of the summons

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suspended from the office of the ministry *sine die*, and from the privilege of full communion as a minister of the Church, dissolves his connection with the congregation of Cathedral Square, and declares the charge vacant.'

"The remedy which the pursuer demands is reduction of this sentence, with corresponding interdict. He prays that it be declared to be null and void, and that the pursuer be restored against it *in integrum*. This is not an action of damages, although right to claim damages is reserved on record. If reduction were granted as craved, the result would necessarily be that the pursuer would be restored to the position in which he was before it was pronounced,—that is to say, that his suspension from the ministry would cease, and he would be restored to the privilege of full communion and to his connection with the congregation of Cathedral Square. Reduction of the sentence might have other effects besides these. It might, for example, facilitate a claim for damages,—it might rehabilitate the pursuer's character,—it might make him eligible for other pastoral charges. But decree could not be pronounced without causing, as a necessary consequence, supersession of his suspension from the ministry, and restoration to full communion and to his connection with his congregation.

"The defenders have repeated their pleas directed to the pursuer's title to sue, to the jurisdiction of the Court, and to the defective character of the instance. These pleas are still open, but they were dealt with in the previous judgment. The argument in support of them or against them was not resumed, and I do not think it necessary to add more on these points. I am not prepared to throw out the action on these pleas.

"The recent argument mainly regarded what may be called the merits of the action. It proceeded on the mutual concession or assumption that the question was not a question about the jurisdiction of the United Presbyterian Church, but was a question of contract, and that there existed a contract, the parties to which were the pursuer on the one hand, and the United Presbyterian Church, acting by its synods, presbyteries, and kirk-sessions, on the other part.

"I think that this condition of the argument is not based on a legal or logical fiction, but on a fact, and that there does exist such a contract.

"The sixth and seventh pleas in law for the defenders seem, at least in part, to be based on the view that the Courts of the United Presbyterian Church are possessed of jurisdiction. But, as I have said, that view was not argued, and the legal authority against it is ample and conclusive.

"Both parties referred to Nos. 7 and 9 of process as containing the contract, the latter (being for the purposes of this argument the more important) containing the rules and forms of procedure of the Church. The pursuer maintained that the contract of the parties is to be found in these documents, and this is admitted by the defenders, who, however, appeal also to the practice of the Church.

"The pursuer's action is based on alleged breach of this contract. That is expressed in his third plea, and the first question is whether a breach of the contract has been relevantly averred. If I rightly understood the pursuer's argument, he maintained, in the first place, that a breach of the contract was involved in his trial under the libel prepared by the Presbytery, because the libel, as he maintained, did not charge any crime or offence cognisable by the Church under the rules and regulations.

"The rules and regulations on this point are contained in chapter 6 of the book entitled Rules and Forms of Procedure, No. 9 of process, which treats of Church discipline. In section 1, subsection 1, of that chapter, it is said 'that the proper ground of Church discipline or censure is a sin or offence

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except that for reduction, and he finally based his claim to the remedy of reduction solely on the ground that the Synod had no power to remit his case to a commission.

Argued for the pursuer;—The pursuer had stated a relevant case

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which, on account of its publicity, is a scandal, and is calculated to bring a reproach on religion.' There is no definition of the word offence. The language is of great generality, and I think it impossible to contend that it does not cover offences by ordained ministers against propriety, prudence, or decorum, as well as offences of greater gravity. The libel, which I need not quote, is certainly not a model of legal or logical statement. The major proposition, with its involved aggregation of particulars, describes conduct which might be laudable, or simply indifferent, or blameably imprudent, or in a very high degree culpable, according to circumstances. Still I think that, fairly read, it must be held to charge the pursuer with such behaviour, in reference to the female member of his congregation alluded to, as was imprudent, and calculated to give occasion for scandal. There is no doubt that it was so intended and understood, and I have no doubt that the trial of a minister by the proper tribunal for conduct of that kind is well within the power conferred by the contract on the Church, and of course the mere criticism that the libel is badly expressed could involve no violation of contract if no miscarriage of justice resulted. I am satisfied that no ground of reduction can be rested on the language of the libel.

"The pursuer maintained, secondly, that the facts found proved, stated in the second and third counts of the libel, inferred no fault of any kind, and were consistent with absolute innocence, and that there was no power under the contract to inflict any punishment on account of that finding. It was maintained that what was found to be proved was no more than that the pursuer had on two occasions walked with a female member of his congregation at ten and nine o'clock at night, without any suspicious quality or circumstances connected with these meetings, and that it was highly ridiculous to censure or punish conduct so innocent. It is possible, however, that there might have been circumstances attending these meetings of which the Synodical commission were entitled to take notice, which might have made them objectionable and open to misconstruction; and I am not prepared to say that it was absolutely necessary to embody these in the finding. It was for the recognised tribunal to judge of the quality of the pursuer's acts. The commission may have judged amiss, possibly with too much rigour and suspicion, and with too little charity and good nature. Still, if the judgment was pronounced *in bona fide* by an authorised tribunal, within its powers, it is clear that no error in the judgment could constitute a breach of the contract.

"It is impossible for this Court to review or rescind the sentence on the ground of excess. Perhaps it was not really so severe as it appears at first sight to be, and might, had the pursuer submitted and acknowledged his error, have amounted practically to little more than a censure. But in any case it was clearly for the Church, through its appropriate tribunal, to award the punishment for the offence proved within the limits of the construction, and it cannot be shewn that in this case the sentence exceeded these limits.

"It is averred on record that the Synodical commission acted irregularly in various particulars enumerated. None of these, however, are of much importance, or could imply any denial of justice, or amount to an allegation of neglect of the ordinary principles of equity, and they afford, in my opinion, no sufficient ground for supposing that the trial of the pursuer was so conducted as to be a breach of the constitution.

"Thus far, therefore, I find no relevant averment of breach of contract. But the pursuer avers another breach of a different kind. It is averred that when the pursuer appealed against the judgment of the Presbytery to

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for the interference of the Court. By his induction to a pastorate in the United Presbyterian Church a contract had been concluded between him and that association, and the "Rules and Forms of Procedure" of the Church formed part of that contract. By these rules the

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the Synod, he was, under the rules and regulations, entitled to a judgment by the Synod on his appeal; that the Synod did not, in fact, decide on his appeal, but remitted to a Synodical commission—not to examine into the cause and to make a report on it to the Synod, but to decide the cause, and that the Synodical commission did so decide it; the sentence under review being a judgment of the commission, although the Synod authorised it, have adopted it, and now maintain it. Parties are at issue as to the power of a Synod to make this remit to the Synodical commission, and as to the power of a Synodical commission to decide. I do not find that these questions can be solved by a reference to the rules and regulations, in which there is reference to a Synodical commission, and if they should require to be solved, that could only be done by a proof as to the practice of the Church, and also as to the consent of the pursuer. I have not been able to resist the conclusion that the pursuer has relevantly averred that on this ground the sentence of which he complains was *ultra vires*, unauthorised by the contract, and in breach of it.

"If it be said that this objection relates merely to matters of procedure in the exercise of Church discipline, which were necessarily under the control of the Synod, and could not be considered by the Court, the answer seems to be, that the breach of contract complained of in the case of *M'Millan* v. *The Free Church of Scotland* was to a large extent of the same character, and was alleged to consist in the entertainment by the General Assembly of charges which had not been competently brought up on appeal. But the objection was considered relevant.

"On the whole, it appears that on these special points, viz., the power of the Synod to remit to the Synodical commission, and the power of the Synodical commission to review the judgment of the Presbytery and to decide the cause, the pursuer has made a relevant averment of breach of contract. It might, of course, turn out on inquiry that there had been no breach of the contract, or that the pursuer was barred from objecting to the judgment of the Synodical commission; but these points could not be determined without a proof, and therefore, for the purposes of this judgment, breach of contract must be assumed.

"But the defenders contend that they are still entitled to judgment, and they have supported that contention on various grounds.

"It is maintained that appeal to the civil Courts is renounced and excluded by the contract. This contention is expressed in plea 9. On this point I refer to the last paragraph of my former opinion, to which I adhere. I think that inquiry is not excluded by contract.

"It was further argued that the Court could not entertain this action because it involved no question of civil right or patrimonial interest. This argument is embraced in plea 6. On this point I refer to my previous opinion, and have little to add. It may be correct to say that the Court will not entertain a question as to the breach of a contract which has no relation to civil or patrimonial rights. No doubt that is a sound proposition; but I have not been able to think that that principle applies in this case. I think that this case involves questions as to the pursuer's status or position in society, his eligibility for office, and the emoluments attending his office and forming his livelihood, any of which would be sufficient to warrant the Court in entertaining the action.

"There is no doubt, I suppose, that in point of fact the pursuer has been deprived of his stipend by the sentence. He enjoyed a stipend before. He does not enjoy a stipend now. That difference in his circumstances was occasioned by the sentence. It is true that the stipend could not be

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Synod was empowered to decide cases brought before it by appeal, but no authority was given it to delegate its powers in this respect to a commission of its number. Such a delegation was contrary to the rule of the common law *delegatus non potest delegare*, and was a breach

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recovered by an action. But it none the less existed, and it is none the less true to affirm that the pursuer has lost it. Had it been recoverable at law, there would have been no doubt that it was a patrimonial interest; its character as such does not seem to me to be destroyed by the circumstance that the pursuer could not sue for it. I need not repeat the references to the cases which were quoted at the debate on the preliminary defences. The pursuer referred, in addition, to *Murray* v. *Burgess*, 1866, 1 P. C. Appeals, 362; *Long* v. *Bishop of Capetown*, 1863, 1 Moore's P. C. N. S. 411; *Bishop of Natal* v. *Gladstone*, 1866, L. R. 3 Eq. 1; *O'Keefe* v. *Cullen*, 7 C. L. Irish Rep. 319. These are certainly cases of great importance in regard to the grounds on which Courts of law will interfere or decline to interfere with the sentences of voluntary Churches. I doubt, however, whether they are material to the present question, because I think in all of them it was more obvious and undeniable than it is in this case that interests of a patrimonial character were directly involved, except in the case of *O'Keefe*.

"In that case, however, the questions were raised in the form of an action of damages, which of itself undoubtedly brought the case within the jurisdiction of the Court.

"In the earlier English club cases, the Court seemed to interfere on the ground of gross injustice to the expelled member who was complaining. But I rather think that in the more recent cases the title to invoke the aid of the Court has been based on the proprietary right of the member complaining in the club-house, or on his right to use or occupy it. The contention that such interests as the pursuer can here qualify are not sufficient to warrant the interference of the Court may certainly be supported by important authority. But having reconsidered the cases, I remain of the opinion already expressed, that the weight of authority is, on this point, on the side of the pursuer.

"The defenders further argued that the Court should refuse to entertain this action, on the principle that it will not pronounce a decree which it cannot enforce, for that here the United Presbyterian Church would pay no regard to a decree of reduction of the sentence of suspension, and would (so I understand the argument) disregard an interdict in terms of the conclusions for interdict. The pursuer could not, it was maintained, be restored through the decree of the Court to his former relations with the Cathedral Square congregation, or to his right to officiate in the church connected with that congregation, and the defenders could not be restrained from appointing another minister to officiate there.

"It is quite true that a Court will refuse to pronounce a decree which it cannot enforce. That principle was affirmed in the case of *Aitken* v. *The Associated Carpenters and Joiners of Scotland*, 4th July 1885, 12 R. 1206; but in that case the inability of the Court to give an effectual decree as demanded arose from express statutory provision, and not from any arrogation of independence of the Courts of the country. I think that principle does not apply in this case. No claim or pretence of the kind can be put forward or recognised. I consider that if decree of reduction of the sentence complained of were pronounced, and if interdict were granted as concluded for, there would not be wanting means for securing that such decrees would receive due legal effect, that they could be enforced, and that the defenders would have neither right nor power to resist them. I am therefore unable to dismiss this action on the ground that it is absolutely impossible for the Court to give practical effect to the decrees concluded for if they were pronounced.

"On the whole, it appears that the pursuer has relevantly averred a

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of the contract between the pursuer and the Church. The sentence which followed this illegal delegation was therefore invalid, and should be set aside.[1] The pursuer was in the same position as a party to a reference complaining of an award as *ultra vires* of the arbiter, and in

breach of contract causing an injury which is of a patrimonial character, or of a character equivalent to patrimonial; that appeal to the Court is not effectually excluded by the contract; and that there exists no ground for refusing this action complaining of that breach, and no absolute inability to grant and make effectual the remedy demanded.

"Up to this point I am not prepared, as at present advised, to reject the pursuer's arguments. But the question remains, whether the remedy demanded, viz., the remedy of reduction and of restoration to the position existing before the sentence of suspension was pronounced, is a remedy which the Court ought to grant, or is in use to grant in similar cases.

"That question I have now come to think should be answered in the negative. It is a remedy which has not yet been granted in Scotland in any question about the sentence of a voluntary Church. It was asked in *M'Millan* v. *The Free Church*, and it was refused. It is possible that this refusal depended to some extent on the pleadings. But in the advisings there were various expressions of opinion against the competency or expediency of granting the remedy of reduction and restoration. In the second advising the Lord President (Colonsay) says: 'The Court may not have the power to repone and restore the pursuer to the ministry, but it does not thence follow that the Court may not repone and restore him to the effect of depriving the sentence of which he complains of any validity as an obstacle to the prosecution of his civil rights and interests, whatever they may be.'—23 D. 1329.

"On the same occasion Lord Curriehill observed that, on the assumption of the truth of the pursuer's averments, the sentence pronounced 'was *ultra vires* of the defenders, and the party aggrieved is entitled to have the nullity of the sentence judicially declared by the Court. But still no action is competent in this Court in reference to that sentence, except for the purpose of setting it aside as a nullity and awarding indemnification for such damage, if any, as the proceeding may have caused to the pursuer'—p. 1338.

"Lord Deas, p. 1345, says: 'If the sentences complained of shall be found to carry with them no presumption of validity, and so not to stand in the way of a claim of damages, there may be no necessity for any reduction of them. But if they are to be reduced, it has never occurred to me, and I do not think it has been suggested by any of your Lordships, that such reduction could go further than removing them out of the way as an apparent obstacle to patrimonial redress. Nobody contemplates that the defenders are to be ordained to receive the pursuer back into their association, to allow him to sit and vote in their Presbyteries, Synods, and General Assemblies, or that the Free Church congregation at Cardross are to be compelled either to listen to his sermons or to absent themselves from the church and leave him to preach to empty benches. The principle on which we should decline to take that course is a very ordinary principle. If a master unwarrantably dismisses his servant, we give pecuniary redress, but we do not compel the master to take his servant back into his service. If I engage a teacher in any department of science, literature, or art, the law will compel me to pay him, but the law will not compel me to be taught by him'; and he proceeds to state the principle: 'It is simply because the Court deals only with civil and patrimonial interests and consequences, and while vindicating or giving redress for these, refuses to go beyond them.' That is to say, as I think, that the Court will remedy the patrimonial wrong done by

[1] Thomson v. Dundee Police Commissioners, Dec. 8, 1887, 15 R. 164; Goldie v. Christie and Petrie, March 3, 1868, 6 Macph. 541.

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such a case the Court would set aside the illegal award, leaving the parties to the reference to work out their rights afterwards. The refusal of the Court in *Forbes* v. *Eden*[1] to interfere between members of a voluntary church in regard to alleged violations of the rules of such church

a dismissal from service by an award of damages, but will not reinstate the servant in the position from which he was dismissed. His Lordship (Lord Deas) deals with the same point somewhat differently on the third advising in the case.

"The remedy sought in this case is of the nature of specific performance. That clearly appears from the conclusions for interdict. Now, there are many contracts of which specific performance will not be ordered. Possibly the most obvious and familiar example is a promise of marriage, which of course is not enforceable, and there are the whole classes of contracts of hiring and service referred to by Lord Deas in the passage quoted, which, generally speaking, will not be enforced specifically, but which will support only a claim of damages in the event of non-fulfilment. It seems open to doubt whether Lord Deas' statement of the reason for which the Court refuses to entertain such actions is entirely exhaustive. The principle is, I humbly think, more satisfactorily expressed by Lord Justice Fry in his treatise on Specific Implement under this suggestive heading, 'Where the enforced performance of the contract would be worse than its non-performance.' The 'relation,' he says, 'established by the contract of hiring and service is of so personal and confidential a character, that it is evident that such contracts cannot be specifically enforced by the Court against an unwilling party with any hope of ultimate and real success, and accordingly the Court now refuses to entertain jurisdiction in regard to them' (section 110); and again, at section 112, he says,—'It is not for the interests of society that persons who are not desirous of maintaining personal relations with one another should be compelled to do so.' I refer to the whole passage, in which the principle is more fully developed and supported.

"I apprehend that these are substantially the reasons for which our Courts will refuse in general to compel specific performance of contracts of hiring and service, and of various other contracts of a like nature. See also Lord Fraser on Master and Servant, 162, where the law is similarly laid down.

"It appears to me that that principle should be applied in the present case, in which the right of the pursuer stands only on personal contract, and is not based on any position created and protected by the law, such as that of a minister of the Established Church, the teacher of a parish school, or an official holding an independent position. It appears to me that the relation in which the pursuer stood to the United Presbyterian Church, so far as it was constituted by contract, was substantially that of a servant, and that the contract has all the qualities of a contract of hiring and service. The pursuer thereby agreed to perform certain services on behalf of the Church, and the Church, on the other hand, put him in a position of consideration and influence, and (substantially) ensured his stipend, although it is true that neither the Church nor anyone else is liable to be sued for it. It was nevertheless the pursuer's wage for which his services were rendered. Of course I do not mean that a minister is not actuated also by motives of a totally different kind, but these are motives into which no element of civil contract enters.

"If this view be sound, then I apprehend that decree of reduction cannot, or ought not, to be pronounced in this case; for it would be a mere contradiction in terms to affirm that a sentence suspending the pursuer from his office of the ministry, and dissolving his connection with Cathedral Square congregation, was null, and yet to affirm that he still remained sus-

[1] Forbes v. Eden, April 11, 1867, 5 Macph. (H. L.) 36, 39 Scot. Jur. 411.

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was based on the ground that no question of civil or patrimonial right was involved. That was not the case here. The effect of the sentence of the commission had been to deprive the pursuer of his status as minister of the church, and to render him ineligible for other ministerial appointments. It therefore inflicted a serious patrimonial loss upon him,[1] and he was entitled to be restored against that loss. He did not now crave specific implement of his contract, *i.e.*, restoration to the particular office from which he had been ousted, but only to be restored to the status of which he had been deprived. Reduction would effect that restoration, and to that remedy he was entitled.[2] The pursuer was in a similar position to a ship captain illegally

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pended from the office of the ministry, and that he had not the connection with the congregation which he enjoyed before the sentence. If regard be had to the unlimited terms of the conclusions of reduction, to the conclusions of declarator, the conclusion for interdict, and to the pleas in law, I am unable to regard this action as anything but an action for restoration of the pursuer to his former position, and I cannot think that a mere general reservation of a claim of damage can affect the true character of the action. It has not been brought to enable him to raise an action of damages. It is not needed for that purpose. It is not an action to vindicate the pursuer's character. Our practice does not admit of an action for that purpose except in the form of an action of damages.

"This action raises the question quite purely whether the Court will set aside a sentence of a voluntary Church suspending or dismissing a minister, which was avoided in the case of *M'Millan*, and which has never been decided in Scotland. In this connection it may be proper to notice the case of *Murray* v. *Burgess*, *supra*, in which a sentence of suspension of the Dutch Reformed Church in the Cape of Good Hope was set aside in the Privy Council, with the effect, I suppose, of restoring the appellant. In that case no question as to the jurisdiction of the Court was raised, that having been determined in the Court below by a judgment not brought up for review. The minister's position seems also to have depended on certain ordinances by the Government, so that the Church seems to have been semi-established.

"I think the precedent in that case cannot be safely followed in the present case, in which all pleas are open, and which is not complicated by a State connection of any sort.

"It seems not out of place to consider that, if the present action was sustained for the purpose concluded for, the Court might, on similar grounds, be called on to determine other similar questions connected with the administration of the United Presbyterian Church. Probably it could not be called on to decide any disputed question as to the election of elders, as being wholly void of patrimonial interest. But it might perhaps be called on to deal with questions as to the moderation of a call, and I think it clear that such a question could never be sustained to the effect of declaring that a call was refused or sustained, and that for the reasons stated by Justice Fry, above quoted and referred to. Such a case would be closely analogous to the present.

"On this last ground therefore I have come to be of opinion that the reductive conclusions and the conclusion for interdict ought not to be entertained. For similar reasons I think that the conclusions for declarator should not be entertained. I think, however, besides, that these conclusions are not well framed, and could not be adopted in any case."

[1] M'Millan v. Free Church of Scotland, July 19, 1861, 23 D. 1314, *per* Lord President M'Neill at p. 1329, 33 Scot. Jur. 665.

[2] *Ibid. per* Lord President M'Neill, at p. 1329; *per* Lord Ivory, at p. 1334; *per* Lord Curriehill, at p. 1338; *per* Lord Deas, at p. 1344.

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deprived of his certificate, who would be entitled to have the illegal decree set aside, not with the view of being restored to the particular command of which he had been deprived, but in order that he might again be rendered eligible to hold other like appointments. The judgment in the last stage of *M'Millan's* case was not contradictory of the opinions expressed at the earlier stage. The reductive conclusions were finally dismissed because in the opinion of the majority of the Court they were merely ancillary to the conclusion for damages, which fell as being directed against the wrong parties,[1] Lord Deas, however, being of opinion that the reductive conclusions might stand alone.[2] Reduction had been held an appropriate remedy in the case of an illegal decree pronounced by the General Assembly of the Established Church,[3] and there was no difference in a question as to the remedy between breach of a statutory and of a conventional contract. In England reduction had been held an appropriate remedy against the illegal sentences of ecclesiastical associations,[4] and of associations for social purposes, such as clubs.[5] *Aitken's*[6] case did not apply, for there the pursuer sought review of the decision of the trades union on the merits, and that was excluded by statute. The sentence of the commission should therefore be reduced. Proof was unnecessary, for the defenders had made no sufficient averment of acquiescence on the pursuer's part in the illegal delegation of the Synod's authority, and their averment that such delegation was in accordance with the practice of the Church was irrelevant in respect that it contradicted the written rules of the Church.

Argued for the defenders;—The case for the pursuer, as now presented, was not in accordance with the action as laid, the object of which was to have the pursuer restored to the particular charge of which he had been deprived. Reduction was asked only in case it might be necessary, and the reductive conclusion being clearly ancillary to the other conclusions of the summons, fell to be dismissed with them.[7] The pursuer now alleged that he sought restoration of his status by reduction of the sentence of the commission, but such reduction would leave him in a state of suspension, as he had, in accordance with the rules of the Church, been interdicted by the Presbytery at the time when the libel was served, from performing ministerial duties. All that he would obtain from the reduction, if granted, would be the right to prosecute his appeal before the Synod, but he might now, if he wished, bring the decision of the commission before the Synod. The result of the authorities was to shew that in two cases only would the Court interfere between an association such as a voluntary Church and its members—(1) when the pursuer claimed the emoluments of an office, in which case the question of

[1] M'Millan v. Free Church of Scotland, July 9, 1862, 24 D. 1282, *per* Lord President M'Neill, at p. 1292, and *per* Lord Curriehill, at p. 1298, 34 Scot. Jur. 621.

[2] *Ibid. per* Lord Deas, at p. 1301.

[3] Cruickshank v. Gordon, March 10, 1843, 5 D. 909, 15 Scot. Jur. 378.

[4] Long v. Bishop of Capetown, 1863, 1 Morris P. C. Rep. N. S. 411; Murray v. Burgess, 1866, 1 P. C. App. 362.

[5] Dawkins v. Antrobus, 1881, L. R., 17 Ch. Div. 615; Labouchere v. Earl of Wharncliff, 1879, L. R., 13 Ch. Div. 346; Andrews v. Salmon, April 27, 1888, 4 Times Law Rep. 490.

[6] Aitken v. Associated Carpenters and Joiners of Scotland, July 4, 1885, 12 R. 1206.

[7] M'Millan v. Free Church of Scotland, *supra.*

reducing illegal decisions of the Church Courts might be incidentally raised; (2) where the pursuer alleged damage resulting from the illegal acts of members of the association, in which case the appropriate remedy was an action of damages. Reduction in such a case would remove the ground upon which the claim of damages was rested. In every case there must be a question of civil right involved or the Court would not interfere,[1] and in no case had the Court interfered where the question involved was merely one of status. In the cases of *Long*[2] and *Murray*[2] a question of right to emoluments was raised, and the ground upon which the Court interfered to set aside sentences of expulsion from social clubs was because of the proprietary right in the club vested in each member. Assuming the defenders' argument to fail, the pursuer could not get decree without inquiry, the defenders having relevantly averred that delegation to a commission was according to the practice and law of the Synod, and that the pursuer had acquiesced in the remit.

At advising,—

LORD PRESIDENT.—The pursuer conceded in debate that the only conclusion of the summons which he can support is the conclusion for reduction. The terms of that conclusion, and still more, an examination of the whole summons, shew that, in the conception of that writ, the demand for reduction was not made as for an independent and substantive remedy, but merely as ancillary to a more effective decree.

The proceedings against the pursuer in the Ecclesiastical Courts were directed to his being punished for having, under certain specified circumstances, met and walked with a young lady. For having done so he was in the end deprived of his charge as minister of the Cathedral Square Congregation in Glasgow, and suspended from the office of licentiate of the United Presbyterian Church; and this was done by the sentence of a committee or commission of the United Presbyterian Synod exercising powers which were *de facto* delegated to it by the Synod.

The scope and purpose of the present action, as laid, is unambiguous. At the time when it was raised the ecclesiastical authorities had not yet taken steps for inducting another minister to the Cathedral Square charge in the room of the pursuer. The prevention of this step was in truth the practical object of this action. The summons begins by asking for declarator that what was charged against him was not an ecclesiastical offence according to the law of this religious body; that this being so the prosecution was illegal, and (I omit in the meantime the reductive conclusion) he ends by asking that the ecclesiastical authorities shall be interdicted from following up these illegal proceedings by treating his charge as vacant and filling it up. Incidentally to all this, and quite logically and coherently, the draftsman, confronted with what on paper at least is a sentence of deprivation of the office in question, says, "and in so far as is necessary" sentence of reduction

[1] Forbes v. Eden, Dec. 8, 1865, 4 Macph. 143, 38 Scot. Jur. 98, April 11, 1867, 5 Macph. (H. L.) 36, 39 Scot. Jur. 411; *cf.* Aitken v. Associated Carpenters and Joiners of Scotland, July 4, 1885, 12 R. 1206.

[2] Long v. Bishop of Capetown, 1863, 1 Moore's P. C. Rep. N. S. 411; Murray v. Burgess, 1866, L. R., 1 P. C. App. 362; *cf.* Bishop of Natal v. Gladstone, 1866, L. R., 3 Eq. 1; O'Keefe v. Cullen, 1873, Irish Rep. 7 C. L. 319; Taylor Innes on Creeds, 261.

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shall be pronounced (of the illegal proceedings), and the pursuer shall be reponed and restored thereagainst.

It thus appears that the conclusion for reduction in this summons is, alike in expression and in substance, merely an incidental step of procedure towards the vindication of the office of minister of the Cathedral Square Congregation in Glasgow. If anyone—this is the tone of the summons—shall vainly seek to set up this pretended sentence as a barrier in the pursuer's path to what he demands, let it, if need be, be formally set aside.

The action, as it now stands, is altered in two essential respects. First of all, the Cathedral Square charge has now been filled up by the induction of another minister; and the pursuer accordingly gives up his conclusion for interdict as now inappropriate. He gives up the idea of ousting his *de facto* successor and recovering the charge for himself. Second, his counsel ultimately gave up the attempt to persuade the Court to pronounce on the goodness or badness of the libel about walking with the lady named.

In the end, therefore, the sole illegality founded on is the delegating to a committee the disposal of the pursuer's appeal, and the sole decree asked is reduction.

The question is, Can we, in this action, give a decree which begins and ends with reduction?

Now—standing these words, "and in case it may be necessary,"—and looking to the substance of the action to which these words are relative, it would be difficult to pronounce a decree of reduction alone, the other conclusions being no longer insisted in. A broader view, however, leads to the same practical conclusion.

Courts of law, as I understand, take no concern with the resolutions of voluntary associations, except in so far as they affect civil rights. If a man says merely, "such and such a resolution of an ecclesiastical body is a violation of its constitution, on the faith of which I became a member or a minister," and stops there, the Court will have nothing to do with his case, and will not declare the illegality or reduce the resolution. But, if the same man says, "I have been ejected from a house, or have been deprived of a lucrative office, under colour of this illegal resolution, and I ask possession of the house, or I ask £500 of damages," then the Court will consider and determine the legality of the resolution, on its way to the disposal of the demand for practical remedy. There is there a specific claim of a specific remedy for invasion of patrimonial rights. If, and in so far as a decree of reduction may be necessary to effectuating such remedy, the Court will pronounce it.

In the present case, the pursuer asks no specific remedy. He has abandoned his claim to be retained in the position of a minister of the Cathedral Square Congregation. He does not ask damages; on the contrary, he reserves all claims of damages. He does not now (although he did formerly) ask to have restored to him his status of licentiate, for his senior counsel, by giving up the contention that we could declare (as he asked in his first conclusion) that walking with this young lady was no ecclesiastical offence in the United Presbyterian Church, leaves standing the original suspension, which (according to the written laws) automatically

resulted from the institution of the libel. The only practical result, therefore, of reduction would be to leave the pursuer in the position of a suspended licentiate, with an appeal not disposed of, and (for anything he tells us or asks us to do) not likely to be disposed of. I do not think that such a predicament can be described as a status in any sense in which the word is relevant to the present question, or has ever been used in this juridical relation.

None of the cases in which (with obvious soundness) reduction has been granted, without any further decree, have been thus resultless. They have led, directly and by their own force, to the establishment of patrimonial right or to immunity from patrimonial claim.

The conclusion which I come to is, that this action has rightly been dismissed, because the averments are not relevant to support the conclusion for reduction, or any conclusion for reduction, no further remedy being sought. I am therefore not called upon to pronounce on the question whether the Synod acted illegally in delegating to a committee the power to dispose of the pursuer's appeal, and to sentence him. That must necessarily depend on what was, in fact, the law, written or unwritten, to which the pursuer is to be held as having committed himself as a minister of this church. These matters would only be examinable,—and they would be examinable,—in an action concluding for a specific civil remedy appropriate to the facts alleged. It is because no such remedy is even proposed that I think that this action should be thrown out.

The two opinions of the Lord Ordinary cover a wide range of discussion, and for this reason I think it well to say that some of the matters which he has so ably discussed are not involved in my present judgment.

LORD M'LAREN.—It is, I think, indisputable that the governing bodies of voluntary Churches or religious associations are responsible for non-fulfilment of their obligations towards their members in the same degree as the directors of associations constituted on a secular basis are responsible. But it results from the history of the decisions, and especially from that of the *Macmillan*[1] case, that the Courts in cases of this description will hold the pursuer of the action strictly to the subject of his original complaint, especially where the action is one for restitution or specific relief. This policy of the law may be justified on the general ground that a defender ought not to be called on to answer charges of which notice has not been given in the prescribed form. But there is another element, namely, the qualified privilege which I think is accorded to the proceedings of ecclesiastical bodies professing to act judicially,—that their proceedings are protected from review in the same degree as the proceedings of arbiters are protected.

Now, the pursuer in this case came into Court complaining of a substantial injury, viz., that he had been tried and condemned upon a libel which did not amount to a relevant statement of an ecclesiastical offence.

We did not think that his ground of action was well founded, because the laws of the United Presbyterian Church do not define the offences of

[1] 24 D. 1282.

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which its Courts take cognisance, and it might well be that mere levity of conduct or indiscretion on the part of a minister of religion would be a proper ground for the exercise of Church discipline in the form of a trial on libel before the Presbytery.

The pursuer then objected that, on appeal to the Synod, that body had remitted his case to a committee or commission with power to dispose of it finally. I agree with your Lordships that this is not the true cause of action as disclosed in the summons, and that it would not be fair to the defenders that their counsel should be called to answer it in this action. I will not attempt to anticipate all the defences which might be stated to an action on this ground. One obvious answer would be that the pursuer did not appeal to the Synod, as he might have done, from the deliverance of the commission, and ask their decision on the merits of his case. Another defence might be (I do not of course mean to indicate an opinion) that the pursuer had submitted to the jurisdiction of the commission.

In dismissing this action, I do not wish to be understood as concurring in an opinion which is held by many, that in no circumstances ought a Court of law to cut down a decree or sentence professing to emanate from a voluntary Church Court or ecclesiastical authority. There might be a usurpation of jurisdiction so flagrant that the Church itself might be compelled to resort to the civil Courts for its protection against the acts of persons professing to represent it, and acting in its name.

In the view we take of this case, the question of the right of the pursuer to specific relief does not arise.

LORD ADAM and LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor: Dismiss the action, and decern: Find the compearing defenders entitled to expenses in the Inner-House, and in the Outer-House in so far as these were not allowed to the pursuer by the Lord Ordinary's interlocutor of 19th January 1895, and remit," &c.

DOVE & LOCKHART, S.S.C.—WILLIAM ROBSON, S.S.C.—Agents.

No. 89.

Feb. 5, 1896. Brown v. Furnival & Co.

ALEXANDER BROWN, Pursuer (Appellant).—*Salvesen—T. B. Morison.*
FURNIVAL & COMPANY, Defenders (Respondents).—*D. Dundas—Clyde.*

Reparation—Negligence—Master and Servant—Employers Liability Act, 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *subsec.* 3.—A workman was injured by the fall of a printers' guillotine which he was assisting to lift into an upright position on a lorry in compliance with the orders of A, one of the men engaged in the operation, who directed the operation to be performed.

In an action by the injured workman against his employers for damages under the Employers Liability Act, 1880, *held* that even if A was, in the sense of section 1, subsection 3, of the Act, a person to whose orders the pursuer was bound to conform, the defenders were not liable, no negligence having been proved.

M'Manus v. *Hay*, Jan. 17, 1882, 9 R. 25, *followed.*

2D DIVISION. Sheriff of Lanarkshire.

IN August 1895 Alexander Brown, labourer, Glasgow, brought an action in the Sheriff Court at Glasgow, against Furnival & Company, printers' engineers there, for damages on account of injuries sustained

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by the pursuer when engaged in the employment of the defenders in raising a printers' guillotine to an upright position on a lorry.

The pursuer averred that on the occasion in question he was engaged, along with three other persons in the employment of the defenders, including a foreman named Patrick; that Patrick was a person in the employment of the defenders to whose orders the pursuer and the two other workmen were bound to conform; that Patrick ordered that the guillotine should be raised to an upright position on the lorry; that "the said order was an exceedingly dangerous one, in consequence of the great weight of the guillotine and of the insufficient number of men, namely, four in number, including pursuer, to do the said work"; and that the pursuer's injuries resulted from his having conformed to Patrick's order. The pursuer therefore pleaded that the defenders were liable under section 1, subsection 3, of the Employers Liability Act, 1880.*

The defenders denied that Patrick was a person to whose orders the pursuer was bound to conform, and further denied that there had been any negligence.

A proof was allowed. The following was the import of the evidence: On 25th June 1895 the pursuer was engaged as a labourer in the defenders' employment in removing a printers' guillotine from the premises of Messrs Adshead, printers in Glasgow, to the defenders' own premises. There were engaged along with the pursuer another labourer in the defenders' employment and the man Patrick, who was a fitter in their employment, and who deponed that he had charge of the contract for the removal of Messrs Adshead's machinery —a business which had lasted for about three weeks. The guillotine lay on the third storey of Messrs Adshead's premises, and it had to be removed therefrom to a court where there was a lorry to receive it. The guillotine weighed at least 17 cwt., and the defenders' regular practice in removing such a machine was to take it to pieces, which would have reduced the weight of the body of the machine to about 6 or 7 cwt. In this case, however, the guillotine was only partly taken to pieces, and the knife block and certain wheels (weighing 2 or 3 cwt.) were not removed, in consequence of a stud having broken so as to require drilling operations for its removal. The guillotine, after having been thus partly taken to pieces, weighed about 9 cwt., and the pursuer, the other labourer, and Patrick agreed to remove it to the ground, notwithstanding that it had not been wholly taken to pieces. The machine was hoisted from the third storey to the ground, and the three men then managed to slide it along the ground to the lorry. When it had been brought alongside the lorry, the three men could not lift it into the lorry, but with the assistance of the lorryman, and of three other men who were not in the defenders' employment, but who volunteered their services, they, by sliding and lifting, got it on to the lorry. The three other men then went away. The guillotine as raised on to the lorry was lying on its side, but

* The Employers Liability Act, 1880 (43 and 44 Vict. c. 42), sec. 1, subsec. 3, enacts,—That where personal injury is caused to a workman "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed," the workman shall have the same remedy against the employer as if he had not been in his service nor engaged in his work.

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Patrick insisted—contrary to the remonstrances of the pursuer and the lorryman—that it should be raised from its side to stand on its feet—that being the common way of conveying such machines on lorries. Accordingly Patrick, the pursuer, the other labourer, and the lorryman, proceeded to raise the guillotine on to its feet. They were hampered in the operation by reason of the guillotine being top-heavy and not equally balanced. Patrick and the other labourer stood on the lorry, and the pursuer and the lorryman stood on the ground, and in order to enable the two men on the ground to raise their end of the guillotine the corner of it was projected about 18 inches over the side of the lorry. The guillotine after having been raised about three feet fell over the lorry and struck the pursuer's foot, seriously injuring it.

On 31st December 1895, the Sheriff-substitute (Balfour) pronounced this interlocutor (after findings in fact):—"Finds that the defenders are not liable under the third subsection of the first section of the statute; therefore assoilzies them from the conclusions of the action, and decerns."

The pursuer appealed, and argued;—The accident resulted from the negligence of Patrick, who was a person in the employment of the defenders, to whose orders "the pursuer was bound to conform" in the sense of subsection 3 of section 1 of the Act. His negligence consisted in (1) his not taking the guillotine to pieces in the manner usually adopted, and (2) in giving the order to lift the machine with an inadequate number of men.

Argued for the defenders;—In order to prevail under section 1, subsec. 3, it was not enough to shew that an order was given, and an accident occurred in obeying it. It must be shewn that the order was an improper one. Here the most that could be said was that the accident had happened through an error in judgment.[1]

LORD JUSTICE-CLERK.—In this case there is not much difficulty as to the facts. We know the weight of the machine. We know that it was actually lifted on to a lorry by seven men after being brought down stairs by a hoist. What then remained to be done was to raise the machine by tilting it into an upright position on the lorry. This was an operation requiring care, but not much skill. Similar work is done every day by ordinary workmen all over the country. It is nothing more than tilting a thing up so as to set it on end. The only difficulty, if it can be called a difficulty, consists in this, that when it has been tilted up it must be so steadied or balanced as to come down gently on its new base. Now, this is a very ordinary operation, which working men do every day under the direction of a man who is simply there to see that the operation is correctly carried through. If no foreman is present, one workman probably takes the lead, and sees to the operation being duly performed. But it is not, as I think, an operation requiring the presence of a superior workman at all. Even apart from authority I should have been inclined to hold that this was just one of those accidents which happen without any fault being attributable to anyone. But I think the case of *M'Manus*,[1] which was quoted to us, is in point. There a somewhat similar operation was being carried on. An

[1] M'Manus v. Hay, Jan. 17, 1882, 9 R. 425.

engine was being lifted at one end, in order that it might be slewed round, and moved forward by a succession of lifts, and to facilitate the operation the foreman put in a brick below the engine, I presume to make sure, that when the men, after resting, came to make a second lift, they would be able to get their hands under the engine, and get a good hold of it. It so happened that in letting the engine down on to the brick a man's hand was injured. I think this accident may be fairly considered to be of the same description as that which happened to the person injured in that case, and I am glad that the opinion at which I should have arrived independently is fortified by the fact that it coincides with the opinion delivered by Lord Young in a case so like the present.

LORD YOUNG.—I reach the same result as your Lordships, although I must say that I think the case is not unattended with difficulty.

I think it proper to say, although it is an observation entirely in favour of the defenders, that I am doubtful whether Patrick was a man whose orders the pursuer was bound to obey, in the sense of the 3d subsection of section 1 of the Employers Liability Act, 1880.

He was a fitter in the defenders' employment, and was engaged with three labourers in what was ordinary labourer's work, they assisting him and he them. With the help of three other men they raised the machine on to a lorry. It may be that it would have been safer to have taken the machine to pieces first, but then this precaution cannot be said to have been absolutely necessary, because the operation was safely performed without adopting it, and I think the consideration of the alleged negligence begins after the machine was placed upon the lorry. When the machine was in this position, Patrick, the fitter, thought that it would be proper to set it up on its end, and asked the three labourers in common employment with him to help him, and they did so, and through their failure the accident happened.

Now, I doubt whether Patrick was a man whose orders they were bound to obey, or that there was negligence on his part in asking them to assist him in this manual operation.

I rather think that the true meaning of the section is that where a master is not in charge of his own work, but puts someone else to be obeyed as master in his place, and that person is negligent or careless, and gives an order without attending to it at all, with the result that serious injury occurs to those who are bound to obey him, then the master shall be responsible for him as he would have been for himself.

But I am very doubtful whether that applies here, where a man does labourer's work and asks other labourers to help him, he assisting them and doing his best and attending to the job. The question of his liability is akin to the question of a master's own liability for his own conduct where he asks his servants to help him, say, in moving a heavy box or table which falls on one of the servant's toes. I should doubt whether that was a case within the region of actionable wrong at all.

But I think it is sufficient to indicate my doubts, and to say here that there is no negligence in any sense. There may have been an error of judgment. I am not sure that the most careful man would not have con-

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cluded that four men could with reasonable safety have raised the machine to its feet.

I therefore come to the same conclusion as your Lordships, and generally upon the same grounds as the Court did in the case of *M'Manus*,[1] that the pursuer has failed to prove that the injury sustained by him was caused by the negligence of any man to whose orders he was bound to conform.

LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—(After findings in fact, in conformity with the above narrative of facts, there being no finding to the effect that Patrick was a person to whose order the pursuer was bound to conform)—" . . . Find in law that the defenders are not liable under the third subsection of the first section of the statute; therefore assoilzie them from the conclusions of the action."

MACPHERSON & MACKAY, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

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Stevenson, Lauder, & Gilchrist v. Dawson.

STEVENSON, LAUDER, & GILCHRIST, Nominal Raisers (Appellants).—*Johnston—D. Dundas.*
MRS JESSIE DAWSON, Objector (Respondent).—*Kennedy—W. Thomson.*
MICHAEL DOUGLAS DAWSON, Claimant (Respondent).—*Kennedy—W. Thomson.*

Right in security—Retention—Factor's right of retention—Effect of assignation to rents in bond and disposition in security where bondholder has not raised an action of maills and duties.—Held that factors who had been authorised by their principal to collect and retain rents in repayment of advances made by them to him were entitled to retain the rents in competition with creditors who held bonds over the property duly recorded, and containing assignations to rents in ordinary form, but who had not brought an action of maills and duties against the tenants.

Bankruptcy—Right in security—Factor's right of retention—Retrocession of bankrupt.—A, the proprietor of heritage, appointed a firm of house factors to be factors of his property, and authorised them to retain the rents which they collected in repayment of an advance which they had made to him on his acceptance. Subsequently a petition for sequestration of A's estates was presented three days before the term of Martinmas, and the first deliverance was pronounced on the same day. At Martinmas the factors uplifted the rents and retained them in repayment of their advance. The trustee who was appointed on A's sequestrated estates made no objection to the retention of the rents by the factors, and they lodged no claim in the sequestration. A having thereafter been discharged on a composition, and retrocessed in his estates, claimed the rents retained by the factors on the ground that it was property falling under the sequestration which belonged to him in virtue of his retrocession.

Held that the factors were entitled to retain the rents claimed.

2D DIVISION. Sheriff of Lanarkshire.

IN November 1892 Michael Douglas Dawson, brewer in Glasgow, bought certain subjects in Argyll Street and James Watt Street there for £14,600, and thereafter granted bonds over the properties for

[1] 9 R. 425.

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£9500, £3900, and £1250 in favour respectively of Miss Elizabeth MacBrayne, John Burns MacBrayne, and the debtor's wife Mrs Jessie Dawson. The bonds, which ranked in the order stated, were dated 19th, and recorded 30th December 1892, and contained assignations to rents in common form.

In order to enable Dawson to carry through this transaction, Stevenson & Lauder, house factors in Glasgow, lent him £200 upon his acceptance, and it was agreed that Stevenson & Lauder should, as factors of the security subjects, collect the rents, and should be entitled to take payment of their advance out of the rents collected. In pursuance of this agreement the advance had by 8th November 1893 been reduced to £100, for which Stevenson & Lauder took a renewed bill.

On 8th November 1893 a petition for sequestration of Dawson's estates was presented, and the first deliverance was pronounced on the same date. On 22d November a trustee was appointed.

On 11th November 1893 Stevenson, Lauder, & Gilchrist, who had succeeded to Stevenson & Lauder, collected the rents then due, and proposed to retain £100 out of the amount collected in repayment of the unpaid balance of the advance; but on 18th November the MacBraynes intimated to Stevenson, Lauder, & Gilchrist that they claimed the whole sum collected in virtue of the assignations to rents in their bonds. At this date the MacBraynes had taken no steps to enter into possession of the security subjects by action of maills and duties, but on 1st December they brought such an action, and subsequently obtained decree therein.

On 4th December 1893, John Burns MacBrayne brought the present action of multiplepoinding in the Sheriff Court at Glasgow in name of Stevenson, Lauder, & Gilchrist, and in the condescendence annexed to the petition set forth the fund *in medio* at £421, 5s., as being the total amount of the rents collected by Stevenson, Lauder, & Gilchrist at the previous Martinmas.

Stevenson, Lauder, & Gilchrist then lodged a condescendence of the fund *in medio* in which they stated the amount of the fund at £129, 14s. 8d., being the amount of the rents collected by them under deduction of the £100 which they claimed right to retain, and of certain other items about which there was ultimately no dispute.

Thereafter, during the dependence of the action in the Sheriff Court, there ensued a variety of procedure and change of circumstances, which need not here be detailed. It is sufficient to state that the trustee in Dawson's sequestration admitted that the balance of rents due by the nominal raisers was £129, 14s. 8d. (the sum stated in their condescendence of the fund *in medio*), and made no claim as against them in the action; that Stevenson, Lauder, & Gilchrist lodged no claim in the sequestration; that on 19th November 1894, Dawson was discharged on a composition and retrocessed in his estates; and that in December 1894, the security subjects having been sold, and the MacBraynes having been repaid the amount of their debts, they assigned their rights to Mrs Dawson, who then became the only person interested as bondholder in the amount of the fund *in medio*.

In this way the question at issue came to depend between, on the one hand, Stevenson, Lauder, & Gilchrist, who claimed right to retain £100 in repayment of their advances to Dawson, and, on the other hand, Mrs Dawson, who claimed the £100 in virtue of the assignations to rents in the bonds, and Dawson, who maintained that, in the event

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of his wife's claim not being sustained, he was, in virtue of his retrocession, entitled to £100 unburdened by any debts due by him at the date of his sequestration.

In the Sheriff Court the result of the action was to sustain the claim for Mrs Dawson on the ground stated by her.

Stevenson, Lauder, & Gilchrist appealed, and argued;—(1) Mrs Dawson had no preference to the rents here. No doubt the bonds contained a clause of assignation to the rents, and they were duly recorded, but this could not avail her, because the bondholders had not done diligence by action of maills and duties before the tenants paid the rents to the appellants.[1] (2) As regarded Dawson, his trustee had admitted that the fund *in medio* was correctly stated, and now that he was retrocessed Dawson could not go back upon this admission. Even if the trustee had not made this admission the appellants were entitled to a preference notwithstanding the sequestration.[2]

Argued for Mr and Mrs Dawson;—(1) The recorded assignation to the rents gave the bondholders a preferable right to the rents without the necessity of any action of maills and duties. It was true that tenants were in safety to pay to the landlord, but, *quoad ultra*, the recording of the bond was an effectual intimation of the assignation as against the landlord, or anyone deriving right from him on a personal title. The bondholders' infeftment was an effectual completion of their right to the rents.[3] (2) Alternatively, the rents passed under the operation of section 102 of the Bankruptcy (Scotland) Act. 1856 (19 and 20 Vict. c. 79), to Mr Dawson's trustee, and on his retrocession to Mr Dawson himself. Mr Dawson was not bound by his trustee's admission of the appellants' contention; there had been no claim and consequently no deliverance in the sequestration with respect to their right to retain. There had simply been the abandonment of a claim by the trustee, and the abstention from lodging a claim by the appellants. Mr Dawson therefore, by his retrocession, became entitled to insist in the abandoned claim, freed of the personal obligation which the appellants formerly had against him.

Lord Young.—(After setting forth the facts)—Now, the Sheriff's judgment—that the bondholders having an assignation of the rents in their bonds which were recorded could object to payment of the rents to the house factors as these rents became due regularly and in the ordinary course of business—I do not appreciate. We are familiar—and we must take judicial cognisance of it as a known fact—with the practice as regards landed proprietors in Scotland having bonds upon their estates. In these bonds there are assignations of the rents, and the bonds are recorded and so the assignations are intimated, yet notwithstanding, the proprietors collect their rents either personally, or more frequently in the case of large proprietors,—invariably in the case of very large proprietors,—by means of their factors or men of business, the bondholders not interfering in any way whatever, although it may be in the power of any bondholder, or any number of bondholders, to interfere to prevent tenants from paying their rents in

[1] Duff's Feudal Conveyancing, p. 274; Bell's Princ. sec. 561.

[2] Broughton v. Stewart, Primrose, & Co., Dec. 17, 1814, F. C.; Bell's Princ. sec. 228.

[3] Bell's Com. i. 757; Chambers' Judicial Factor v. Vertue, Jan. 19, 1893, 20 R. 257; Guthrie v. Earl of Galloway, 1637, M. 567.

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the ordinary way to their landlords, or to the landlords' agents or factors. But if there is no such interference, and the rents are paid in the ordinary way by the tenants to the landlord himself, or to the landlord's agent or factor, I do not understand the view that the bondholders can complain of any wrong or injury having been done to them. But the view that they can is the only view upon which the Sheriff proceeds in the judgment which he pronounced—that the bondholders are entitled to interfere to prevent the factors from applying these rents, which they lawfully, regularly, and in the ordinary course of business collected, in payment of the legal debt due to them by the party to whom the rents belonged, and upon whose employment they had collected the rents.

It was said that there was a specialty here, because a day or two before the term application had been made for sequestration. It does not appear to me that that makes any difference. Sequestration might be awarded or might not be awarded. If it were awarded it would bring in the trustee in bankruptcy. If it were not awarded, then the fact of the application having been made before the rents were collected would have no effect whatever. I think the factors, as in a question with the proprietor, who had an absolute right to collect the rents himself, were entitled to retain them, and to retain them against any debt which was due by him, and if the trustee in bankruptcy here had insisted in a claim to that effect I am by no means satisfied that he would have been entitled to get that money out of the hands of the factors. But assuming that he would, or that they did not choose to raise any question with him as to putting the money into his hands, I think their claim in the sequestration would have been well founded upon their legitimate right of retention for a debt justly due to them by the owner of the property upon whose authority they had collected the money. That would have led precisely to the same result, and it is quite unnecessary for us to consider whether they might not have said to the trustee effectually and conclusively, "We have a right to retain, and we will not hand over the money to you." The legitimacy of their claim—the legal view respecting it—depends entirely upon the right of retention, for it is that which gives them a preference over any of the other creditors.

Upon these grounds I am of opinion that the judgment of the Sheriff ought to be altered, and that Messrs Stevenson, Lauder, & Gilchrist are entitled to prevail.

LORD TRAYNER.—Between Mr Dawson and the pursuers there can, I venture to think, be no question. The effect of the retrocession of Mr Dawson was to put him exactly in the same position as if his estates had never been sequestrated. The sequestration being then out of the way matters stand thus between the nominal raisers and Mr Dawson:—He was the proprietor of certain subjects in regard to which the nominal raisers acted as his factors. They had as factors uplifted the rents of the property as they became due. They had, however, advanced money to Mr Dawson, and I think it is not open to question that, at any time when they were accounting to Mr Dawson for the money they had collected for him, they were entitled out of that money to repay themselves what Mr Dawson owed them. Therefore in a question with Mr Dawson the proper fund *in*

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medio was the amount collected by the nominal raisers as his factors, less the amount which Mr Dawson owed to them.

With regard to the question between the nominal raisers and the bondholders' assignee, I am satisfied that the latter, in the position in which she stood, had no right over the rents collected giving her priority to the nominal raiser's claim. The factors legitimately had retained out of the rents received by them the amount of their advances to Mr Dawson. A bond and disposition in security containing an assignation to rents in common form, but with no diligence proceeding upon it, gives the bondholder no preferable right to the rents in a question either against the tenant or against the factor who has received the rents for the landlord.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced an interlocutor giving effect to Stevenson, Lauder, & Gilchrist's contention.

DAVID TURNBULL, W.S.—J. DOUGLAS GARDINER & MILL, S.S.C.—Agents.

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Feb. 7, 1896. Craig v. Brunsgaard, Kjosterud, & Co.

MRS MARION CRAIG, Pursuer (Respondent).—*Orr—Christie.* BRUNSGAARD, KJOSTERUD, & COMPANY, AND ANOTHER, Defenders, (Reclaimers).—*Dickson—Salvesen.*

Jurisdiction—Foreign—Arrestment jurisdictionis fundandæ causa—Delay in raising action.—A foreign ship arrested *jurisdictionis fundandæ causa* on the 5th June sailed from the country before the end of the month. An action was raised against the owners on 30th August. *Held* (*aff.* judgment of Lord Kincairney) that the arrestment had not become invalid because of delay in raising the action, and the jurisdiction of the Court *sustained.*

Opinions that there might be such unreasonable delay in following up arrestment *jurisdictionis fundandæ causa* that the Court would refuse effect to the arrestment.

Observed that arrestment *jurisdictionis fundandæ causa* imposed no *nexus* on the subjects arrested.

1ST DIVISION. Lord Kincairney.

THIS was an action at the instance of Mrs Marion Guthrie or Craig, widow of Alexander Craig, stevedore, Paisley, against the owners and master of the s.s. "Nordlyset" concluding for damages in respect of the death of her husband who had been killed while unloading the vessel in Cessnock Dock, Glasgow.

The defenders were resident in Norway, and the pursuer arrested the vessel *jurisdictionis fundandæ causa* on 5th June 1895. The vessel left the country before the end of June. The summons in the action was signeted on 30th August 1895.

The defenders averred that the arrestment had become inoperative before the action was raised, and pleaded, *inter alia*, "no jurisdiction."

On 26th December 1895 the Lord Ordinary repelled this plea.*

* "OPINION.—The defenders in this case plead 'no jurisdiction,' and it was conceded that this plea depends on the validity of the arrestments of the steamship 'Nordlyset' used to found jurisdiction. The arrestment was used on 5th June 1895, when the ship was in Scottish waters, and near Glasgow, and the summons was not signeted until 30th August, that is, after an interval of eighty-six days. It is argued that by that time the arrestmen:

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The defenders reclaimed, and argued;—There had been undue delay in following up the arrestment, and the arrestment had therefore become inoperative. Arrestment *jurisdictionis fundandæ causa* was founded on an arbitrary and unreasonable rule of the Scottish Courts. It imposed no *nexus* on the subject arrested. It did no more than give notice to a foreigner that an action would be raised, and afford a good answer in ordinary circumstances to the plea of no jurisdiction.[1] But the action must be raised *tempestive*. There must be some limit of time to the operative effect of an arrestment which was founded on no principle of law. A reasonable period would be twenty-one days, as in the case of arrestment in security, or at most forty days, after the lapse of which even a residential domicile was lost for the purpose of jurisdiction. If the view of the Lord Ordinary were sustained, a foreigner might suffer great hardship, for he would be liable to answer a summons raised at any time, however remote, after the arrestment had been used. The practice was to follow up such an arrestment by immediately raising an action.

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had become inoperative. Between these dates and some time in June the ship had left, and had gone out of the country. The question seems not without difficulty, but I am of opinion that the plea ought to be repelled, and that the jurisdiction of the Court should be sustained.

"It is settled that when objection is taken to the jurisdiction of the Court, in a question of the kind raised in this action, the question is, whether there was jurisdiction at the date of citation.—*Stewart* v. *North*, 14th July 1890, 17 R. (H. L.) 63. It is not well settled whether an arrestment *jurisdictionis fundandæ causa* creates a *nexus* on the object arrested—See *Malone* v. *Caledonian Railway Company*, 28th May 1894, 11 R. 853, and cases and *dicta* there referred to. But if it does not, then the validity of the arrestment to create jurisdiction cannot depend on the continuance of the thing arrested within the country; and if it does create a *nexus*, then I think that the effect of the arrestment on the liability of the defenders to answer in the Courts of Scotland cannot be destroyed by the defenders' voluntary disregard of the arrestment. Accordingly it was not argued that the efficacy of the arrestment in founding jurisdiction was destroyed by the ship leaving the country before citation on the summons. The argument was to the effect that the arrestment was lost by delay. It was urged that it was unreasonable to hold a foreigner liable to answer in the Scotch Courts when no step was taken to follow up the arrestment. The defenders supported their argument by two analogies,—the first, the analogy of jurisdiction in virtue of the defenders' personal presence in the territory; and the second, the analogy of arrestment in security on the dependence of an action. It is our law that residence of a party in the territory for forty days will give the Scotch Courts jurisdiction to try ordinary actions against him, not involving questions of status. That is customary law. It is also the law that if a man be absent from his usual place of residence for forty days he falls to be cited edictally,—Act of Sederunt, 14th December 1805; *Joel* v. *Gill*, 10th June 1859, 21 D. 929. It was argued that in like manner the force of an arrestment to found jurisdiction should fall in forty days. But I see no ground for reasoning from a rule settled by custom, or a rule settled by Act of Sederunt, to a case wherein neither custom nor municipal regulation can be appealed to. It was further pleaded that, if that argument could not be supported, the rule applicable to arrestments on the dependence should be adopted, viz., that the arrestment should fall unless the warrant of citation on the summons was executed within twenty days after the date of the execution of the arrestment—1 and 2 Vict. cap. 114, sect. 17. But

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[1] Cameron v. Chapman, March 9 1838, 16 S. 907.

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Argued for the pursuer;—The arrestment when used was admittedly valid. It lay upon the defenders, therefore, to shew that it had ceased to be operative. There was no authority to the effect that mere lapse of time rendered an arrestment *jurisdictionis fundandæ causa* ineffectual. There had been no undue delay in raising the present action.[1] In *White* v. *Spottiswoode*,[1] it appeared from the session papers that there had been two years' delay. There was no analogy between arrestment *jurisdictionis fundandæ causa* and arrestment in security.

Lord Adam.—The question here is whether the pursuer has constituted jurisdiction against the defenders, who for the purposes of this action are admitted to be the owners of the ship. The ship came into a Scottish port, and arrestment *jurisdictionis fundandæ causa* was used on the 5th of June. She sailed away on some day in June, and the summons in this action was not served till August 30th. Now, it is said that in consequence of this delay in serving the summons the arrestment which was used had fallen and lost its effect. It was admitted by Mr Dickson that arrestment *jurisdictionis fundandæ causa* is essentially different in character from other forms of arrestment, such as arrestment in security on the dependence of an action, or for execution, because this form operates no *nexus* upon property, the result being that the master of a ship is entitled to sail away without

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it was not maintained that the provisions of the Personal Diligence Act applied to arrestments used to found jurisdiction; and it is impossible to extend statutory enactments to analogous cases.

"It was argued that unless some limitation in point of time were admitted, it would follow that an arrestment to found jurisdiction would subsist for forty years, or possibly beyond that. But that does not appear to me to be a necessary consequence. For it may, perhaps, be that jurisdiction would not be sustained on the ground of an arrestment if there was clearly unreasonable delay in following it out, such as might warrant the inference that it had been abandoned. On this point I was referred to a judgment by Lord Stormonth-Darling in *Jacobo* v. *Scott*, 2d February 1895, shortly noticed in 2 Scots Law Times, 458, where jurisdiction in an action raised on 13th September 1894 was sustained in respect of arrestments used on 12th July 1894, it being held that there had been no undue delay; and in this case there are no averments inferring undue delay.

"Farther, it might be maintained that the Statute 1669, c. 9, and the 22d section of the Personal Diligence Act, applies to arrestments used to found jurisdiction, and if so, they would prescribe in three years. It may be worthy of notice that the hardship to a defender is not so great as is represented, because an arrestment *jurisdictionis fundandæ causa* can, I apprehend, be loosed on caution *judicio sisti*—See Juridical Style Book, 2d ed. vol. iii. 564, and 3d ed. vol. iii. 325; *Carlberg* v. *Borgesson*, 26th November 1877, 5 R. 188, *per* Lord President Inglis, at page 192. Now, by the ordinary form of a bond of caution *judicio sisti* the obligation of the cautioner is limited to the period of six months,—*Herries* v. *Lidderdale*, 7th March 1755, M. 2044; Bell's Pr. sect. 275. It appears, therefore, to be within the power of a foreigner subjected to arrestment to found jurisdiction to force on the action in six months. On the whole, I think that the defenders' objection to the arrestments on the ground of undue delay fails, and that, as that is the whole ground of objection to the jurisdiction, the plea of no jurisdiction must be repelled."

[1] White v. Spottiswoode, June 30, 1846, 8 D. 952, 18 Scot. Jur. 479. Longworth v. Hope, July 1, 1865, 3 Macph. 1049, 37 Scot. Jur. 552.

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committing any breach of arrestment. That is of course different from the case where there is a *nexus* laid upon property. In that case, it is necessary, to escape the effects of arrestment, to find caution, and then to come to the Court to have the arrestment loosed. Accordingly, the reasons applying to the one class of arrestment do not apply to the other, and the analogy drawn between them is not in point. If this be so, the question is, whether, assuming that the captain of the ship was entitled to sail away, any effect arises from the action not having been raised till 30th August? Now, there was a good and valid arrestment laid on, which undoubtedly created jurisdiction, and the only question is how long that lasted. No authority has been quoted, and I believe none exists, to the effect that mere lapse of time will cause an arrestment to become invalid; but it has been said that it is impossible to allow it to hold good for ever, and that some limit must be fixed to its duration. It is unnecessary to decide that point in the present case, for there is nothing to shew that here there was unreasonable delay, and so we need not consider whether such a rule might be applied in cases where that had been proved. Accordingly I reserve my opinion on the question whether, if the action had not been raised for a year or two years, we might not on equitable considerations apply some such principle as that contended for by the defenders.

LORD M'LAREN.—On the question of jurisdiction we have a very distinct and satisfactory statement of the law from the Lord Ordinary, in which I concur.

It is now settled, I think, beyond dispute that arrestment *jurisdictionis fundandæ causa* does not attach the property arrested. Perhaps it has not been defined what is the precise effect of the diligence. It seems to me merely to attest the fact that the ship is at the time within the jurisdiction, and that notice has been given that it is the intention of the person using the diligence to raise an action founding on the jurisdiction which results from the property being within the country. It is difficult to see what hardship should result from the continuance of the effect of such a certificate or notice in the case of maritime subjects. No disability is imposed upon the owner of the ship, and the master is put under no obligation to make the ship forthcoming. Within reasonable limits, therefore, we may leave it to the person using the diligence to serve his summons, it being his interest to use dispatch. It may be that if the vessel sails from the country after the first arrestment has been used the claimant may wish to defer raising his action until she returns, so that he may be able to use arrestments on the dependence, and I cannot say that such a delay would be illegitimate. The Lord Ordinary thinks that possibly a fixed period might be settled, say six months, or perhaps a year and day, so that if the summons is served and there is no further procedure within that time the action should fall. I do not think it is likely that the Court would be called on to fix such a limit, for it would probably be held that the party who had used the diligence had not followed up the arrestments within a reasonable time.

LORD KINNEAR.—I agree. It is, I think, a very anomalous rule that jurisdiction should be founded by a diligence which is utterly ineffectual to attach anything. It is conceded, and indeed that is the basis upon which

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the whole discussion arises, that the arrestment upon which the pursuer relies lays no embargo upon the ship. It does not attach the ship. It is not an arrestment in fact of anything whatever, but is an arrestment which the owner or master of the ship may disregard entirely; or which, if it were used with reference to debts or goods in the hands of a third person, the arrestee might disregard so as to render it absolutely of no effect. But it is conceded, and I think the concession could not be withheld, that the rule, however anomalous, is so well fixed by decision that we cannot refuse to give effect to it. We cannot hold that an arrestment to found jurisdiction lays a *nexus* upon the subjects arrested, or that it must be immediately followed up by an arrestment on the dependence in order to make the jurisdiction valid. It is decided the other way. Now, if that be a fixed rule, the only question is whether there is anything in the circumstances of this case to prevent its being applied in favour of the pursuer. I agree that there is no sufficient ground for refusing to give the ordinary effect which the law attaches to this arrestment. I quite concur with what has been said that there may be a case in which the Court might find it necessary or proper to refuse effect to such an arrestment if it were allowed to lie dormant for an unreasonable time; but I am not prepared to say, as we are asked to say by the defenders, that an arrestment of this kind must be good for forty days and no longer. Nor am I prepared to say in this particular case that more than reasonable time was allowed to elapse before the action was raised. I am not disposed to agree with all that is said in the Lord Ordinary's note, because I cannot see how the question can be affected at all by the consideration that arrestments may be loosed on caution *judicio sisti*. The defender is not bound to find caution unless he is already subject to the jurisdiction of the Court, and I do not see what interest he could have in finding caution, or how that is supposed to alter the position of the parties. The sole effect of the arrestment is, according to the argument, to subject the defender to the jurisdiction of the Court; and if that is a disadvantage to him, I do not see how he is relieved by finding security to abide the judgment. The condition on which the argument proceeds, and on which we are asked to sustain the jurisdiction, is that there is nothing to loose. There is no means,—the ship is gone,—and that being so, the pursuer maintains nevertheless that there is a good arrestment. How this ineffectual tie can be loosed at all, or why it should be supposed that the defenders have any interest to have it loosed if they are still to abide judgment within the jurisdiction, I do not understand.

The LORD PRESIDENT concurred.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—W. & J. BURNESS, W.S.—Agents.

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Feb. 8, 1896. Macdonald v. Udston Coal Co., Limited.

DANIEL MACDONALD, Pursuer (Appellant).—*A. S. D. Thomson.* THE UDSTON COAL COMPANY, LIMITED, Defenders (Respondents).—*Ure—Salvesen.*

Reparation—Master and Servant—Coalmaster—Responsibility of coal mining company for defective system of working.—A miner brought an action of damages against his employers, a coal mining company, alleging

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that he had been injured in consequence of the defenders failing to properly secure the roof of the mine. The action was laid both at common law and under the Employers Liability Act. The defenders pleaded that the action was irrelevant at common law, on the ground that they had placed the management of the mine in the hands of a certificated manager, in accordance with the provisions of the Coal Mines Regulation Act, and that it was not said that they had failed to supply the manager with every appliance for which he asked.

Held that the case could not be dismissed as irrelevant at common law, in respect that the record imputed fault to the defenders, as distinguished from their servants, in regard to their system of working, and that it was not impossible that a mining company might be guilty of such fault.

1st Division. Sheriff of Lanarkshire.

DANIEL MACDONALD, miner, brought an action of damages in the Sheriff Court at Glasgow, against the Udston Coal Company, on account of injuries sustained by him while working in one of the defenders' pits.

The action was laid both at common law and under the Employers Liability Act, 1880.

The pursuer averred, *inter alia*, that he had been injured in consequence of a fall of debris from the roof of one of the roads in the pit. (Cond. 8) "The defenders were bound by law and the general practice in mining to secure the sides and roof of the said slope road by putting up wooden props, or otherwise securing the said sides and roof, in respect that the crush of the superincumbent strata was constantly liable to bring away falls, and in particular the defenders were bound by law and the general practice in mining to secure the junctions of the branch roads with the said slope road by putting up wooden props, or otherwise securing the same, on account of the extra width of the travelling road at that point, and the consequent greater liability to danger from falls. Nevertheless, the defenders worked the said road without putting up wood in any part of it, and in particular without putting up wood at any of the junctions of the slope road with the said branch road, whereby the pursuer's injuries, as before mentioned, were caused or materially contributed to." (Cond. 9) "General Rule No. 21 of the Coal Mines Regulation Act, 1887, provides that the roof and sides of every travelling road and working place shall be made secure. The defenders deliberately violated the terms of this general rule in respect that, as before mentioned, they did not secure the roof and sides of the travelling road, either by wooden props or otherwise, whereby the pursuer's injuries, as before mentioned, were caused or contributed to."

The defenders pleaded that the pursuer's averments were irrelevant.

On 19th November 1895 the Sheriff-substitute, before answer, allowed a proof.

The pursuer appealed to the First Division for jury trial.

The defenders objected to the relevancy of the action as laid at common law. They argued;—By statute a coalmaster was bound to place every mine under the control of a certificated manager, and the responsibility for the management of the mine was laid upon this manager.* The duties of a coalmaster, who did not personally super-

* The Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), sec. 20 (1), enacts,—"Every mine shall be under a manager, who shall be responsible for the control, management, and direction of the mine, and the owner or agent of every such mine shall nominate himself or some other person to be the manager of such mine, and shall send written notice to the inspector of the district of the manager's name and address."

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vise the working of the pit, were to employ competent servants, to comply with all the requirements of the manager, and to supply him with everything which he declared to be necessary for the working of the pit. If he fulfilled these duties no action would lie against the coalmaster at common law.[1] It was not alleged that the defenders had failed in any of these duties, or that they knew of the defect complained of. In no case, with the possible exception of *Murdoch* v. *Mackinnon*,[2] had a coalmaster been found liable in damages at common law, and in that case the damages claimed were under the statutory limit, and the defenders had therefore no interest in raising the question now argued. If rule 21 of section 49 of the Coal Mines Regulation Act had not been complied with, the failure was to be ascribed to the fault of the manager, and not to that of the company.

Argued for the pursuer;—The Coal Mines Regulation Act[3] imposed the duty upon the coalmasters of seeing that the roofs of the mine were made secure. A like obligation lay upon them at common law to see that their system of working was safe. They could not delegate these obligations to a manager so as to relieve themselves of responsibility if he failed to discharge them,[4] and there was no difference in this respect between a coal mining company and an individual coalmaster,[5] who could not exercise personal supervision. The cases quoted by the defenders did not establish that a mining company could get rid of all its duties as employer by employing competent agents. There were duties which they could not delegate, and it was no answer for the company to say that they were ignorant that these duties were not being satisfactorily discharged.[6] At all events the contention of the defenders was premature. In all the cases quoted, the decisions were given after evidence had been heard, and the Court would in general refuse to decide a point of this kind until the facts were ascertained, especially where, as here, the action had to go to trial in any case as regarded the claim under the Act.[4] Further, the special defence of delegation should have been specifically averred.

At advising,—

LORD PRESIDENT.—Before we could throw out this action as laid at common law without ascertaining the facts, we must be sure that the record, when read as a whole, raises any of the questions which Mr Ure has discussed. For my part, I find it sufficient to say that cond. 8 seems to impute fault to the defenders, as distinguished from their servants, in a matter which may fairly be described as their system of working. I am not prepared to say that it is a legal impossibility that a mining company can be guilty of such fault, and beyond this I am not at present required to go.

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[1] Wilson v. Merry & Cuninghame, May 29, 1868, 6 Macph. (H. L.) 84, 40 Scot. Jur. 486; Sneddon v. Mossend Iron Co., June 23, 1876, 3 R. 868; Stewart v. Coltness Iron Co. and Dewar, June 23, 1877, 4 R. 952; Gibson v. Nimmo & Co., March 15, 1895, 22 R. 491; Allen v. New Gas Co., 1876, L. R., 1 Exch. Div. 251.

[2] Murdoch v. Mackinnon, March 7, 1886, 12 R. 810.

[3] Sec. 49, rule 21.

[4] Henderson v. John Watson, Limited, July 2, 1892, 19 R. 954; Wallace v. Culter Paper Mills Co., Limited, June 23, 1892, 19 R. 915.

[5] Wright v. Dunlop & Co., Limited, Feb. 14, 1893, 20 R. 363.

[6] Wallace v. Culter Paper Mills Co., Limited, 19 R. 915, *per* Lord Adam at p. 919.

LORD ADAM concurred.

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LORD M'LAREN.—I agree that the case should go to a jury.

LORD KINNEAR concurred.

THE COURT approved of an issue for trial of the cause.

J. GORDON MASON, S.S.C.—GEORGE INGLIS & ORR, S.S.C.—Agents.

ROBERT BURNS, Pursuer.—*C. J. Guthrie—Glegg.*
C. DIAMOND, Defender.—*Shaw— W. Thomson.*

No. 93.

Feb. 18, 1896. Burns v. Diamond.

Process—Jury Trial—Issue—Motion to vary—Substitution of new issue—Dismissal of action—Court of Session Act, 1868 (30 *and* 31 *Vict. cap.* 100), *sec.* 28—*A. S.*, 14*th October* 1868, *sec.* 6.—Upon a motion to vary the terms of an issue, it is incompetent either (1) for a party to propose a new issue resting upon an entirely separate ground of action, or (2) for the Court to disallow altogether the issue whose terms are sought to be varied, and dismiss the action as irrelevant.

Observed, per Lord M'Laren, that when it is desired to substitute one issue for another, a reclaiming note, and not a motion to vary, is the proper mode of bringing the case into the Inner-House.

1ST DIVISION. LdStormonth-Darling.

ROBERT BURNS, who carried on business in Glasgow as a proprietor of homes for the working classes, raised an action of damages against C. Diamond, the editor of the *Glasgow Observer and Catholic Herald* newspaper.

The pursuer averred that at a recent municipal election in Glasgow he had been a candidate for the representation of the Fourth Ward, in which there was a large Roman Catholic population and vote, and that as there were rumours abroad that he was a Roman Catholic he had, in answer to questions put to him by a representative of the defender's newspaper, explained that he had been brought up a Protestant, but he was not "anti-Catholic."

He further averred that the defender had thereafter published false and calumnious statements about him, and, *inter alia*, that he had in his newspaper of the 2d November 1895 stated that the pursuer was "undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue he must expect that his conduct will meet with some criticism. Mr Burns has been declaring at public meetings that he never changed his religion, that he never was anything but a total abstainer. A short investigation has sufficed to prove—to our mind at least—the contrary, and we are anxious to place before the electors the sum and substance of the investigation we have instituted. . . . As a refresher might we ask, Is Mr Robert Burn, of the Fourth Ward contest, the same gentleman, who having been married in an Established Church, once called, while, as he believed, *in extremis*, for his boon companion, a Catholic, asking the latter to go for the priest, in order that he might be married according to Catholic ritual before death overtook him? Is Mr Robert Burns the gentleman who, while in Campbeltown, renounced the Catholic religion and embraced Freemasonry? . . . Is Mr Robert Burns the gentleman whose children have been known openly to lament the neglect of their religious training?" In a leading article, also, in the same issue, defender says,—"Allegations regarding Mr Burns' religion have been made,

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and the electorate will see for its own part how these have been answered."

The pursuer proposed two issues, of which the Lord Ordinary (Stormonth-Darling) allowed the first as amended, and disallowed the second.*

The pursuer thereafter gave notice of a motion to vary † the issue allowed by the Lord Ordinary by substituting for it the two following issues:—"(1) It being admitted that the defender in the issue of 2d November 1895 of the *Glasgow Observer and Catholic Herald* newspaper, printed and published the paragraph—'Is Mr Burns the gentleman whose children have been known openly to lament the neglect of their religious training?' Whether the said paragraph is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had so entirely neglected the duty of giving religious training to his children as to receive and merit their condemnation therefor, to the loss, injury, and damage of the pursuer? (2) It being admitted that the defender, in the issue of 2d November 1895, . . . printed and published the following statements, viz.:—'Mr Robert Burns, of Fourth Ward election fame, is undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue he must expect that his conduct will meet with some criticism.' As a refresher, might we ask, Is Mr Burns of the Fourth Ward contest the same gentleman

* The amended issue allowed by the Lord Ordinary was in the following terms:—"It being admitted that the defender, in the issue of 2d November 1895 of the *Glasgow Observer and Catholic Herald* newspaper, printed and published the article set out in the schedule appended hereto, and in particular the passage,—'Mr Robert Burns, of Fourth Ward election fame, is undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue he must expect that his conduct will meet with some criticism'; and the passage,—'Is Mr Burns the gentleman whose children have been known openly to lament the neglect of their religious training?' Whether the said passages are of and concerning the pursuer, and falsely and calumniously represent that the pursuer, while making a profession of religion, had so entirely neglected the duty of giving religious training to his children as to receive and merit their condemnation therefor, to the loss, injury, and damage of the pursuer?"

† The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 28, provides that "it shall be lawful to either party . . . without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired: Provided also that nothing herein contained shall be held to prevent the Lord Ordinary or the Court from dismissing the action at any stage upon any ground upon which such action might at present be dismissed according to the existing law and practice."

The Act of Sederunt, 14th October 1868, sec. 6, enacts that when an interlocutor has been pronounced by a Lord Ordinary approving of issues, "it shall not be necessary nor competent to reclaim against the said interlocutor if the party aggrieved thereby desires only to obtain a variation of the terms of the issue or issues, and does not desire to have such issue or issues, or one or more of such issues, disallowed *in toto*; but in every such case the party shall apply by motion to the Inner-House in terms of the 28th section of the said recited Act (the Court of Session Act), specifying precisely in his notice of motion the particular variation or variations which he desires should be made on the said issue or issues."

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who, having been married in an Established Church, once called, while as he believed, *in extremis*, for his boon companion, a Catholic, asking the latter to go for the priest, in order that he might be married according to Catholic ritual before death overtook him?' 'Is Mr Robert Burns the gentleman who, while in Campbeltown, renounced the Catholic religion and embraced Freemasonry?' 'Is he the gentleman to whom the priest of the day in Campbeltown spoke in terms of the strongest condemnation of his attitude towards the Church after the opening of his Freemason connection?' Whether the said statements are of and concerning the pursuer, are false, and were made with the design of exposing, and did expose, the pursuer to public hatred and contempt, to his loss, injury, and damage?" The second of these issues was identical with the issue which had been disallowed by the Lord Ordinary.

The defender argued;—(1) Variation by substitution of two issues for one was unprecedented, and was incompetent. The second issue now proposed was in identical terms with the issue disallowed by the Lord Ordinary, and it rested upon an entirely different ground of action from the issue allowed. The proper course for the pursuer was to have presented a reclaiming note.[1] (2) The pursuer, by taking exception to the Lord Ordinary's issue *in toto*, had raised the question of the relevancy of the action. The defender was entitled, therefore, to have that issue disallowed, and the action dismissed as irrelevant. It was competent for the Court to do that under the last proviso of section 28 of the 1868 Act.

Argued for the pursuer;—(1) The substitution of the two issues for one was essentially a variation. The issue allowed by the Lord Ordinary would not be superseded *in toto*, though for convenience it would be broken up. That was the converse of what the Lord Ordinary had done, for he had not really disallowed the pursuer's second issue, but merely incorporated it with his first. This being a variation, a reclaiming note would have been incompetent.[2] (2) There was no warrant for the defender's motion to have the issue refused *in toto* and the action dismissed. Besides, the action whether tested by the one issue allowed by the Lord Ordinary, or by the two proposed by the pursuer, was quite relevant.[3]

LORD PRESIDENT.—Two points of practice under the Act of 1868 have been raised.

The Lord Ordinary has approved of an issue which, with a slight difference, is substantially the same as the first of the two issues which the pursuer now desires to have settled. But the notice of motion now given, while purporting to be given under the section allowing motions to vary the terms of the issue approved by the Lord Ordinary, is in truth and substance directed to obtaining, *plus* the issue allowed by the Lord Ordinary, another issue which the Lord Ordinary has disallowed, and which rests upon a separate ground of complaint altogether. The second proposed issue is not an issue of slander, and does not use the terms of approved issues in cases of slander, but, on the contrary, resorts to a style of issue appropriate to a

[1] Hare v. Hopes, Dec. 10, 1870, 8 S. L. R. 189.
[2] Macarthur v. Ballantyne, May 13, 1871, 8 S. L. R. 499.
[3] Macfarlane v. Black & Co., July 6, 1887, 14 R. 870; Paterson v. Welch, May 31, 1893, 20 R. 744.

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class of cases in which an ordinary issue of slander would not be allowed. Now, it seems to me that the Act of Parliament, as construed by the Act of Sederunt, does not permit a question of that kind to be raised on a notice of motion to vary an issue. The words of the Act of Parliament are,—"That it shall be lawful to either party . . . without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired." It seems to me that emphasis must be laid both upon the word "vary" and also upon the word "terms"; and if fair effect be given to these words, it will be seen that what is proposed by that section is something widely different from an alteration of the grounds of action which are to be placed before the jury. In substance what is proposed here is that there shall be one action for slander, and another action for false statements made with an injurious intention, and with the result of injury. I think that is not a competent use of the provisions of the section, and that we are precluded from considering the merits of the proposed second issue. As to its merits, one could hardly avoid forming an opinion in the course of the discussion, but it is unnecessary to express any opinion upon that matter.

The second point was raised by Mr Shaw. He said (maintaining in the first place the limited construction of section 28, which I accept),—"If a notice of motion, confined purely to varying the terms of an issue, is presented, that entitles me, while resisting the motion, to avail myself of it to the effect of having the action dismissed on the ground of irrelevancy." Mr Shaw founded upon the last proviso of section 28. I entirely agree with the view, which has been thrown out in the course of the argument, that that is merely a salvo of the power of the Court to dismiss an action according to the existing practice. But if you apply the proviso in that sense, where was the power previous to this Act of Parliament, on a motion of this kind, to throw out the action? Certainly there is none under the practice that is introduced for the first time under this very Act; and if any analogous incidental proceedings are considered, it will appear that, once there has been an interlocutor by the Lord Ordinary sustaining the relevancy of an action and sending it to trial, it is beyond the power of the Court to upset that except upon a reclaiming note.

I am of opinion that we should refuse the motion as regards the issue approved by the Lord Ordinary. I do not think it necessary to criticise that issue, because it is, except in regard to the preamble, accepted by both parties. So far as relates to the preamble, it is perfectly plain that the full effect and meaning of the incriminating part of the article is only ascertained when the three sentences are put together as the Lord Ordinary has done.

Lord Adam.—I am of the same opinion. We have here printed, in this notice of motion to vary issues, the issues which the pursuer proposed should be fixed as the issues for the trial of the case. The Lord Ordinary disposes of them by disallowing the second issue altogether, and substantially approving of the first issue. This matter has been brought before us under the 28th section of the Court of Session Act, which gives the power to either party to "move the Division to vary the terms of any issue that may

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have been approved of by the Lord Ordinary, specifying in the notice of motion the variation that is desired." It appears to me that the changes proposed here go far beyond the variations intended by the Act. The notice we get is this, that the Division should be moved to vary the terms of the issue approved of by the Lord Ordinary, by doing what? Not by varying, not by altering the words of the issue approved of. We are not asked to do that. The pursuer asks us to substitute for the issue two other issues, which seems to me a very odd way of varying an issue. No doubt it is varying, for if you abolish every word of an issue it is varying; but that is not the meaning of the Act of Parliament. Accordingly, I agree with your Lordship that what we are asked to do here is not a proceeding authorised by the 28th section of the Act.

Upon the point as to the competency of refusing an issue altogether, I am of opinion that the case is not in such a position that we can dismiss it at the present stage.

LORD M'LAREN.—I think that variation has a distinct and well-defined meaning in the Act of Parliament, and that, when it is desired to substitute one issue for another, a reclaiming note, and not a motion to vary, is the proper mode of bringing a case into the Inner-House. If it be incompetent to introduce a new issue under a motion to vary, it follows, in my opinion, that on a motion to vary you cannot disallow an issue altogether, for that is no more a variation than the substitution of a new issue for an old one would be. I may add that, in my view, when an issue comes before the Court, either under a reclaiming note or under a motion to vary, the Court has power to make such variations on the form of the issue as it thinks proper, in order that the true question in dispute may be put before the jury, and I should have been in favour of making an alteration on the issue approved of by the Lord Ordinary, by deleting the words "so entirely" and "as to receive and merit their condemnation therefor," for I think these words are merely expletive, and have no tendency to direct the minds of the jury to the true question before them.

LORD KINNEAR.—I agree with your Lordship. The Lord Ordinary allowed one of two issues proposed by the pursuer, subject to a certain amendment which he made upon it, and then he disallowed the second issue altogether. I think that is in effect and substance a judgment that the statement which forms the subject of the second issue contained no issuable matter. The issue is disallowed, because in the opinion of the Lord Ordinary the words complained of are not slanderous, and are not injurious in such a sense as to entitle the person complaining to an issue. That appears to me to be a judgment upon the merits of one part of the case, and I agree that it cannot be brought under review except by the ordinary process of presenting a reclaiming note. I do not say that it might not be possible to substitute two issues for one on a motion to vary issues, if it were quite clear that the substitution was not intended to present entirely different questions to the jury from those presented in the issue allowed, but was in truth a mere amendment of the terms in which the Lord Ordinary had sent the question to the jury; but I think the purpose of the present note is to submit to the jury a totally

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different question from that raised in the issue which the Lord Ordinary has allowed, and one practically identical with that raised in the issue which the Lord Ordinary has refused to allow. I therefore agree with your Lordship, irrespective of any question that may arise upon the merits of the issue proposed to be substituted.

LORD PRESIDENT.—With regard to the alteration suggested by Lord M'Laren on the issue, I had understood in expressing my opinion that this matter was not discussed in argument, and accordingly I was in favour of adhering to the terms of the Lord Ordinary's interlocutor, not that I differ from Lord M'Laren.

THE COURT refused the motion, and remitted to the Lord Ordinary to proceed.

ROBT. D. KERR, W.S.—JOHN VEITCH, Solicitor—Agents.

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Feb. 19, 1896. Tierney v. Ballingall & Son.

MICHAEL TIERNEY, Pursuer (Appellant).
BALLINGALL & SON, Defenders (Respondents).—*Jameson—Constable.*
BOARD OF INLAND REVENUE, Compearer.—*A. J. Young.*

Proof—Diligence for recovery of documents—Public Government Board—Inland Revenue—Instructions issued to officers of Inland Revenue—Reparation—Personal injury.—In an action at the instance of an excise officer against a firm of brewers for damages for injuries sustained by the pursuer, while engaged in the performance of his duty in sampling liquors in the defenders' premises, the defenders moved for a diligence to recover the instructions issued by the Inland Revenue to their officers as to their duties in drawing samples. The Board of Inland Revenue objected on the ground that the recovery sought would be prejudicial to the public service. The Court *refused* the diligence.

1ST DIVISION. Sheriff of Forfarshire.

MICHAEL TIERNEY, an excise officer, raised an action in the Sheriff Court of Forfarshire, at Dundee, against Ballingall & Son, brewers there, concluding for damages.

The pursuer averred that he had sustained injuries by falling through a trap door, used for hoisting yeast into the defenders' brewery, while he was engaged in drawing and testing samples from the liquor in the vessels in the fermenting room.

The defenders pleaded contributory negligence, and averred that it was one of the pursuer's duties to make, and that he had in fact made himself well acquainted with the system of working carried on in the brewery, and in particular with the times at which the yeast was hoisted. They further averred that the pursuer had, in breach of a rule of the excise department, that their officers should personally draw the samples, sent two of the defenders' servants to do this for him, it being part of the duty of these servants to attend to the trap-door when it was open.

The pursuer having appealed for jury trial, and obtained an issue, the defenders applied for a diligence to recover the instructions issued by the Inland Revenue to their officers as to their duties (*a*) with respect to drawing samples from fermenting vessels in breweries; and (*b*) with reference to making themselves acquainted with the system of working adopted in breweries, and in particular with the time at which yeast is placed in the tuns therein.

The Board of Inland Revenue compeared and objected on the

ground that the production of the instructions would be prejudicial to the public service.[1] The defenders referred to the undernoted authority.[2] No. 94. Feb. 19, 1896. Tierney v. Ballingall & Son.

THE COURT refused the diligence.

BOYD, JAMESON, & KELLY, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

JAMES HOPE AND OTHERS, Pursuers (Reclaimers).—*Sol.-Gen. Murray—D. Dundas.* No. 95. Feb. 19, 1896. Hope v. Hope's Trustees.
DAVID CAMPBELL AND OTHERS (John Hope's Trustees), Defenders (Respondents).—*Comrie Thomson—C. J. Guthrie—Dickson—John Wilson.*

Insanity—Succession—Testament—Relevancy.—In a reduction of a will on the ground of the testator's insanity, a general averment that the testator was of unsound mind at the date when he made the will is not sufficient, if the facts stated or admitted by the pursuer raise a strong presumption that the testator was sane, and there is nothing in the will itself to indicate insanity.

In an action of reduction of a will, by which the testator directed the greater part of a large estate to be applied in promoting total abstinence, and preventing the spread of Roman Catholicism, the pursuer averred that the testator was not of sound disposing mind, but admitted on record detailed statements by the defender to the effect that the testator during his life had not only managed his own affairs but had been entrusted with the affairs of other people and of the public, and that he had devoted a great deal of energy and money to exactly the same schemes which he had endowed by his will. Being allowed to amend his record, the pursuer added a statement that the testator "was subject to insane delusions," that "he believed that he had a special and imperative duty to further the cause of total abstinence, and to oppose the Church of Rome, by devoting his pecuniary resources to those objects, in consequence of commands which he conceived he had received from the Deity, by direct communication, upon various occasions"; and that "these insane delusions dominated his mind and mastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate." The Court *dismissed* the action as irrelevant.

THIS was an action for reduction of the testamentary writings of the late Mr John Hope, W.S., Edinburgh, raised by Mr James Hope, W.S., and others, the testator's heir-at-law and next of kin, against the trustees appointed by Mr John Hope, for carrying his will into effect. 1ST DIVISION. Lord Kincairney.

Mr John Hope died on 25th June 1893, aged 86. He was possessed of very large estates, both heritable and moveable. He left a trust-disposition and settlement, dated 2d August 1879, an *inter vivos* trust-conveyance dated 22d April 1890, a trust-disposition and settlement dated 26th July 1890, and several codicils of various dates between 1890 and 1893. The pursuers sought reduction of all these writings.

By the trust-disposition and settlement dated 2d August 1879 (which was afterwards to a great extent superseded and cancelled by the deed of 26th July 1890), Mr John Hope conveyed his whole estate

[1] Earl v. Vass, July 17, 1822, 1 Sh. App. 229; Arthur v. Lindsay, March 8, 1895, 22 R. 417.

[2] Leven v. Young & Company, March 17, 1818, 1 Murray, 350, at p. 356.

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to trustees for certain purposes, directing them to apply the capital of the residue (1) for the advancement of total abstinence, (2) in opposition to Popery, (3) in disseminating a knowledge of the evidences of Christianity, and (4) in promoting Church establishment and monarchical and constitutional government. The later deeds were silent with regard to 3 and 4.

By the trust-conveyance dated 22d April 1890, Mr Hope, on the narrative that he was "resolved to make suitable permanent provision for the carrying on of the total abstinence, antipopery, and other operations which I have been, and am engaged in, and for other works and operations and purposes," conveyed to himself and certain other persons as trustees sundry lands, and bound himself to grant assignations of certain bonds specified in a schedule appended to the deed, the value of which bore to be £84,459, 12s. 8d. He directed that the capital of the trust-estate should be administered as a permanent trust for the following purposes:—(First) In paying the expenses of the trust. "(Second) In expending not less than the sum of £1000 sterling, and not more than the sum of £1500 sterling, per annum in the carrying on and advancing the cause of total abstinence at home or abroad from the giving or partaking of any beer, porter, ale, wine, or cordials containing alcohol, or any whisky, brandy, rum, gin, or other spirits, or any spirituous or fermented or alcoholic liquors, or tobacco, or opium, as articles of diet, or luxury, or beverage, in any form and degree, and from the use of alcoholic or fermented wine or other intoxicating liquors in the celebration of the Lord's Supper, and in promoting, in the celebration of the Lord's Supper, the use of the grape unfermented, being the fruit of the vine commonly called unfermented wine, and these by means of the formation and carrying on by the said trustees, or by those whom they may employ, of children's meetings, young men's meetings, young women's meetings, adults' meetings, debating associations, societies and classes, public discussions, public lectures, limelight exhibitions illustrative of the subjects treated of at such meetings, lectures, and others, publishing or purchasing and distributing librettos, tracts, petitions," and by various other means: "and (Third) in expending the remainder of the said income and annual proceeds (but subject always during the earlier years of the said trust to the power of accumulation hereinafter conferred upon the said trustees) in the following objects, *videlicet*, in disseminating among the people of Edinburgh and elsewhere in the United Kingdom or abroad a knowledge of the antiscriptural nature and character of the doctrines and practices of the Church of Rome, otherwise called the Roman Catholic Church, and in arousing the people of Scotland, England, or Ireland, or of the whole United Kingdom, or of other lands, to a sense of the dangerous, pernicious, and evil influences and operations of the Church of Rome upon the people's civil and religious liberties, and in originating and promoting efforts and operations, whether religious or social, or political or otherwise, for the conversion of Roman Catholics to Protestantism and to Christ, and the hastening the overthrow of the Church of Rome, and in exposing and opposing all attempts to introduce a liturgy, or prelacy, or sacerdotalism, or ritualism, in any form or degree into or among any of the Presbyterian Churches of Scotland, and these by means of the following works and operations and enterprises and others, all and every one of which, when entered upon, I hereby provide and declare shall be carried out and effected in accordance with the evangelical

Calvinistic principles of the Protestant religion as at present embodied and set forth in the standards of the Church of Scotland, *videlicet*, by public lectures," and various other means.

The trustees were empowered to accumulate year by year a sum not exceeding £1500 in any one year, until 1908, from which date the accumulated fund was to form part of the trust capital, and to be administered under the third purpose of the deed.

Mr Hope further provided that all the trustees named, and to be assumed, and all cashiers, factors, law-agents, and others employed must be total abstainers, and in full communion with the Church of Scotland.

He conferred large and detailed powers upon the trustees, and gave particular instructions with reference to different portions of the trust-estate.

By his trust-disposition and settlement dated 26th July 1890 Mr Hope, on the narrative of the deed of trust of 22d April 1890, brought under its operation the remainder of his estate, and conveyed the whole residue of the estate, heritable and moveable, belonging to him at the date of his death to trustees named, to be administered by them for the purposes set out in the deed of 22d April 1890, subject to certain minor directions with reference to particular portions of his estate, which it is not necessary to set out.

The codicils under reduction were for the most part concerned with legacies to persons of both sexes, conditional upon their being and continuing to be total abstainers from alcohol, tobacco, opium, and snuff, upon their not frequenting taverns, theatres, balls, and circuses, and upon their continuing to attend Divine Service in the Church of Scotland.

The pursuers, besides setting out or referring to the foregoing deeds and writings, averred;—(Cond. 8) "The said John Hope was in many respects a man of very eccentric habits, both of mind and body. For many years of his life he was subject to hallucinations, especially in regard to matters connected with temperance and total abstinence and with the Church of Rome. His speech, writings, and actions in regard to these topics were unreasonable and extravagant, and his mind in relation to said subjects was disordered and unhinged. Upon both the said topics he was subject to [insane] delusions. [He believed that he had a special and imperative duty to further the cause of total abstinence, and to oppose the Church of Rome, by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity, by direct communication, upon various occasions. These insane delusions dominated his mind, and mastered his judgment] to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will. The pursuers believe and aver that at the dates of the said deeds and codicils, reduction of which is sought by the leading conclusion of the summons, the said John Hope was not of sound disposing mind. The said deeds and codicils are not the deeds of the said John Hope. . . ."

The words within brackets were added on amendment by the pursuers in the Inner-House.

The defenders denied the averments of insanity, and, *inter alia*, stated;—(Stat. 1) "The late Mr John Hope was a man of great business

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capacity. He was admitted to the Society of Writers to the Signet in 1829. Down to 1864 he was in partnership with the pursuer, Mr James Hope, and took the leading share in the conduct of the firm's business. After the firm was dissolved the late Mr John Hope continued to carry on business on his own account, and down to the date of his death he acted as agent for several important landed proprietors and other clients, all of whom placed the most implicit confidence in his professional ability and soundness of judgment. The deceased was also a man of great public spirit, and, besides attending to his professional business as a Writer to the Signet, he devoted much of his time to public affairs, and to the promotion of various schemes for the social and religious wellbeing of the people. In 1857, when he was fifty years of age, he entered the Town-Council of the city of Edinburgh as representing St George's ward, and he remained in the Town-Council, with the exception of a single year (1866 to 1867), for the long period of thirty-two years, retiring in November 1889 in his eighty-third year. . . . He took a special interest in the volunteer movement. In 1860 he was appointed a Captain in the 2d Edinburgh Rifle Volunteers, now the Queen's Brigade, having by his own efforts raised a company of 100 men . . . At the end of 1866 he started the 3d City of Edinburgh Rifle Volunteers, now known as the 4th Volunteer Battalion, The Royal Scots. Beginning with one company the corps grew year by year, until it was a fully equipped battalion of six companies. Mr Hope's connection with the Volunteers lasted until 1884, when he resigned.

"Mr Hope's views on social matters were broad and liberal, and in many cases he was far in advance of the times. He advocated free education as long ago as 1852. In 1848 he established a number of apprentice evening schools for males, and separate schools for females, where the ordinary branches of elementary education were taught by experienced teachers paid by himself. . . . These schools were continued by him till 1873, when the governors of George Heriot's Hospital made arrangements for having evening schools for young people. One of his female evening schools, attended by both Protestant and Roman Catholic girls, was continued by Mr Hope until his death, and is now carried on by his trustees. . . .

"Mr Hope's British League Cadet Corps, formed in 1860, one of the earliest, if not the first, in the kingdom, was the pioneer of the modern Boys' Brigade which was begun in 1883. For twenty-eight years, from 1860 to 1888, Mr Hope's Cadet Corps was a well-known institution in Edinburgh, and upwards of 6000 boys passed through the ranks. Prior to 1851, children attending the day schools in Edinburgh received no instruction in music or singing, and Mr Hope recognising the advantage of brightening school life by the introduction of these subjects, proposed to several of the teachers in Edinburgh that, at his own expense, he should send to the schools music masters who would give the children lessons in music and singing while in the schools. The offer was accepted, and for thirty years, from 1851 down till 1881, Mr Hope employed music-masters to visit and to teach music in forty of the Edinburgh day schools. The arrangement was only brought to an end in 1881 in consequence of ample provision for teaching music and singing having been by that time made by the school boards. . . .

"He assisted many young men in their University course, several of them becoming ministers of the Church. . . ."

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(Stat. 2) "The late Mr Hope was particularly identified with the total abstinence and Protestant movements of the past fifty years. He himself became a total abstainer in 1839. In 1847 he founded the British League of Juvenile Abstainers. Branches of the British League Association were soon formed throughout the Lothians, and even in England, through Mr Hope's personal efforts; but Edinburgh was Mr Hope's special concern, and in the work of organising the Edinburgh branch, and in providing instruction by means of lectures, tracts, melodies, and in arranging public gatherings, entertainments, and excursions, he expended enormous energy. . . .

"In 1868 Mr Hope made an appeal to the minister of his own church for the use in the Communion service of unfermented wine. This proposal was not adopted, and in 1872 Mr Hope himself took up the idea of instituting special services to be held periodically in Edinburgh, at which the Lord's Supper could be dispensed with unfermented wine as a provision for those who had conscientious scruples against partaking of fermented wine at the Communion, and as the result of his exertions such services were ultimately, in 1882, begun. . . . When Mr Hope began these services very few congregations in Scotland used unfermented wine, but now upwards of five hundred congregations are doing so."

The defenders made further statements setting forth the interest of the testator, and the practical work done by him, in connection with the total abstinence and Protestant movements.

"From 1851 till 1859 Mr Hope carried on Protestant work in concert with the Committee on Popery appointed in 1851 by the General Assembly of the Church of Scotland. In 1859, when that committee was merged in the Home Mission Committee of that Church, Mr Hope took upon himself the whole burden of the classes, lectures, and other operations which had theretofore been in charge of that committee. . . . Mr Hope throughout the total abstinence and Protestant movements, with which he was identified, made large disbursements to meet the expenses attending the carrying on of the work. In November 1886 Mr George M'Gibbon, of the British League Office, prepared at Mr Hope's request from his books a statement of Mr Hope's expenses in connection with these operations carried on by him from 1st January 1847 to November 1886. The total amount was found to be, exclusive of interest, £70,583, 18s. 3d. The lowest expenditure in any year was that of 1847, namely, £269, 6s. 3d., and the highest was in 1875, namely, £2683, 8s. Between 1886 and 1890 Mr Hope, in contemplation of the *inter vivos* trust, which he subsequently executed, engaged several persons to carry on the trust work throughout the country. In 1889 he resigned his seat in the Town-Council, informing his constituents that he intended to devote what remained to him of life to operations which he had much at heart."

The pursuers answered these statements,—"The dates mentioned and the averments relative to matter of fact are believed to be substantially correct. *Quoad ultra* not known, and not admitted."

The pursuers pleaded;—Decree of reduction and declarator ought to be pronounced . . . in respect that at the dates of the documents sought to be reduced the said John Hope was not of sound disposing mind, and that the said documents are not his deeds.

The defenders pleaded;—(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons.

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On 18th June 1895, the Lord Ordinary (Kincairney) sustained the first plea in law for the defenders, and dismissed the action.*

* "OPINION.—The late John Hope, W.S., died on 29th June 1893, at the advanced age of eighty-six. His nearest relatives who survived him were a brother and sister and several nephews and nieces, and they now seek to reduce the trust-deeds by which he devoted his large estates to the furtherance of certain social and ecclesiastical opinions to which he appears to have attached extreme importance. The deeds sought to be reduced (besides subordinate codicils, to which it is not necessary to attend) are three in number, two trust-dispositions and settlements dated respectively 2d August 1879 and 26th July 1890, the latter of which appears practically to supersede the former, and an *inter vivos* trust-deed dated 22d April 1890 dealing with large estates thereby conveyed, and designed to come into operation at its date. The trustees nominated in the two latter deeds are the same, except that Mr Hope was himself a trustee under the *inter vivos* deed. The body of trustees under the first deed—that of 1879—is somewhat different. It may be worth while to notice that the purposes of that deed were more diversified than the purposes of the later deeds. By the deed of 1879 the trustees were directed to employ the income of the estates (1) for the advancement of total abstinence; (2) in opposition to Romanism; (3) in disseminating a knowledge of the evidences of Christianity; (4) in promoting Sabbath observances, (5) Church establishment, and (6) monarchical and constitutional government.

"In the later deeds all these purposes except the first two are dropped, and the trustees are directed to expend from £1000 to £1500 per annum in advancing the cause of total abstinence, and the remainder and considerably larger portion of the revenue of the estates, in disseminating a knowledge of the antiscriptural character of the doctrine and practices of the Church of Rome, in awakening a sense of its evil influence upon the people's civil and religious liberties, and in opposing the introduction of ritualism into the Presbyterian Churches of Scotland. Mr Hope's deeds indicate a deeply rooted sense of the evils of intemperance, an unhesitating reliance on the beneficial effects of total abstinence, and an intense disapproval of and dislike to the Church of Rome and to all practices in any degree savouring of Romanism; and they formulate clearly conceived and comprehensive schemes, and give remarkably definite, comprehensive, and practical ideas about the appropriate methods by which his objects might be carried into effect.

"The point which has been debated is the relevancy of the pursuers' averments, and I have on consideration come to the conclusion that they are irrelevant, and not such as can be sent to proof.

"The pursuers' only plea is, that the deeds should be reduced because at their dates Mr Hope was not of sound disposing mind, and because they are not his deeds. The averments on which that plea is founded are contained in condescendence 8, the rest of the record consisting merely of a narrative of the deeds. In condescendence 8 it is averred that Mr Hope was not of sound disposing mind, and that the deeds were not his deeds. Now, no doubt, in a sense these averments, with the corresponding plea, are perfectly relevant, and if they were proved the deeds would be of course reduced. But they are entirely wanting in specification and detail. I consider that it is not sufficient merely to lay a deed before the Court, and aver that it was not the deed of its apparent granter. It is necessary, I conceive, to aver special facts from which the inability of the granter can be inferred, and which will inform the defender of the kind of case which he requires to meet. Accordingly the pursuers add to this general statement the averments that Mr Hope was for many years of his life subject to hallucinations, especially in regard to matters connected with temperance and total abstinence and with the Church of Rome; that his mind was in relation to these

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The pursuers reclaimed, and were allowed to amend their record to the effect before stated. The reclaimers argued;—The question was, Was there mental disease? It was not necessary on record either to specify the physiological condition of the testator's brain, or to state the form of the delusions from which he suffered. The leading delusion from which Mr Hope suffered had been specified, but that merely led up to, and did not supersede what was the essential averment in the case,—and it was quite distinctly set out,—viz., that Mr Hope was unable to make a will. He was so dominated by the two ideas—antipopery and antidrink—that he was unable to give rational consideration to the disposal of his estate. Whether that was so or not was eminently a question of fact, and the pursuers were entitled to have it answered by a jury. It might be that partial mental disorder did not necessarily incapacitate a man from making a rational will, but it might, and the pursuers averred that it did so in this case, and there should be an inquiry into the nature and effect of the partial disorder. In *Ballantyne's* case,[1] the delusion averred had nothing to do with will-making, and yet there was inquiry.

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subjects disordered and unhinged, and that he was subject to delusions in regard to them to such an extent as to render him incapable of making a reasonable and proper settlement of his estates. I think that these averments are still insufficient, and so defective in specification and definiteness as to be irrelevant. They probably indicate the nature of Mr Hope's mental defects intended to be averred, at least to the extent of shewing what kinds of mental defect are not intended. It is clearly not intended to be averred that Mr Hope was not of sound disposing mind either because of mental imbecility or of any failure of intellect incident to his great age. What is averred are hallucinations and delusions, and seeing that delusions and even hallucinations are not necessarily the product of insanity, I think it essential to relevancy that it should be averred that they were so in this case, or otherwise—in perhaps less exact language—that they were insane hallucinations and delusions. Counsel for the pursuers held that the addition of the word 'insane' added nothing to the meaning, but they stated that, nevertheless, they were willing to add this word. I think, however, that the record as so amended would still fall short of relevancy, and would not give the defenders the information as to the grounds on which it was intended to attack the deeds to which they are entitled.

"Mr Hope's opinions about total abstinence and Roman Catholicism may have been erroneous, extreme, and extravagant, and the importance which he attached to them may have been exaggerated out of reason. Many people, doubtless, think so; while there are, I have no doubt, not a few who consider them reasonable, wholesome, and beneficent; but unless he reached his opinions under the influence of some insane hallucination, the mere fact that his opinions were extreme, and were held with more than ordinary earnestness and tenacity, cannot, I apprehend, indicate insanity. If the pursuers knew enough to be able to aver that he laboured under delusions and hallucinations on these subjects, they must necessarily be able to say what these hallucinations and delusions were. They say—and perhaps are entitled to say—that if a man labours under certain insane delusions, it is not unlikely that other similar delusions may be discovered in the course of inquiry, and that they do not wish to tie themselves down to those delusions only which they have at present discovered, and it is possible that they might be entitled to add to a statement of specific delusions some general words which may meet such a case. Had they condescended on special insane delusions they might have made a case for inquiry, although

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[1] Ballantyne v. Evans, March 3, 1886, 13 R. 652.

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Inquiry was much more necessary in a case like the present, where the delusion was directly concerned with the subject-matter of the will. The rationality of the will itself, moreover, was a very important matter, and should be submitted to a jury.[1] The deeds here were full of oddities, and saturated with the insane delusion from which the testator suffered.

Argued for the defenders;—There was no averment of general insanity here. No doubt the pursuers said the testator was of unsound mind, but then they admitted the defenders' statement of Mr Hope's life and work, which shewed, not only that Mr Hope was possessed of more than an ordinary business capacity for all sorts of affairs both private and public, but also that he had devoted a great deal of time and money during his lifetime to the very objects which formed the subject-matter of his will. That being so, very specific statements of the particular insanity from which the testator suffered,—its character, and the way it manifested itself,—required to be made to warrant a proof. There were none such here. In all the cases referred to by the pursuers, there were very precise and circumstantial statements of insanity. As regarded the particular delusion from which the testator was alleged to have suffered, the record was equally irrelevant. It might as well be said that anyone who believed in direct answer to prayer was not of sound disposing mind. There was nothing incoherent in the objects to which the testator had devoted his estate. His intense interest in their promotion did not in the least indicate even partial mental disorder, but even if it did, his general faculties were not affected by the so-called insane delusion.

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it might not necessarily follow that the deeds would be reduced even if the hallucinations were proved. But I hold that they are not entitled to get into a proof while they withhold information, which *ex hypothesi* they possess, about the truster's insane hallucinations.

"The pursuers' counsel mentioned at the debate no special hallucinations, and seemed rather to put forward the view that Mr Hope's mind was so dominated and monopolised by the two ideas which possessed him, whether they were right ideas or wrong, as to be thrown clean off its balance, and rendered unable to take any rational view of other interests to which in making his settlements he ought to have had regard. That is hardly the case averred on record, and I am not prepared to say that an averment of that kind would be relevant.

"No authorities were quoted to me in regard to the amount of specification, and the definiteness of averment necessary for relevancy in an action of reduction of trust-deeds. Various important cases were referred to, and in particular the cases of *Morrison* v. *Maclean's Trustees*, 24 D. 625; *Nisbet's Trustees* v. *Nisbet*, June 30, 1871, 9 Macph. 937; *Ballantyne* v. *Evans*, March 3, 1886, 13 R. 652; *Boughton & Marston* v. *Knight, &c.*, 1873, L. R., 3 Pro. and Div. 64; *Jenkins* v. *Morris*, 1880, L. R., 14 Ch. Div. 674; and the highly important case of *Banks* v. *Goodfellow*, 1870, L. R., 5 Q. B. 549. These cases, however, do not bear on the question of relevancy of averment, but on the effect of insane delusion on contractual or testamentary power.

"I proceed on the view that the defenders are entitled to more specific information than the record affords, and am of opinion that I cannot send the pursuers' averments to proof, but must, unless they propose to amend their record, sustain the first plea in defence and dismiss the action."

[1] Morrison v. Maclean's Trustees, Feb. 27, 1862, 24 D. 625, 34 Scot. Jur. 311; Nisbet's Trustees v. Nisbet, June 30, 1871, 9 Macph. 937, 43 Scot. Jur. 530.

Such partial unsoundness of mind did not infer incapacity to make a will.[1]

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At advising,—

LORD PRESIDENT.—My opinion is that the pursuers' case, as stated on record, does not entitle them to go to trial.

It may be that a bald averment that a testator was of unsound mind when he made his will, and that the will is therefore not his will, might be sustained as relevant without any more circumstantial statement. I do not pronounce upon this question of pleading, for it is not before me. The present pursuers have, with becoming frankness, done two things. They have substantially admitted the whole of what is a pretty full biographical account of the testator and of his relations during his life to the two public objects to which by his testamentary writings he has devoted his fortune after his death. They have also, by an amendment of the record, which can only be ascribed to a sincere desire to inform the Court, disclosed their reason for calling the testator insane.

It appears then, on the face of the pursuers' record, that this gentleman, during his life, not merely managed his own affairs, but was entrusted with the affairs of other people, and of the public. Concurrently with the performance of these professional and public duties he was devoting a great deal of energy and money to exactly the schemes which he has endowed by his will. All this went on for a period exceeding an ordinary lifetime.

I do not go into detail about all this, for it would never do to decide a case on relevancy by what are inferences from facts which might strike different minds differently, and are therefore appropriate to a jury, even although the true result might be easy of prognostication. But the point is, whether this admission by the pursuers of this very detailed account of the testator does not dislodge them from the position of being entitled to bid the Court take their word for it that the testator was of unsound mind, and that the will is not his will? I think that it does; and the pursuers seem to have thought so, for they have quitted the abstract, and have specified the kind of insanity which they allege.

Now, I do not think that the amendment of the record contains any good averment of unsoundness of mind. The crudeness of the language used cannot be permitted to enhance its significance; and it amounts to no more than this, that Mr Hope believed that in promoting the two objects in question he was obeying God's will, as made manifest by God to his conscience.

The amendment of the record seems to me, therefore, to weaken, and not to strengthen it. But, taking the record of the pursuers as a whole, including the admissions, the general statement of unsoundness of mind is to be read as relative to the will which it is said to invalidate. Now, let it be assumed as true that the intense interest which Mr Hope is said to have taken in abstinence from alcohol and in Protestantism made those causes the absorbing subjects of his thoughts, to the exclusion or to the prejudice of

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[1] Jenkins v. Morris, 1880, L. R., 14 Ch. Div. 674; Banks v. Goodfellow, 1870, L. R., 5 Q. B. 549; Boughton v. Knight, 1873, L. R., 3 P. and D. 64.

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other matters, which are regarded by most men as of equal or greater importance. Some men devote their time and their means to what, on a fair view of life, will be regarded as matters of minor concern, and they exaggerate the importance of what, conversationally, are called their hobbies. But even one who does not sympathise with the peculiar views expressed in Mr Hope's will is constrained to allow that both his favourite causes touch large human interests, and are both susceptible of being advanced by such methods as he indicates. Now, if a man who has taken a lifelong interest in some specific subjects, even of minor importance, desires his fortune to be applied to their furtherance after he is dead, it cannot be said that the testamentary purpose is of itself presumptive of mental unsoundness, unless the sum bequeathed be so large and the object to be advanced so small that the application of the one to the other is impossible or preposterous. If Mr Hope's fortune had been a tenth or a fifth of what it was, I hardly think that his settlement would have caused surprise. But if regard be had to the far-reaching influences which he desired to counteract, to the unquestioned power of propagandism, and to the equally certain cost of such operations, there is no such palpable disproportion between the means and the ends as to presume unsoundness in a mind which desired to apply the one to the other. Accordingly, I do not think that *res ipsa loquitur*, so as to dispense with the need for particularising the kind of insanity which is said to invalidate the will of a man about whom the pursuers concur with the defenders in stating so much that is presumptive of sanity. As I have already pointed out, the pursuers have met the challenge for particulars by their amendment of the record; and for the reason already stated I think that it shews they have no case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

DUNDAS & WILSON, C.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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Feb. 19, 1896. North British Railway Co. v. Hutton.

NORTH BRITISH RAILWAY COMPANY, Pursuers (Respondents).—*Balfour—Cooper.*

ANDREW HUTTON, Defender (Reclaimer).—*Dickson—Cook.*

Property—Bounding Title—Measurement—Plan—Prescription.—A purchaser obtained a conveyance to four acres of ground excepting "those parts and portions thereof sold and disponed by me to A and B, all as specified and described in the disposition thereof by me in their favour, dated 11th July 1864." The disposition of 11th July referred to an annexed plan as delineating the ground conveyed, and also described that ground by measurement.

Held that the purchaser's title was a bounding title, and that he could not acquire by prescription any of the subjects excepted from the grant.

1ST DIVISION. Ld. Kyllachy.

UNDER powers conferred upon them by the North British (Galashiels and Peebles) Railway Act, 1861 (24 and 25 Vict. c. cii.), the North British Railway Company acquired, by agreement, a piece of ground about 550 feet long by 50 feet wide, from Mr Robert Symington Grieve, merchant, Edinburgh, for the purpose of building a bridge over the River Tweed.

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The disposition conveying the land was dated 11th July 1864, and the land was thus described:—"All and Whole these seven hundred and twelve decimals or one-thousandth parts of an acre imperial measure or thereby, being the portions of ground taken and used by the said North British Railway Company from the lands belonging to me hereinafter described, as the said portions of ground are delineated and coloured red on a plan thereof signed by me as relative hereto; and which portions of ground lie in the parish and county of Peebles, and form part of All and Whole these four acres of land of the Bridgelands, now called Walkershaugh, lying on the north side of the River Tweed, near the burgh and within the parish and sheriffdom of Peebles."

On 11th October 1864, Mr Grieve disponed the remainder of the four acres of Walkershaugh to Mr Archibald Marshall.

The disposition bore to convey the four acres; "but excepting and reserving always from the subjects before disponed those parts and portions thereof sold and disponed by me to the North British Railway Company for their line of railway from Peebles to Innerleithen, all as specified and described in the disposition thereof by me in their favour, dated the 11th day of July 1864."

In November 1894 Mr Marshall's testamentary trustees sold to Mr Andrew Hutton, printer, Edinburgh, the portion of the lands of Walkershaugh, "lying to the west of the North British Railway, extending to six hundred and fifty-one decimal or one-thousandth parts of an acre."

In 1895 Mr Hutton proceeded to erect a house on this land, when the North British Railway Company intimated to him that his operations were an encroachment on their property.

On 2d August 1895 the Railway Company raised an action against him to have him decerned and ordained to remove the building, or at least to take down and remove such part thereof as had been erected on any part of the lands belonging to the pursuers.

The defender in his statement of facts averred;—Stat. 5. "When the said Archibald Marshall so purchased the lands of Walkershaugh, under exception of the ground sold to the pursuers for their line of railway, there was delivered to him, with the titles of the lands, a copy of the disposition by Robert Symington Grieve in favour of the pursuers, dated 11th July 1864, but the said copy disposition had not annexed to it any copy of the plan annexed to the disposition in favour of the pursuers, without which the precise limits of the land sold to the pursuers could not be ascertained. Said plan was not validly incorporated in the pursuers' title so as to form the measure of their rights. They did not, under said disposition, acquire any right to the portion of ground now in dispute. The subjects disponed were only those 'taken and used' by them, which the said portion of ground never was, and under their statutes they had no right to acquire any others." Stat. 8. "A period of upwards of thirty years, being the full prescriptive period, elapsed between the date of Mr Marshall's purchase of the land in question and the date of the sale of it by his trustees to the defender, during the whole of which period Mr Marshall and his trustees had continuous, uninterrupted, and unquestioned possession of their ground, including a small portion thereof extending to about 24 square yards, to which portion the pursuers have now laid claim."

The pursuers pleaded, *inter alia*;—5. The defender having set

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forth no title to the land in question which can compete with the pursuers', decree should be granted as concluded for.

The defender pleaded, *inter alia*;—3. The defender having a good and valid title to the piece of ground in dispute (1) in virtue of his titles produced, or (2) in virtue of said titles and of prescriptive possession thereon, is entitled to be assoilzied from the conclusions of the summons.

A proof was allowed. It was admitted that the area in question was within the pursuers' titles. It was proved that the area was within the alignment of the railway company's fences, that it had not been fenced off by the company, and that for thirty years it had been used by the defender and his author as part of a garden, the wall surrounding the area in question being upon the pursuers' land.

On 5th December 1895 the Lord Ordinary (Kyllachy) pronounced an interlocutor, finding that the defender had built upon a portion of the railway company's land, and ordaining the defender to remove such portion of the building as was erected on the pursuers' land.*

The defender reclaimed, and argued;—The exception contained in his author's title was applicable only to land *de facto* "taken and used" by the railway company in the words of the disposition of 11th July 1864. But the area in question had not been even fenced, as the railway company were bound to fence it under section 60 of the Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 33). He was not bound to refer to an unregistered plan annexed to the disposition. All a singular successor had to take notice of when he bought a property was what was in his own disposition, and what had entered the records. Now, here the defender found that certain portions of the land were not taken and used by the railway company, and he was therefore entitled to assume that these did not fall within the pursuers' disposition. Accordingly, it

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* "OPINION.—In this case the first point to be decided is, whether the defender has acquired by prescription a right to the ground in question. He and his authors have had *de facto* possession for more than thirty years; that is to say, it has been occupied by their tenants along with the adjacent ground. But the pursuers dispute that the possession has been of the requisite character, and they maintain further that the title of the defender's author excluded the ground in controversy (being in fact a bounding title), and that therefore prescription cannot apply.

"I think that the proof sufficiently instructs the possession on which the defender founds; and if it had followed upon a title to which it could lawfully be ascribed, I see nothing in its character to deprive it of effect. But I am of opinion that, as regards the matter of title, the pursuers are right. The defender's title is deduced from a disposition by Robert Symington Grieve in favour of Archibald Marshall, dated 11th October 1864, and by that disposition there is expressly excepted from the conveyance the ground conveyed by Grieve to the railway company by disposition dated 11th July 1864. Now, turning to that last disposition it is not, I think, doubtful that it includes a conveyance of the ground in dispute. That ground is required to meet the measurement of the area disponed. The disposition is with reference to an annexed plan, which shews the ground in question as within the conveyance. And it does not appear to me that, because the disposition is of ground 'taken and used' by the railway company, that expression can reasonably be held to limit the disposition to such ground as might *de facto* be fenced off from the adjacent ground by a railway fence. That being so, I am compelled to hold that the area in question is within the pursuers' title, and is excluded from that of the defender, and that the defender has therefore no title upon which he can plead prescription. . . ."

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could not be said that his was a bounding title,[1] which excluded prescription. The description was capable of the construction that it had included the ground in question. In short, there was an ambiguity on the face of the title which the defender was entitled to remove, by shewing, as he had done, that he had possessed exclusively for the prescriptive period the subjects in dispute.[2] *Reid's*[3] case was practically overruled by *Auld's*[4] case.

Argued for the pursuers;—The pursuers' title was a bounding title. Erskine's definition[1] of such a title as one pointing out the limits of the grant by "march-stone" was intelligible at a period when the country was not fenced. In such a case it was necessary to go outside the title itself. The modern conveyancer in drafting such a title referred as here to a plan and to measurement of the ground. What, then, the defender under his title obtained was part of the ground, *minus* what was disponed to the pursuers. Accordingly, he got an unequivocal reference to an unambiguous title, and in this view his own title was also a bounding one. Such being his title, no amount of prescriptive possession would avail him.[5]

At advising,—

LORD M'LAREN.—The question in this case is, whether the defender can maintain his possession against the heritable right of the pursuers.

I assume, in accordance with the fair import of the evidence, that the defender and his author Mr Marshall have had since 1864 all the possession of the land in dispute of which it is susceptible, but mere possession will not suffice to establish a right of property in the defender unless the possession is referable to charters and dispositions followed by sasine.

Where an estate is described in the title-deeds by a general name or in general terms so that its extent and boundaries cannot be ascertained from the title-deeds themselves, then anything that has been possessed under the general name or general descriptive words for the prescriptive period is deemed to be part of the estate, and it is not of much consequence whether we consider the subject possessed as having been acquired by prescription under the Scottish statute, or whether we consider the long possession as connected with a rule or principle of the common law for defining and ascertaining the original extent of the estate. In either view the person in possession has a prescriptive title to the land.

There is also a principle of the law of property, which is correlative and complementary to the principle I have stated, viz., that a proprietor cannot acquire by prescription a subject which is excluded by the terms of his title, because this would not be possession under charter and sasine, but would be possession contrary to the written title. The case of what is termed a bounding charter is an example, but not the only example, of a title which

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[1] Ersk. Inst. ii. 6, 2.

[2] Auld v. Hay, March 5, 1880, 7 R. 663, Lord Justice-Clerk Moncreiff, p. 668, Lord Deas, 675; Magistrates of Perth v. Earl of Wemyss, Nov. 19, 1829, 8 S. 82, 2 Scot. Jur. 30.

[3] Reid v. M'Coll, Oct. 25, 1879, 7 R. 84.

[4] Auld v. Hay, 7 R. 663.

[5] North British Railway Co. v. Magistrates of Hawick, Dec. 19, 1862, 1 Macph. 200, 35 Scot. Jur. 94; Reid v. M'Coll, Oct. 25, 1879, 7 R. 84.

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so defines the estate as to exclude the possibility of acquiring land by prescription in excess of the subjects actually conveyed.

In the present case the prescriptive title of the defender begins with the conveyance by Grieve to Marshall. In it the subjects previously conveyed to the North British Railway Company are expressly excepted, and the conveyance to the railway company is referred to by its date, so that the extent of the land conveyed to the railway company is just as clearly defined as if the description had been *verbatim* inserted in the disposition to Marshall.

Now, when the granter of a conveyance says, "I except from this conveyance so many fractional parts of an acre previously conveyed and delineated in a plan annexed to that conveyance," I think that, so far as relates to the bounding line which separates the areas first and second conveyed, he has just as clearly defined the boundary as if he had defined it by reference to march-stones or natural land-marks. I see no distinction between the cases; the principle is one and the same, that you cannot by long possession acquire a subject which your title-deed in terms excludes or declares to be the property of a conterminous proprietor. It follows, in my opinion, that the Lord Ordinary has rightly held that the defender is not in a position to plead prescription in answer to the pursuers' demand for the restoration of their property.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT adhered.

JAMES WATSON, S.S.C.—W. & J. COOK, W.S.—Agents.

No. 97.

REV. JOHN METHVEN ROBERTSON, Petitioner.—*Craigie.*

Feb. 21, 1896. Robertson.

Church—Glebe—Feuing—Expenses which fall to be imposed as permanent burden on glebe—Roads necessary for advantageous feuing—Avenue to manse—Glebe Lands (Scotland) Act, 1866 (29 *and* 30 *Vict. c.* 71), *secs.* 14 *and* 18.—The Glebe Lands Act, 1866, enacts (sec. 14) that on an application for authority to feu a glebe the Court may authorise the minister to construct such roads as it may find reasonable or expedient with the view of the more advantageous feuing of the glebe; and (sec. 18) that the Court may decern the expenses of constructing such roads a permanent burden on the glebe. *Held* that the cost of a new avenue to a manse, the construction of which had become desirable for its amenity in consequence of the feuing of the glebe, could not be imposed as a permanent burden on the glebe.

TEIND COURT.

ON 8th December 1891 the Rev. John Methven Robertson, minister of the parish of St Ninians, in Stirlingshire, presented a petition for authority to feu the glebe of St Ninians, and craved the Court, *inter alia*, to decern the amount of the expenses incurred by the petitioner in making and constructing roads, passages, drains, and sewers, in and through the glebe or any part thereof a permanent burden on the glebe.*

* The Glebe Lands (Scotland) Act, 1866 (29 and 30 Vict. c. 71) enacts—

Sec. 14.—"The Court may . . . authorise the minister to make and construct such streets, roads, passages, sewers, or drains in and through the

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Authority to feu having been granted, the petitioner thereafter lodged a minute in which he set forth an account of the sums which had been expended by him in the construction of roads and other works, including a new gateway and approach to the manse, and craved the Court to inquire into and ascertain the amount of these expenses, and thereafter to decern these a permanent burden on the glebe.

A remit was made to a land-valuator, who, *inter alia*, reported—"In order to complete his new road the minister has altered the former approach to his manse, and made it a continuation of his new road or street through the feus.

"This new approach is, no doubt, a very great improvement and addition to the amenity of the manse, but it was not absolutely necessary, as the original approach could have remained as it was."

The account of the expenses of constructing the roads, &c., having thereafter been remitted to the Teind Clerk, he lodged a report, in which he disallowed the items relating to the gateway and new approach to the manse as not falling within the expenses sanctioned by the Glebe Lands Act.

The petitioner objected to the report, and argued that the items disallowed were reasonable charges which had been necessitated by the feuing of the glebe. The gateway and approach were really incidental to, and arose from, the making of a road through the glebe, and they were absolutely essential to the convenient occupation of the manse, and greatly improved its amenity.

LORD ADAM.—I think Mr Craigie's objection is not well founded. The first of the claims is that this road having been made for the convenience of the manse, the expense of making it is to form a charge against the future incumbent of the glebe. The claim arises in these circumstances. The glebe having been feued, it became desirable for the amenity of the manse that a new avenue should be made. That may be a matter of great importance for the manse, but it cannot be said that it has been made "with the view of the more advantageous feuing" of the glebe. But the words I have quoted are the words of section 14 of the Glebe Lands Act, which is the only authority that the Court has for allowing the expenses of making roads. Now, the road in question was made, not for the more advantageous feuing of the glebe, but was constructed after the feuing was completed, and solely for the convenience of the manse. The other two sums whose disallowance was objected to follow the fate of the first, for they represent expenses incurred in connection with the formation of this access to the manse. I therefore think that the Teind Clerk's report disallowing the items I have referred to should be approved.

LORD KINNEAR.—I think the only expenses which we are empowered to impose as a permanent burden on the glebe are the expenses required to

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glebe or any part thereof as the Court on inquiry may find reasonable or expedient, with the view of the more advantageous feuing . . . thereof."

Sec. 18.—"The Court shall inquire into and ascertain the sums which shall have been paid as the . . . expenses of . . . making and constructing streets, roads, passages, sewers, or drains in or through the glebe or any part thereof, and shall decern the amount thereof a permanent burden upon the glebe."

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make the feuing which we have authorised profitable to the benefice, and not expenses incurred to improve the amenity of the manse, or required for its convenient occupation.

LORD M'LAREN, LORD STORMONTH-DARLING, and LORD LOW concurred.

THE COURT approved of the report.

WM. DUNCAN, S.S.C., Agent.

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Feb. 25, 1896.
Bain v. Mackenzie.

WILLIAM BAIN, Pursuer (Reclaimer).—*Cook*—*Constable.*
DONALD MACKENZIE, Defender (Respondent).—*Guy*—*Graham Stewart.*

Passive Title—Heir—Lease excluding assignees.—A nineteen years' lease of an urban subject was granted to a tenant and his heirs, but excluding assignees and subtenants without the consent of the lessor. On the death of the tenant, his heir took up the lease. *Held* that the heir did not incur passive representation for the debts of his predecessor, in respect that he took the lease, not as representing his ancestor, but in his own right under the lease.

Question as to whether passive representation would be incurred by an heir under a lease excluding subtenants and assignees which was of such duration as to amount in law to an alienation.

Campbell v. *Gallanach*, July 11, 1806, cited in 1 Bell's Com. p. 78, note 5, *overruled.*

Leslie v. *Macleod*, June 20, 1870, 8 Macph. (H. L.) 99, and *Macalister* v. *Macalister*, Feb. 22, 1850, 21 D. 560, *commented on.*

1ST DIVISION.
Ld. Moncreiff.

DONALD MACKENZIE senior was, at the date of his death, tenant of the Trevelyan Hotel, Leith Street, Edinburgh, under a lease for nineteen years from Whitsunday 1886. The lease bore to be granted to "the said Donald Mackenzie and his heirs, but expressly excluding assignees and subtenants without the consent in writing of" the proprietors.

Mr Mackenzie, to whom Mr William Bain had been appointed curator bonis in January 1892, died on 30th November 1894. He left a disposition and settlement by which he disponed and assigned to his wife in liferent, and certain other persons in fee, his whole estate, including expressly the unexpired portion of the lease of the hotel.

The proprietors did not give their consent to this proposed assignation of the lease, and Mr Mackenzie's son, Donald Mackenzie junior, as heir of his father, took possession of the subjects, and carried on business there.

In June 1895 Mr Bain, as curator bonis to the late Mr Mackenzie, raised this action against Donald Mackenzie junior, concluding for payment, *inter alia*, of £298, 17s. 2d., being the sum alleged by the pursuer to be due and resting owing to him in connection with his intromissions with the curatory estate.

The facts before narrated were admitted by the parties.

The pursuer averred that the defender took up the lease as heir-at-law of his father, that the goodwill of the hotel was worth £700, and that the defender was to that extent *lucratus.*

The pursuer pleaded;—(1) The sum of £298, 17s. 2d. first sued for being due and resting owing to the pursuer, in connection with his intromissions as curator bonis to the late Donald Mackenzie senior, or

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alternatively the same, so far as undischarged, forming proper charges against the curatory estate, and the defender, as heir of the said Donald Mackenzie senior, being *lucratus* to the amount thereof, the pursuer is entitled to decree in terms of one or other alternative of the first conclusion of the summons, with expenses.

The defender pleaded;—(1) The action is irrelevant. (3) The lease referred to not being available to the deceased's creditors, the defender incurred no liability to them by taking up the same.

On 19th December 1895 the Lord Ordinary (Moncreiff) sustained the third plea in law for the defender, and assoilzied him.*

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* "OPINION.— . . . By the terms of the lease in question assignees and subtenants are excluded, the lease passing on the death of the tenant to his heir. The question, which, strangely enough, has not been definitely settled by decision, is, whether the heir of a tenant who takes up a lease in such circumstances incurs passive representation for his predecessor's debts? If passive representation depended solely upon whether the heir was *lucratus* by taking up the lease, this case would require to be sent to proof on that point, but it seems to me that it is also essential to the doctrine of passive representation that the property or asset which is taken up by the heir is one which the predecessor's creditors could have adjudged or attached had the heir abandoned it. The terms of a lease, including the destination, depend on contract in which the landlord is one of the parties interested, and therefore apart from statutory provisions conferring power to bequeath a lease, which do not apply to urban subjects, the same rules cannot be applied to the transmission of a lease as apply to succession to other kinds of property. Where assignees and subtenants are excluded, the creditors of the tenant have no power to adjudge the lease. If, on the death of the tenant, his heir abandons the lease, the creditors of the tenant cannot compel the landlord to receive them. The lease is in no way available to them should the landlord not consent. It seems to follow that when in such a case the heir of a tenant takes up the lease, he does so, not as representing his predecessor, but more as an heir of provision, or heir of entail, although his position is not precisely analogous.

"It appears from a note in 1 Bell's Commentaries (5th edition), p. 82—(p. 78, note 5, 7th edition)—that the question was raised in the unreported case of *Campbell of Melford* v. *Gallanach*, 11th July 1806. Lord Newton, in the Bill-Chamber, decided in favour of the present pursuer's contention, viz., that the heir incurred a passive title by taking up a lease under which assignees and subtenants were excluded. A petition was presented to the Court, but refused on a point of form, 'the Court regretting that the merits of the question could not be tried.' I gather from Mr Bell's observations that he doubts the soundness of Lord Newton's judgment. He says:—'It may be questioned whether the heir, who succeeds to the lease under such a clause, does not take it without incurring any passive title, further than as he can be shewn to have taken up a subject which, as properly belonging to the predecessor, his creditors could attach. The stocking of the farm is indeed the fund of the creditors, so are all arrears due by subtenants; but with regard to future and accruing profits, have the creditors right to them—their debtor's right having expired with his life, like that of an heir of entail?' I find the law stated to the same effect in Bell's Principles, section 1922 (4).

"I also find the same doubt expressed in More's Notes to Stair, 364, in which he says,—'And here, by the way, it may be observed that it has never been decided whether an heir succeeding to such a lease will incur a passive title so as to be liable for his father's debts. The principle upon which liability for such debts may be maintained in the ordinary case does not apply here. The heir takes the subject destined to him by a third

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The pursuer reclaimed, and argued;—The original rule of common law was that an heir incurred universal liability, but that had been first modified by the introduction of the *beneficium inventarii*,[1] and his liability was now ascertained by section 12 of the Conveyancing Act of 1874 (37 and 38 Vict. c. 94). Hence the test was whether the heir was *lucratus*. The defender here took in the character of heir,[2] and he was *lucratus*, the business being worth at least £700. It might be that he took as heir of provision—as the Lord Ordinary thought—he was none the less liable for his author's debts, so far as he was *lucratus* by the inheritance. The attachability of the estate by creditors was not the test of passive representation. Benefit to the person succeeding was the essential consideration in the question of liability. The clause excluding assignees was conceived only in the interest of the lessor,[3] and could not be founded on by the heir to

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party, like an heir of entail, and he does not deprive the creditors of his ancestor of any property which they could attach, or make responsible for the payment of their debts'; and then he mentions the case of *Campbell* v. *Gallanach*.

"Professor Rankine on Leases, p. 151 (1st ed.—p. 159, 2d ed.), says,—'It seems the better opinion . . . and to result especially from the fact that the heir to a lease takes as heir of provision (as in entails) and takes nothing of which his predecessor's creditors could make use in the event of his renouncing, that he incurs no passive title by entering, and that these creditors cannot attach the profits of the subject let, so far as accruing subsequently to the death of their debtor.'

"On the other hand, Mr Hunter, in his work on Landlord and Tenant, vol. i. p. 231, expresses an opinion to the opposite effect. He says,—'Although opinions against the heir's liability have been indicated, the view more consonant to principle appears to be in favour of the ordinary rule of representation. The analogy between an exclusive destination in a lease and succession under an entail so far holds good as to cut off the right of the heir of line and to bar alteration by the lessee. But there are no data for so extending the analogy as to alter the effects of representation as known to the common law. In almost every description of lease, agricultural, mineral, or manufacturing, the predecessor must have invested capital, the profits of which are to be reaped during its currency, and accrue to the successor, who thereby becomes *lucratus*, which is of the essence of representation. The exemption from liability, in the case of feudal property, is the creature of statute, and is repugnant to the common law, which therefore will not give it an analogical or constructive extension.'

"The question undoubtedly is one of difficulty; but I incline to the opinion indicated by Professor Bell, and the other writers to whom I have referred who seem to agree with him, namely, that a lease with such a destination, being a subject which the creditors could not attach, an element is awanting which is essential to the existence of passive representation, and that it is immaterial whether the heir, if he takes up the lease, is *lucratus* or not.

"As it is solely in respect of the lease that the pursuer maintains that the defender has incurred a passive title, and is therefore liable in the sums in question, I am prepared to assoilzie the defender from this part of the action."

[1] Ersk. Inst. iii. 8, 50, 68.

[2] Sinclair v. Dunbar, July 18, 1845, 7 D. 1085, 17 Scot. Jur. 559; Leslie v. Macleod, Feb. 21, 1868, 6 Macph. 445, 40 Scot. Jur. 229, June 20, 1870, 8 Macph. (H. L.) 99, 42 Scot. Jur. 489.

[3] Dobie v. Marquis of Lothian, March 2, 1864, 2 Macph. 788, 36 Scot. Jur. 393.

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exempt him from a liability which he would otherwise have incurred. The only case in which the present question appeared to have been raised was decided directly in favour of the pursuer's contention.[1]

Argued for the defender;—The defender was not heir in the sense that he had taken any inheritance from his author; all he had taken was from the lessor. Having acquired no estate, therefore, from his father, he was not liable for his father's debts. If he had renounced the lease the creditors would have had no claim under the lease, and the true test of representation was the passing to the heir of some estate which was subject to the diligence of the ancestor's creditors. There was none such here. The debtor's right in the lease expired with his life. He had no power to dispose of it by will to the prejudice of his heir. The case of *Gallanach* had never been accepted as an authority.[2]

At advising,—

LORD ADAM.—The question is whether, by taking possession of the subjects as heir of his father, no service or other writ having been needed to give him a title thereto, the defender has rendered himself liable for his father's debts on any of the passive titles known to the law. It is not specified on record which of the passive titles the defender is said to have incurred, but I suppose it is that known as *gestio pro hærede*.

The question raised in this case appears never to have been decided except by Lord Newton in the case of *Campbell* v. *Gallanach*,[1] and that case, as appears from the Lord Ordinary's opinion, has never been regarded as an authoritative decision.

For present purposes we must assume that the defender was *lucratus* by taking up the lease, but whether that will make him liable or not depends upon the nature of his own and his father's rights under the lease. Now, in this case, the lease was granted to the father and his heirs, excluding assignees and subtenants. It appears to me that under this destination the rights of the father under the lease were temporary, and limited to his own lifetime. He could not of his own motion effectually assign it, or otherwise dispose of it, to the prejudice of his son, as appears, indeed, clearly from the assignation which he attempted to grant in favour of his wife. On the other hand, I think the defender succeeded to the lease, not as representing his father, but in his own right by force of the destination in the lease granted by the proprietors.

In the next place, it is clear that the position of the creditors of his father was in no way affected by the defender's taking up the lease. If he had renounced it, it would have lapsed to the landlord, and the creditors could in no way have affected it for payment of their debts. That being so, it is difficult to see on what principle the fact that the defender took it up should accrue to their advantage. If in order to acquire a right to the lease the defender had required to serve to or represent his father, that might have followed as a legal consequence. But that is not, in my opinion, the position of the matter, as I think the right to the unexpired portion of the lease never was the property of the defender's father, but belonged to the defender in his own right.

[1] Campbell v. Gallanach, 1 Bell's Com. 78, note 5.
[2] 1 Bell's Com. 78; More's Notes to Stair, 364.

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Mr Erskine in treating of these passive titles, says (iii. 8, 92),—"The only reason for introducing passive titles was that the creditors might not suffer by the devices of heirs, who wilfully stood off from entering, and therefore if the heir who incurs a passive title be made liable as if he had entered the creditors of the deceased can demand no more." In this case it is clear that the creditors of the deceased have suffered no prejudice at all by the act of defender, and I fail to see why he should be made liable to pay the creditors of his father.

I therefore concur in the interlocutor of the Lord Ordinary.

LORD M'LAREN.—This action raises a curious conflict between principle and practice, and if we suppose the case of a long lease extending to ninety-nine or even nine hundred and ninety-nine years (of which examples are known in our practice) granted to a person and his heirs, I am unable to see why in principle any different consequences should be deduced from such a right and the right under a grant in feu to the same person and his heirs. In the latter case no doubt the heir takes his inheritance as heir and represents his ancestor, the representation being limited to the value of the estate which he takes. This principle of the law would appear to me to lead to the recognition of a corresponding liability where the subject is let on lease for a term of years to a party and his heirs. But then, with the exception of a decision by a single Judge, the authority of which has been questioned, there is no authority for extending the principle of representation to an heir taking up a lease; and the fact that in the three centuries during which the decisions of this Court have been reported no decision seems to have been given upon the question, is good evidence that the profession, and the public as represented by the profession, have acquiesced in the view that representation does not apply under leases of ordinary duration and in favour of heirs only. Such constant practice in one direction is just what establishes a rule of common law. On that ground I agree with Lord Adam that this case must be treated as exceptional, and that the heir is to be considered as taking in the character of conditional institute or substitute under the destination, and not by inheritance, and consequently that he is not liable even to the extent of the interest which he takes for his ancestor's debts.

In this decision we only consider the case of a lease in favour of heirs and excluding assignees. It may be that when a lease is of such duration that it amounts in law to an alienation, the exclusion of assignees would be ineffectual, and so the question of representation would not arise in its present form.

LORD KINNEAR.—I have come to the same conclusion. I think that the defender cannot be made liable for his father's debts by reason of his taking up an interest under the lease which did not belong to the father, and which the creditors of the father could not have attached by diligence or reached in any way whatever. The father's right of tenancy determined with his life. He had no power to assign the lease; he had no power to nominate an heir, because it has been decided and cannot now be disputed, that where assignees are excluded and the heir is admitted by the terms of the lease, it must be taken by the heir of line. And therefore there was

nothing in the father under this contract of lease at any time except the interest which it gave him during his own life.

It appears to me, therefore, that the heir does not take as representing his father, but takes directly under a contract which contains an offer to him upon the termination of his father's interest if he chose to avail himself of it. The practical ground upon which it would be unjust and unreasonable to subject the son to liability for his father's debts is just that stated by Professor Bell, that he has taken nothing from the creditors which they could possibly have reached but for him, and therefore his taking under a contract which is open to himself, and himself only, and not to the creditors of his father or to anyone deriving right from the act of his father, ought not to subject him to obligations with which he has otherwise no concern.

Taking that view, I should desire to confine my opinion to the case of such a lease as we have to consider here; that is to say, a lease of such duration as to make the exclusion of assignees both reasonable and effectual. I do not know that the same considerations would apply at all to a lease of so long duration as to be equivalent to a right of property, because in such a case the exclusion of assignees might be ineffectual, and, of course, my opinion would not be applicable to cases of feu—which, both in form and in substance, confer rights of property transmissible from one feuar to another—but applies solely to the particular case with which we are here concerned, which is that of a son taking up the remainder of a lease for a short duration by direct contract with the lessor, and not through or as representing his father.

If these views be sound I am unable to assent to the view expressed or sanctioned by the Lord Ordinary when he says that the heir of the lessee is to be considered as an heir of provision, although I am quite aware that that view has the very high authority of Professor Bell. But, then, an heir of provision represents the deceased, and in representing him he has to perform all the onerous obligations which his ancestor has undertaken, just as much as the heir of line, unless the estate is held under the fetters of an entail. He may be liable in a different order; if the debt is moveable he may have relief from the executor, and as heir of provision in a special subject he may have relief against the heir-general. But his representative character and his consequent liability to creditors are undisturbed. He takes the estate as an inheritance, and subject to the onerous obligations of the ancestor to whom he succeeds. That is the import of the judgment in the very important case of *Leslie* v. *Macleod*,[1] and I think the distinction between the character of an heir of provision taking property as an inheritance from his father, and that of an heir taking up a lease by virtue of a contract with the lessor, is very well brought out by a comparison of the case I have cited with that of *Macalister*,[2] in which the respective rights of successive lessees are explained by the late Lord President. The case of *Macalister*[2] differed from this in this respect, that the lease there was not given to the original lessee and his heirs, but to the original lessee, whom failing, to one particular son; but then the Court had occasion to point out the difference

[1] 6 Macph. 445, 40 Scot. Jur. 229.

[2] Feb. 22, 1859, 21 D. 560.

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between the legal effect of the ordinary words of destination as used in a conveyance of property and the same words when used in a contract of lease. The case is an authority for holding that when a lease of ordinary duration is taken to one who has no power to assign to executors or to nominate heirs, and on his death, during the currency of the lease, to another, the second lessee is not bound by the obligations of the first, because he does not take by inheritance from his predecessor but by contract with the lessor.

I am of opinion, therefore, that the Lord Ordinary's judgment is right, although I am not prepared to accept his Lordship's definition of the character in which the heir takes up the lease.

The LORD PRESIDENT concurred.

THE COURT adhered.

G. BROWN TWEEDIE, Solicitor—CLARK & MACDONALD, S.S.C.—Agents.

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Powell v. Long.

WALTON POWELL, Pursuer (Respondent).—*Jameson—Wilton.*
HARRY ALFRED LONG, Defender (Reclaimer).—*Comrie Thomson—Crabb Watt.*

Reparation—Slander—Issue—Counter Issue.—In an action of damages for alleged slander contained in two leaflets issued by the defender, the pursuer averred that the leaflets falsely and calumniously represented him to be a dishonest and disreputable person, but only proposed to put in issue certain specific charges of dishonesty out of various charges which the leaflets contained. The defender pleaded *veritas*, averred a number of instances, in which he alleged the pursuer to have acted dishonestly, and proposed issues in justification.

Held (1) that the pursuer was entitled to limit his issues to certain of the specific charges of dishonesty contained in the leaflets, although these were only given in illustration of the general attack on his character; and (2) that the counter issues must be limited to these specific charges.

1ST DIVISION. Lord Kincairney.

THIS was an action of damages for slander at the instance of Walton Powell, against Harry Alfred Long, director of missions in Glasgow.

The pursuer averred, *inter alia*, that he had for some years been occupied in publicly opposing infidel opinions, and had recently come to Glasgow, and that the defender being jealous of his success had formed the malicious design of injuring him by spreading false and calumnious reports about his character. (Cond. 3) "In or about the month of August 1895 the defender caused to be printed and published, and to be widely circulated in Glasgow and elsewhere, a leaflet, of which the following is a copy of the letterpress of the front page thereof:—'Liverpool and Southport to the rescue.—Letter from Mr Thomas Thompson (of Liverpool) to Mr H. A. Long.—Sir,—I feel it my duty as a Christian to let you know something of the character of Walton Powell, who is troubling Glasgow, as he has other places. Of his life before his professed conversion I know nothing save what he or Mrs Powell have told me. Since his conversion he was fined at Bristol for violently assaulting a policeman, which is recorded in the *Western Daily Press*, October 1892. He left Bristol for Liverpool, residing there till he left for Glasgow. During his Liverpool residence he has been repeatedly before the County Court for non-payment of

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the accounts of tradesmen—as printers', billposters', milkmen's accounts, &c.—judgment being entered against him in all cases. . . . The saloon carriage he has shewn off was obtained thus: A Mr Barber of Southport had it for sale. After much negotiation, Mr Powell got it under promise of paying £110, but paid down £25, which he borrowed from a colleague, giving the promise of monthly payment of the balance, of which, however, he has paid nothing; and, as a consequence, the mental health of Mr Barber has been seriously injured. —Thomas Thompson. 132 Boundary Lane, Liverpool.'" (Cond 4) "Further, in or about the month of September 1895, the defender caused to be printed and published and widely distributed in Glasgow and elsewhere, a handbill or advertisement, of which the following is a copy of the letterpress on the front thereof:—'Powellism Exploded! —Glasgow can endure its affliction no longer. The doings of Walton Powell to be shewn up, whether in Bath, Bristol, Manchester, Liverpool, Southport, Sunderland, Belfast, or Glasgow.—Public Meeting in the Blythswood Rooms on Monday 16th, at 8 P.M.—To be addressed by . . . Syllabus.—Mr Powell as a Medico in Ceylon. As a salvationist. His work in Bristol. Migrates to Liverpool, where he is converted, April 1893. Makes for Southport. Here is the story of the saloon carriage and horses two. Lectures at Failsworth: borrows largely, forgets to pay. Leaves Liverpool by louping the dyke and giving creditors the rue. The £100 story clearly told. . . .' The letterpress on the back of this handbill or advertisement is in identical terms with the part of the leaflet set forth in cond. 3." Both leaflets were of and concerning the pursuer, and falsely and calumniously represented, *inter alia*, that the pursuer was a dishonest and disreputable person. The defender was the author of these calumnies.

The defender denied that the leaflets would bear the construction which the pursuer sought to put upon them, but assuming that they were capable of that construction, he averred that the representations contained in them were true, and that in the towns where he resided before coming to Glasgow the defender habitually incurred pecuniary obligations, which he was either unwilling or unable to discharge, with the intention of evading payment. He gave a number of instances in which he alleged that the defender had acted in this way. *Inter alia*, the defender stated,—"(2) In the County Court at Liverpool judgment was given against the pursuer, on or about 15th August 1893, for 15s., with 3s. of costs, and on or about 28th September 1893 judgment for 4s. 2d., and 1s. of expenses, was averted by the said sums being paid into Court. Both of these summonses were at the instance of John Fothergill, 4 Dorothy Street, fish-dealer and dairyman." "(8) Mr Pottage, chemist, Picton Road, Liverpool, from 4th March 1893 onwards, gave him credit to a considerable sum, and . . . had to take judgment in the County Court for £1, 0s. 5d."

The defender pleaded, *inter alia*;—(3) *Veritas.*

On 20th December 1895 the Lord Ordinary (Kincairney) approved of the following issues and counter issues for trial of the cause:—

Issues:—

"(1) Whether, in or about the month of August 1895, the defender caused to be printed and published in Glasgow a leaflet in the terms set forth in the first schedule hereto appended; and whether the first portion of the said leaflet, purporting to be a letter from Thomas Thompson to the defender, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents that the pursuer,

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while resident in Liverpool, upon several occasions, got work done for him, or produce or goods supplied to him, by tradesmen there, without the intention of paying therefor, and dishonestly withheld payment of the debts justly incurred by him therefor until actions had been raised and judgment entered against him therefor in the County Court; or makes similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage?

"(2) Whether the said first portion of the said leaflet, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had obtained a saloon carriage from Mr Barber of Southport, therein mentioned, upon the false representation that he would pay to the said Mr Barber the full price thereof on delivery, and that he dishonestly failed to pay to the said Mr Barber a balance of £85 due by him in respect thereof after deducting £25 paid by him on account of said price; or makes similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage?

"(3) Whether, in or about the month of September 1895, the defender caused to be printed and published in Glasgow a handbill or advertisement in the terms set forth in the second schedule hereto appended, and whether the said handbill, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents that the pursuer borrowed money at Failsworth, which he dishonestly failed to repay, and that in or about August 1895 he absconded from Liverpool with the object of eluding his lawful creditors there, and of defrauding them of their just claims; or makes similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage?"

Counter issues:—

"(1) Whether the pursuer, in or about 1893, incurred the debts, amounting to £1, 0s. 3d., to John Fothergill, dairyman and fishdealer, Dorothy Street, Liverpool, and of £1, 0s. 5d. to Mr Pottage, chemist, Picton Road, Liverpool, when he knew he could not pay the said debts and without the intention of paying them, and dishonestly withheld or evaded the payment thereof?

"(2) Whether, in or about the month of June 1895, the pursuer obtained possession of the said saloon carriage belonging to the said Mr Barber under false pretences and promises of payment of the price thereof which he knew he could not fulfil; and whether he dishonestly withheld payment thereof?

"(3) Whether, in or about the winter of 1893-4, the pursuer came under an obligation to repay to Mr Butterworth, within three months, being the stipulated time, the sum of £25, which he had borrowed from him and dishonestly failed to fulfil said obligation; and whether, in or about said month of August 1895, the pursuer left Liverpool with the object of eluding his creditors there, and of defrauding them of their just claims?"

The defender reclaimed, and also presented a note wherein he craved the Lord President, in the event of the Court allowing the issues approved by the Lord Ordinary, to move the Court to vary the first counter issue so that it might read as follows:—"Whether the pursuer incurred the debts or obligations specified in the schedule *

* "SCHEDULE.—In or about the year 1882, £20 to Green & Marah, music-sellers, Bath."

(Here followed a number of entries, but none of them, with the exception

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hereto annexed, and at or about the dates therein mentioned, when he knew he could not pay or fulfil them, and dishonestly withheld or evaded the payment or fulfilment thereof, or of one or more of them, and left Liverpool to elude his creditors, or one or more of them"; or to substitute for these counter issues, approved by the Lord Ordinary, a counter issue in the following terms[1]:—"Whether from the year 1885 to 1895, or thereby, the pursuer has habitually incurred debts or obligations when he knew he could not pay or fulfil them, and dishonestly withheld or evaded the payment or fulfilment thereof, or of one or more of them, and whether in or about the month of August 1895 the pursuer left Liverpool with the object of eluding his creditors?"

At advising,—

LORD PRESIDENT.—It may be conceded to the defender that, if this action is brought for the vindication of character, the pursuer's methods are unusual. The import of the first of the two prints complained of was tersely stated by the pursuer himself, in condescendence 6, to be that he is a dishonest and disreputable person; and there is, to say the least, great plausibility in this averment of the meaning of the print. *Prima facie* the second print complained of has the same drift. Instead, however, of taking a general issue on this footing, the pursuer, by the issues which he asks, limits his complaint to certain specific statements in the two prints, which, to the ordinary reader, might appear to be made rather as illustrations of the general character of a rogue than as separate accusations of fraud.

In my opinion, the pursuer is legally entitled to take the course which he has chosen. First of all, he is entitled to treat the two prints, which were published at different times, as separate libels. Then, I think, he is also entitled to fasten upon one or two specific charges contained in the prints and make them the ground of action, ignoring the general attack on his character, which the specific charges were advanced to support. This course may not commend itself to persons of sensitive honour; but reparation for libel is a remedy not confined to that class. A man whose general character for honesty is indefensible, or is treated (by himself) for the purposes of the action as indefensible, is entitled to redress for accusations of specific acts of dishonesty of which he happens to be innocent, although the measure of damage may be as limited as his own ambition for good fame. In this view, I think that the Lord Ordinary has rightly allowed the first issue. If this be so, the logical result is that the relative counter issue must be correspondingly limited in its scope, and the first counter issue allowed by the Lord Ordinary meets this requirement. The charge which the pursuer resents being a local and specific one,—to wit, that in Liverpool he cheated tradesmen, who took him to the County Court,—it is not to the purpose to say that in ten specified cases he swindled people who either were not swindled in Liverpool, or, although swindled in Liverpool, were not trades-

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of the two debts mentioned in the first counter issue allowed by the Lord Ordinary, were tradesmen's accounts, incurred in Liverpool for which the pursuer had been sued in the County Court.)

[1] Hunter v. Macnaughton, June 5, 1894, 21 R. 850; M'Donald v. Begg, March 1, 1862, 24 D. 685, 34 Scot. Jur. 343; Mason v. Tait, July 10, 1851, 13 D. 1347, 23 Scot. Jur. 667.

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The second issue and counter issue were not in dispute. So far as the third issue and counter issue were discussed, they fall within the same principle as determines the first.

It is unnecessary to add that the decision which I propose does not at all exclude the cross-examination of the pursuer on all or any of the matters which the defender desired to make the subject of counter issues.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

JOHN RHIND, S.S.C.—CUTHBERT & MARCHBANK, S.S.C.—Agents.

No. 100. GEORGE JOHNSTONE AND OTHERS (Johnstone's Trustees), First Parties.—*Craigie—Harvey.*

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MRS ANNE WRIGHT OR JOHNSTONE, Second Party.—*A. S. D. Thomson—Abel.*

DAVID WILLIAM JOHNSTONE AND ANOTHER, Third Parties.—*Craigie—Harvey.*

Husband and Wife—Donation inter virum et uxorem—Implied revocation—Donation of heritage by husband—Subsequent granting of bond over property by him—Liability of wife for expenses connected with property.—A husband purchased a house, taking the title to himself and his wife, equally between them, and to their respective heirs and assignees. At the date of the purchase the house was burdened with a bond and disposition in security, and this was taken over in part payment of the price, the husband and the wife becoming liable in the personal obligation. Subsequently a second bond in security of a loan to the husband was granted over the property, the husband alone becoming liable in the personal obligation, and both he and his wife granting the disposition in security with joint consent and assent. The husband predeceased the wife, leaving a trust-disposition and settlement by which he directed his trustees, in the first place, to pay all his just and lawful debts. The house having been sold by the trustees, with consent of the widow, *held*, in a competition between her and the trustees, that one half of the sum in the bonds and of the expense of discharging the same fell to be deducted from the widow's half of the price, as regarded the first bond, on the ground that the gift to the wife was to be taken *cum onere*, and as regarded the second bond, on the ground that the husband, by burdening the property with the bond, had by implication revoked the gift to the extent of one-half of that bond.

Held further that the following liabilities in connection with the property incurred but not discharged, in the husband's lifetime, viz. (1) for a law-agent's account, (2) for compositions due to the superior, (3) for the expense of confirming the title, and (4) for taxes, feu-duties, and incidental expenses, were personal debts of the husband, and were not chargeable against the widow's share of the price.

2D DIVISION. IN June 1877 John Johnstone bought the house No. 20 Haddington Place, Edinburgh, for £364, the conveyance being taken "to and in favour of the said John Johnstone and Anne Wright or Johnstone, his spouse, equally between them, and to their respective heirs and assignees, heritably and irredeemably." At the date of the purchase the property was burdened with a bond for £100, and the

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property was taken over under burden of this bond in part payment of the price, Johnstone and his wife in the conveyance respectively binding themselves, and their respective heirs and assignees, in payment of the sum in the bond, and agreeing that the personal obligation should transmit against themselves and their foresaids, in terms of the Conveyancing Act, 1874, section 47. Johnstone paid the balance of the price in cash.

Subsequently, on 29th July 1891, Johnstone borrowed a further sum of £130 upon a bond and disposition in security of the Haddington Place subjects. The acknowledgment of receipt and the personal obligation in the bond were granted by Johnstone alone, but the disposition was granted by him and his wife, with joint consent and assent.

Johnstone died on 17th October 1894, survived by his wife and by two children, and leaving a trust-disposition and settlement, dated 28th November 1892, by which he directed his trustees, in the first place, to pay all his "just and lawful debts," and in the second place, to convey one-third of the residue of his estate to his widow, and the remaining two-thirds to his two children.

The trustees having, with the consent of the widow, sold the Haddington Place property, the widow claimed one-half of the price without deduction in respect of the bonds, interest thereon, and the expenses of the discharge of the bonds, all of which she maintained fell to be paid by the trustees out of the husband's estate. The trustees maintained that one-half of the amount of the bonds, and of interest and the expenses of discharge, fell to be deducted from the widow's half of the price.

The widow and the trustees also maintained similar contentions with respect to the following liabilities which had been incurred in connection with the Haddington Place property in the testator's lifetime but had not been discharged by him, viz. (1) the amount of a business account incurred by the testator to Millar, Robson, & Company, S.S.C., in connection with an ineffectual attempt to sell the Haddington Place property; (2) compositions upon several past transmissions of that property, the right of relief for which was of no value, and on the transmission to the testator and his wife; (3) the expense of a minute confirming the title, which had been irritated in respect (*a*) of the omission fully to refer to burdens, &c., in a deed of gift from the Crown in March 1886, and (*b*) of failure timeously to pay compositions; and (4) taxes, feu-duties, and generally all sums of money payable in respect of the Haddington Place property prior to the testator's death.

In these circumstances, a special case was presented, to which the trustees were the first parties, the widow was the second party, and the two children were the third parties.

The following question of law was stated:—"(*a*) Are the first parties, in accounting to the second party for her share of the proceeds of the said subjects in Haddington Place, entitled to debit her with one-half of all or any of the following items, viz. (1) the bond for £100, interest, and expenses of discharging the same; (2) the bond for £130, interest, and expenses of discharging the same; (3) the amount of Millar, Robson, & Company's said business account; (4) the compositions, amounting to £52, 10s.; (5) the expense of the minute confirming the title; and (6) the feu-duty, taxes, and incidental expenses connected with the said property, down to the date

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of truster's death? Or (*b*) Is the second party entitled to receive payment of one-half of the price of the said subjects, without any or what deductions?"

Argued for the first and third parties;—The gift of one-half of the Haddington Place property to the second party was to be taken as subject, in the first place, to the bond for £100 with which the property was burdened at the date when it was purchased by the husband. The general rule was that a gift was to be taken *cum onere*, unless it was clear that the donor intended to discharge the burden. There was no evidence of such intention on the husband's part here. He could of course have directed his trustees to discharge the bond out of his general estate, but an ordinary clause of style directing payment of his debts was not to be construed as importing such a direction. Then as regarded the second bond, the gift being a *donatio inter virum et uxorem*, was revocable by the husband, in whole or in part, expressly or by implication; and the husband, by burdening the property with an additional bond, had by implication revoked the gift to the extent of one-half of the bond, there being no evidence of a contrary intention.[1] The wife was a party to both bonds, and was personally liable under the first. The other items specified in the question, being liabilities incurred in connection with the subject of the gift, were also proper burdens on the gift.

Argued for the second party;—The husband was the real debtor under both bonds, and in his settlement he had directed payment of all his just and lawful debts. *Prima facie*, therefore, the bonds fell to be paid wholly out of his general estate, and not to any extent out of the widow's share of the price; and there was no evidence to rebut this presumption. Of the two the second bond was the stronger for the widow's contention. Under it she was not personally bound to repay the debt, and merely consented to the disposition in security because of the state of the title. A wife consenting to the burdening of her property for her husband's behoof was entitled to relief out of his estate.[2] Further, while the first bond was open to the argument that the wife must take the gift *cum onere*, the only argument against her on the second bond was implied partial revocation of the gift. But it was not sufficient to sustain the inference of an intention to revoke that the husband had for his own convenience burdened—it might be temporarily—property which he had given to his wife. To the second bond the clause directing payment of the husband's debts clearly applied. With respect to the remaining items the case for the widow was very strong. These items were in no sense burdens on the property, but were simply personal debts of the husband. In so far as they were concerned, therefore, the inference of partial revocation was out of the question.

LORD JUSTICE-CLERK.—The question which we have here to determine, as regards the first two items, relates to two bonds, the first for £100, and the second for £130, over a property in Haddington Place which the husband purchased. These bonds the widow maintains should be paid otherwise than by deduction from her half share of these subjects. Now, what came to her was a gift from her husband, and not only was she bound to take that gift subject to the burdens which were on it when she got it,

[1] Stair, i. 4, 18; Ersk. i. 6, 31; Fraser, Husb. and Wife, ii. p. 954.
[2] Williams v. Williams, Nov. 15, 1844, 7 D. 110.

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but her husband was quite entitled to take back again what he had given, in whole or in part. I have therefore no doubt that the widow is not entitled to decree as regards the first and second items. As to the other items, I think she is entitled to obtain what she asks for.

LORD YOUNG.—I entirely agree that the widow must take the property which was gifted to her subject to the burdens which were upon it at the date of her husband's death. He was entitled to put any burdens that he pleased on the property during his life. That disposes of the second bond, and the first bond is in a stronger position even than the second. What the husband gave his wife was a gift with the burdens which were on it. I do not think, however, that it was intended that her share should suffer deduction in respect of all expenses connected with the property. I am of opinion, therefore, that she is entitled to receive payment of one-half of the price of the property, less one-half of the two bonds for £100 and £130 respectively.

LORD TRAYNER.—I agree. About the first bond I think there can be little question. It was a burden on the property when the husband made the donation. As regards the second bond there is perhaps more room for argument, but, I think, no room for doubt. The husband, in the exercise of the power which he unquestionably had over what was virtually his own property, burdened it with a further sum of £130. The wife must take the gift subject to the burdens put upon it by him during his life. With regard to the other items, they were personal debts of the husband, and I do not think they can be made chargeable against the wife.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the question "by declaring that the second party is entitled to her share of the proceeds of the subjects in Haddington Place subject to one-half of the principal sums due under the bonds for £100 and £130, and the expenses of discharging the same: Find and declare accordingly, and decern."

JOHN ELDER, S.S.C.—W. & J. L. OFFICER, W.S.—Agents.

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School Board of Cabrach v. Macdonald.

THE SCHOOL BOARD OF CABRACH, Pursuers (Respondents).—*M'Lennan.*
JOHN MACDONALD, Defender (Reclaimer).—*Abel.*

School—School Board—Nomination by board of person to fill vacancy in board—Whether person nominated may decline office—Education (Scotland) Act, 1878 (41 *and* 42 *Vict. cap.* 78), *sec.* 15.—A person nominated by a school board, under section 15 of the Education (Scotland) Act, 1878, to fill a vacancy caused by the resignation of a member of the board is entitled to decline office, and if he declines he never becomes a member of the board, and does not require to resign.

School—School Board—Resignation of member—Right of board to nominate successor—Education (Scotland) Act, 1878 (41 *and* 42 *Vict. cap.* 78), *sec.* 15.—The Education Act, 1878, section 15, enacts that the vacancy caused by the resignation of a member of the board "shall, where a quorum remains, be supplied by the school board . . . and if the school board fail for eight weeks to fill up the vacancy, the Scotch Education Department may nominate a person to fill the vacancy at such time and place and in such manner as the said department shall determine."

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2D DIVISION. Ld. Moncreiff.

Opinion, that the power of a school board to nominate a person to fill a vacancy caused by the resignation of a member does not *ipso facto* cease on the lapse of eight weeks from the date of the resignation.

IN October 1895 the School Board of Cabrach brought an action against John Macdonald, certificated schoolmaster, who had been appointed teacher of Upper Cabrach Public School in 1887. The leading conclusions of the action were for declarator that the defender had been validly dismissed from the office of teacher in that school, and that his tenure of office came to an end not later than 2d October 1895; for decree ordaining him to remove from the school dwelling-house, and for interdict against him interfering with the school and pertinents thereof. There was also a conclusion for reduction (if necessary for giving effect to the foregoing conclusions) of the interlocutor after mentioned pronounced by the Sheriff-substitute of Banffshire on 20th March 1895.

The action arose in the following circumstances, as appearing from the admissions of the parties.*

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* The parties referred to the following statutory enactments:—

"The Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62) (the principal Act referred to), sec. 13, enacts,—" . . . Should a vacancy occur in any board during the currency of its period of office, such vacancy shall be supplied by the board itself nominating a person to supply such vacancy, and every person so nominated shall go out of office at the same date as the school board."

Section 15, enacts,—"In case the election of any person or persons shall be declared to be invalid, and the full number of members shall not without such person or persons have been validly elected, the school board, if a quorum exist, shall nominate and appoint a person or persons to be a member or members of the school board in room and place of such person or persons whose election has been declared to be invalid . . . and all persons who shall be so nominated and appointed by the school board shall be deemed and taken to be duly elected members of the school board."

The Education (Scotland) Act, 1878 (41 and 42 Vict. cap. 78), sec. 15, enacts,—"A member of a school board may resign on giving to the board one month's previous notice in writing of his intention so to do. The vacancy so caused shall, where a quorum remains, be supplied by the school board in the manner provided in section 13 of the principal Act, and if the school board fail for eight weeks to fill up the vacancy, the Scotch Education Department may nominate a person to fill such vacancy, or may issue an order for an election of a person to fill such vacancy at such time and place and in such manner as the said department shall determine."

The Public Schools (Scotland) Teachers Act, 1882 (45 and 46 Vict. cap. 18), sec. 3, enacts,—"In order to secure that no certificated teacher appointed by and holding office under a school board in Scotland shall be dismissed from such office without due notice to the teacher, and due deliberation on the part of the school board, the following provisions shall from and after the passing of this Act have effect,—that is to say,

"(1) No resolution of a school board for the dismissal of a certificated teacher shall be valid unless adopted at a meeting called not less than three weeks previously by circular sent to each member intimating that such dismissal is to be considered, and unless notice of the motion for his dismissal shall have been sent to the teacher not less than three weeks previous to the meeting. . . .

"(2) No resolution of a school board for the dismissal of a certificated teacher shall be valid unless agreed to by a majority of the full number of members of the board."

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The School Board of Cabrach consisted, in terms of the statutes, of five members, three being a quorum.

By letter dated 30th April 1894 Mr W. M. Skinner, a member of the board, wrote to the board intimating his resignation of office. This resignation was accepted by the board on 9th June.

On 19th July the board appointed the Rev. George G. Macmillan, minister of the parish, to be member in place of Mr Skinner.

This appointment having been intimated to Mr Macmillan, he, on 6th August, sent to the board a letter in which he begged "to state that I shall on no consideration accept office in the Cabrach School Board."

This letter was considered by the board at a meeting on 16th August. The minute of that meeting, relating to the matter, was in these terms:—"The clerk read and laid on the table a letter dated 6th August curt., from Rev. George G. Macmillan, declining to accept the office of member of board conferred upon him at last meeting of the board. The board, in these circumstances, unanimously elected, in the room and place of Mr Skinner resigned, Mr William Beattie junior, Todholes."

Mr Beattie accepted office on 20th August.

On 29th August, one of the original members of the board gave notice that at a meeting of the board, to be held on 27th September, he would move that the defender should be dismissed from his office of teacher at the Upper Cabrach Public School.

Notice of this motion was sent to the four original members of the board, to Mr Beattie, and to the defender, but no notice was sent to the Rev. Mr Macmillan.

On 27th September, at a meeting at which the four original members, together with Mr Beattie, were present, the defender was unanimously dismissed from his office, on a motion made and seconded by original members of the board—the dismissal to take effect three months from the date of the meeting, viz., on 27th December 1894.

Thereafter, the defender having declined to vacate the schoolhouse, the board brought an action in the Sheriff Court at Banff to have him interdicted from entering the school or its pertinents. In this action, the Sheriff-substitute (Grant), by interlocutor, dated 20th March 1895 (being the interlocutor under reduction), refused to grant interdict, holding that when the procedure for the defender's dismissal was initiated the Rev. Mr Macmillan was a member of the board, and consequently that the dismissal was invalid, in respect that no notice of the motion for dismissal was sent to Mr Macmillan in terms of the Public Schools (Scotland) Teachers Act, 1882, sec. 3, subsec. 1.

The board did not appeal against this judgment, but began procedure *de novo* for the dismissal of the defender, on the assumption that Mr Beattie had not been validly appointed a member of the board. On 12th April 1895, the Rev. Mr Macmillan sent a letter to the board formally resigning office as a member of the board. The board (Mr Beattie being absent) accepted this resignation on 13th May, and on 16th May nominated Mr Beattie a member of the board "to fill the vacancy caused by Mr Macmillan's resignation." Mr Beattie accepted office on the same day.

Thereafter at a meeting held on 6th June, at which the four original members and Mr Beattie were present, one of the original members gave notice that on 29th June he would move that the defender be dismissed from office.

Notice of this motion was sent to each of the four original members,

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to Mr Beattie, and to the defender; and on 29th June (the four original members and Mr Beattie being present) the member who had given notice of motion moved that three months after 2d July 1895 the services of the defender as teacher would no longer be required. This motion was seconded by another of the original members, and carried unanimously.

On the expiration of the three months—on 2d October—the defender still declined to remove from the schoolhouse, and in consequence the present action was raised.

The pursuers maintained that the defender had been validly dismissed in terms of the resolution of 27th September 1894; and, in any event, that he had been validly dismissed in terms of the resolution of 29th June 1895.

With respect to the resolution of 27th September 1894, the defender maintained that the Rev. Mr Macmillan on being nominated *ipso facto* became a member of the board; that he could not relieve himself of that office except by resigning; that his letter of 6th August 1894 was an intimation of his intention to resign, but that in terms of section 15 of the Education Act of 1878, his resignation did not take effect until 6th September 1894; that, as he was thus at the time a member of the board, intimation of the notice of dismissal given on 29th August ought, under section 3, subsection 1, of the Teachers Act, 1882, to have been sent to him; and that therefore, as such intimation had not been sent to him, the resolution of 27th September was invalid.

With respect to the resolution of 29th June 1895, the defender maintained that it was invalid, on the ground that at its date Mr Beattie (who took part in the resolution) was not a validly nominated member of the board. The defender contended (1) that Mr Beattie's nomination on 16th August 1894 was invalid, in respect that Mr Macmillan's resignation had not then taken effect; and (2) that Mr Beattie's nomination of 16th May 1895 was invalid under the 15th section of the Education Act, 1878, as having taken place more than eight weeks after the time when Mr Macmillan's resignation took effect, viz., on 6th September 1894. The defender contended that Mr Macmillan's first resignation being effectual, his second was nugatory.

On 15th January 1896, the Lord Ordinary (Moncreiff) pronounced this interlocutor:—"Having considered the cause, finds and declares in terms of the declaratory conclusions of the summons and of the conclusions for removing and interdict, and decerns: Finds it unnecessary to dispose of the reductive conclusions of the summons: Finds the pursuer entitled to expenses," &c.

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* "OPINION.—(After setting forth the facts, including the opinion of the Sheriff-substitute in his decision of 20th March 1895)—I do not find it necessary to decide whether the Sheriff was right or not, because I am prepared to hold that the defender was effectually dismissed in 1895, if not in 1894; but I do not wish to be understood as accepting the Sheriff's views. The Sheriff's judgment involves this—that a person who has been nominated without his knowledge or against his will, and who refuses to accept office and never acts, nevertheless becomes and must remain a member of the board unless he resigns in terms of the statute. The question must be tested by considering how matters would have stood if the question had arisen before the passing of the Education Act of 1878, under which, for the first time, members of the school board were empowered to resign office. In the case of a triennial election, a person nominated without his permis-

The defender reclaimed.

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LORD JUSTICE-CLERK.—The defender in this case maintains that at the date of his first dismissal Mr Macmillan was a member of the School Board, and that notice of the motion for defender's dismissal ought to have been sent to him. Mr Macmillan had been nominated by the School Board, but he had refused to accept office. I see no ground for holding that a person who has been thus nominated is a member if he declines to accept office. The analogy which was attempted to be drawn between this case and the case of an elected member of Parliament is inadmissible, because the position of a member of Parliament is entirely different. He has no right to resign. Although it is common to speak of a member of Parliament resigning, that is not really what takes place. The member cannot resign. He must accept an office under the Crown, the acceptance of which by statute vacates his seat in Parliament. Here we have an entirely different state of

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sion is given an opportunity of having his name withdrawn, because he is entitled to receive notice of his nomination. But in the case of a nomination by a quorum of the School Board, under section 13 of the Act of 1872, no such opportunity is given under the statute to the person nominated to object; and therefore unless he is to be held bound to act against his will, the only thing he can do is to decline to accept. It would be strange if a person nominated by a school board were in this matter placed in a worse position than a candidate nominated at a triennial election. Indeed it is a novel view to me that membership of a school board is a *munus publicum* which a citizen cannot decline to accept.

"But I do not pursue this further, because, in my opinion, the defender was well dismissed in 1895. The pursuers, acting on the view which the Sheriff took that Mr Macmillan became a member of the School Board in July 1894, in order to obviate any difficulty, proceeded *de novo*, obtained from Mr Macmillan a formal notice of resignation of office, and on the expiry of the statutory period of one month, of new appointed Mr Beattie to fill his place. Thereafter, in due form, they again unanimously dismissed the defender. One would have thought that there would have been an end of the matter; but the defender, who had previously * ignored the nomination of Mr Macmillan in order to make out that there was an interval of more than eight weeks between Mr Skinner's resignation and the nomination of Mr Beattie in August 1894, now maintains not only that Mr Macmillan was duly elected, but that he resigned office in August or September 1894; and that as there was an interval of more than eight weeks from the time when his resignation took effect before the Board filled up the vacancy, the right of nomination devolved upon the Scotch Education Department under section 15 of the Education Act of 1878.

"It seems to me that there is a simple ground of decision which renders unnecessary consideration of that defence. The defender is in this dilemma. If Mr Macmillan never became a member of the Board the first dismissal was effectual. If, again, he became a member of the Board he could *ex hypothesi* only demit office by resigning. This he did not do until April 1895, and if so, it cannot be disputed that the defender's objection to the second dismissal fails. Refusal to accept office and resignation are not the

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* In the Sheriff Court action the defender maintained that Mr Macmillan's nomination had no effect in consequence of his declinature to accept, and consequently that Mr Beattie's nomination was void, in respect that it had taken place more than eight weeks after the resignation of Mr Skinner.

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circumstances. I have no doubt that Mr Macmillan could quite competently refuse to accept office. In that view the Board were bound to proceed to get someone else instead of him, and on 16th August 1894 William Beattie was nominated to fill the vacancy. Thereafter, when the proper period of notice had elapsed, which was necessary to enable such a motion to be dealt with, the defender was dismissed. I think this was all perfectly regular.

But it is not necessary to rely solely on this dismissal, as I think there can be no doubt that the defender's second dismissal was entirely free from exception. The defender maintains that Mr Macmillan's letter of refusal to act must be read as a resignation, and that as such it did not take effect till 9th September 1894; that consequently Mr Beattie's nomination on 16th August was inept, there being then no vacancy, and that no nomination by the Board to fill the vacancy was made till 16th May 1895. Accordingly he says that more than eight weeks elapsed before the Board proceeded to supply the vacancy, and that consequently the Board must be held to have lost their right of nomination, which, he submits, after the elapse of eight weeks, passed to the Scotch Education Department. It does not appear to me that the power given to the Scotch Education Department to fill vacancies after the elapse of eight weeks in any way puts an end to the right of school boards to make nominations after the expiry of that period. If the Education Department does not execute the power given to it, I think the School Board can at any time competently exercise the power conferred upon them. But, in any view, I am clear that it is not within the right of a third party to come forward and vindicate the rights of the Department, when the Department is not claiming any rights for itself.

I am therefore of opinion that Beattie was legally nominated in May

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same thing. This ground of judgment may be technical, but it is scarcely for the defender to object to it on that ground. Holding this view, I shall only say a word or two on the remaining answers to the defence, which do not need to be considered if what I have stated is correct.

"As to the defender's contention that the right of nomination devolved upon the Scotch Education Department, the provision in section 15 of the Act of 1878 was introduced for the purpose of meeting the case of a school board refusing or delaying to fulfil their statutory duties. I doubt whether it applies at all to a case like the present, where the remaining members of the Board did not fail to nominate a new member within eight weeks of a vacancy occurring. The nomination may have been invalid on account of the omission of some statutory requisite, but there was a timeous nomination. I would only further observe that, so far as I know, the Scotch Education Department has not hitherto acted on the view that on the expiry of eight weeks the right of nomination passes entirely from the School Board and devolves upon the Department, even where the Department is satisfied that there has been no wilful failure on the part of the School Board, and raises no objection to the vacancy being filled up by the School Board—(See the case of *Skene*, reported in Mr Sellar's Manual, 9th edition, p. 309, note).

"Even if the Court were to hold that Mr Beattie was not validly nominated in May 1895, it does not follow that the acts of the School Board while he acted as a member of it would be invalidated by reason of any judgment subsequently pronounced—(See section 44 of 53 & 54 Vict. cap. 55. Further, if Mr Beattie's vote were left out of view, there remained more than a quorum of the board who voted for the dismissal of the defender. . . . ."

1895, and if that be so, then there is no doubt that whatever may have been the case with regard to the first dismissal the defender was duly dismissed on 29th June 1895. I think the reclaiming note should be refused, and the Lord Ordinary's interlocutor affirmed.

No. 101.
Feb. 27, 1896.
School Board of Cabrach v. Macdonald.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

DALGLEISH & DOBBIE, S.S.C.—CHARLES GEORGE, S.S.C.—Agents.

THE COLONIAL REAL PROPERTY COMPANY, LIMITED, Petitioners.—*W. Campbell.*

No. 102.
Mar. 3, 1896.
Colonial Real Property Co., Limited.
1ST DIVISION.

Company—Reduction of capital—Dispensation with words "and reduced"—Motion for dispensation on presentation of petition for confirmation—Companies Act, 1877 (40 *and* 41 *Vict. cap.* 26), *sec.* 4, *subsec.* 2.—The Colonial Real Property Company, Limited, presented a petition to the Court for an order confirming a reduction of its capital resolved on by special resolution duly passed and confirmed by the company. In Single Bills the petitioners, on moving for intimation and advertisement, craved the Court to dispense, in the meantime, with the addition of the words "and reduced" to the name of the company, in virtue of the powers conferred by subsection 2 of section 4 of the Companies Act, 1877. The Court pronounced an interlocutor granting the dispensation "from this date, and until disposal of the petition."

Albany Steam Shipping Company, Limited, Dec. 11, 1895, *supra*, p. 272, *followed.*

MACANDREW, WRIGHT, & MURRAY, W.S., Agents.

MRS JANE ANDERSON OR JAMIESON (Thomas Anderson's Executrix), First Party.—*D. Dundas.*

MRS JANE ANDERSON OR JAMIESON AND SPOUSE, Second Parties.—*D. Dundas.*

MRS ANNIE ANDERSON OR WALKER, Third Party.—*W. C. Smith.*

No. 103.
Mar. 4, 1896.
Jamieson v. Walker.

Succession—Collation—Intestate Moveable Succession (Scotland) Act, 1855 (18 *and* 19 *Vict. c.* 23), *sec.* 2.—The Intestate Moveable Succession Act, sec. 1, enacts that in cases of intestate moveable succession "where any person who, had he survived the intestate, would have been among his next of kin shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in place of such person," and shall have right to the share of the moveable estate to which he would have been entitled had he survived, "provided always that no representation shall be admitted among collaterals after brothers and sisters descendants."

Sec. 2 enacts,—"Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming the share of the moveable estate which might have been claimed by the predeceaser upon collation if he had survived the intestate."

An intestate, leaving heritable and moveable estate, was survived by an aunt, his sole next of kin, and was predeceased by his uncle, who, had he survived, would have been his heir in heritage and one of his next of kin. *Held* that the only child of the uncle being heir in heritage of the intestate,

No. 103.
Mar. 4, 1896.
Jamieson v. Walker.
2D DIVISION.

was entitled under sec. 2 to call upon the next of kin to collate, although in consequence of the proviso in sec. 1 she would not have been entitled under that section to a share of the moveable estate.

THOMAS ANDERSON, picture-dealer, Glasgow, died on 29th July 1895, unmarried and intestate, leaving estate amounting to £18,750, of which about £17,000 was moveable and £1,750 was heritable.

Anderson's sole next of kin was his aunt, Mrs Jane Anderson or Jamieson, and his heir-at-law was Mrs Annie Anderson or Walker, who was the only child of William Blair Anderson, a predeceasing uncle of the intestate. On 22d August 1895 Mrs Jamieson was confirmed executrix-dative *qua* next of kin of the intestate.

Mrs Walker having claimed right to collate the heritage with the moveable estate,* a special case was presented by (1) Mrs Jamieson as executrix, (2) Mrs Jamieson as next of kin and her husband as her administrator-at-law and for his own interest, and (3) Mrs Walker as heir-at-law.

The second parties maintained that Mrs Jamieson, as sole next of kin of the deceased was entitled to the whole of the moveable estate left by him, and that the third party had no right or title to any share in the same.

The third party maintained that she, the heir in heritage of the deceased, being the only child of William Blair Anderson, who, had he survived, would have been not only heir in heritage, but also one of the next of kin of the deceased, was entitled to collate the heritage to the effect of claiming one-half of the combined heritable and moveable fund, as her father could have done if he had survived the deceased.

The questions of law were,—"(1) Is Mrs Jamieson, as the sole sur-

* The Intestate Moveable Succession Act, 1855 (18 and 19 Vict. c. 23), section 1, enacts,—"In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled: provided always, that no representation shall be admitted among collaterals after brothers and sisters descendants. . . ."

Section 2 enacts,—"Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heir-portioners of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation."

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viving next of kin of the said Thomas Anderson, entitled to the whole of his moveable estate, to the exclusion of any right of collation by the heir-at-law, Mrs Walker? Or (2) is Mrs Walker entitled to collate the heritage, and to receive one half of the combined moveable and heritable estate, the other half thereof falling to Mrs Jamieson?"

Argued for the second parties;—At common law the third party could not collate, because at common law the heir in heritage was not entitled to collate in moveables, unless he himself was one of the next of kin,[1] which the third party was not. Nor was her right better under the Intestate Moveable Succession Act, 1855. While the language of section 2, taken by itself, was perhaps sufficient to support her claim, that section could only be read along with section 1; the section began "where the person predeceasing," not "a" person predeceasing. Then, in consequence of the provisions of section 1, the third party, being the child of an uncle, would not have been entitled to share in the moveable estate (along with her aunt) as representing a person who would have been among the intestate's next of kin.[2] It followed that she was not entitled to share by right of collation.

Argued for the third party;—Sections 1 and 2 were separate and independent, and the third party fulfilled in every particular the conditions of section 2, and was therefore entitled to collate.[3]

At advising,—

LORD TRAYNER.—The question presented to us for decision under this special case does not appear to me to be attended with any difficulty. Indeed, if the view which I take is correct, the question is already decided by the express and unambiguous language of an Act of Parliament. Prior to the passing of the Act 18 and 19 Vict. cap. 23, an heir in heritage had no right of collation unless he was also among the next of kin of the deceased. By the second section of that Act, however, the right to collate was extended. It provided that when the person who would have been heir in heritage of an intestate predeceased the intestate, his child (being the heir in heritage of the intestate) should have the same right to collate which his parent would have had had he survived. That is exactly the case here. It was admitted in the argument addressed to us by Mr Dundas that this must be the result if the second section of the Act I have cited is read as a substantive provision independent of the first section. I think it is the result whether the sections are read separately or together. But I have no difficulty in coming to the conclusion that the sections are independent of each other. They deal with separate matters, and are intended to effect changes in our law quite distinct from each other. The first clause introduced representation in intestate moveable succession, thus admitting persons who were not next of kin to share in the intestate succession with persons who were. The second introduced the right of an heir in heritage who was not of the next of kin to the benefit of collation. I am therefore

[1] Anstruther v. Anstruther, Jan. 20, 1836, 14 S. 272, at p. 282, 8 Scot. Jur. 152; M'Caw v. M'Caw, Nov. 28, 1787, M. 2383.

[2] Ormiston v. Broad, Nov. 11, 1862, 1 Macph. 10, 35 Scot. Jur. 8; M'Laren on Wills and Succession, 3d edn. p. 299.

[3] Erak. Inst. iii. 9, 3.

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for answering the first question in the negative, and the second question in the affirmative.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the first question in negative and the second in the affirmative.

MACANDREW, WRIGHT, & MURRAY, W.S.—FORRESTER & DAVIDSON, W.S.—Agents.

No. 104.

Mar. 4, 1896. Dolan v. Burnet.

MRS MARY DOLAN, Pursuer (Appellant).—*Graham Stewart.*
ROBERT BURNET, Defender (Respondent).—*Shaw—T. B. Morison.*

Reparation—Negligence—Defective condition of shop floor—Liability of tenant of shop for injuries to customers—Latent defect.—In an action of damages against the tenant of a shop by a woman who, after making some purchases, had fallen through the floor of the shop into a cellar, the following facts were proved:—The shop was an old building. The portion of the floor which gave way underneath the pursuer had been patched many years before, the patching having been effected by sawing off the flooring flush with the two adjacent joists, and nailing pieces of wood termed "fillets" along the joists, upon which was supported the new flooring. The flooring probably gave way owing to the nails fixing the fillets to the joists having become insufficient for that purpose. Previous to the accident, the surface of the floor was to all appearance safe. Anyone going below into the cellar might have seen that the portion in question of the floor rested on fillets and not on the joists; but there was evidence to the effect that such a person merely by looking upwards would not have noticed anything wrong. The defender, who was a yearly tenant, and had been in possession for about three years, had never made any inspection of the floor, and had never been in the cellar (which, though within his tenancy, he did not use), and did not suspect that anything was wrong with the floor.

Held (*diss.* Lord Trayner) that although the defender had no reason to suspect that the floor was insecure, he was in fault in not having it inspected and kept in a safe condition for customers, and that he was liable in damages.

2D DIVISION. Sheriff of Lanarkshire.

IN August 1895, Mrs Mary Dolan, wife of William Dolan, bricklayer, Glasgow, with consent and concurrence of her husband, raised an action in the Sheriff Court at Glasgow, against Robert Burnet, grocer at, and tenant of, the shop 52 Stevenson Street there, for damages on account of injuries sustained by her in consequence of falling through the floor of the defender's shop into a cellar, the floor having given way when she was leaving the shop after making purchases in it.

The pursuer averred,—(Cond. 4) "The said fall and pursuer's injuries were due to the fault of the defender. The said shop is in an old building, and the woodwork of the floor is old and worn. It is defective in respect that the floor, when the accident occurred, was patched in an imperfect manner—the flooring was not nailed on to the joists, but on to a strip of wood which was nailed on to the joist at the place of accident. . . ."

In his statement of facts the defender averred,—(Stat. 5) "The floor of the shop in question was an old floor, but quite sufficient for the purpose required, and never shewed any signs of giving way, or the floor would have been put right."

The pursuer pleaded;—(1) The pursuer having sustained loss, injury, and damage through the fault of the defender, is entitled to

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compensation, with expenses. (2) The defender being tenant and occupant of said shop, warrants to the public that the same is safe.

The defender pleaded;—(1) The pursuer not having sustained any loss or damage for which the defender is liable, defender should be assoilzied, with costs. (2) The slight injuries sustained by pursuer having been occasioned through no fault of defender, or through circumstances for which the defender can be held responsible, defender should be assoilzied, with costs. (3) The floor in question having shewn no previous sign of weakness the defender is not responsible for an unexplained accident.

A proof was allowed. The following was the import of the evidence:—The building in question was at least fifty years old. The extent of flooring which gave way underneath the weight of the pursuer (which was about fourteen stone) was about two feet square. This portion of the floor had been patched up by the flooring between the two adjacent joists being sawn off and replaced by new flooring. There was no positive evidence as to when or why this patching was put in. William Lorimer, the landlord's factor, deponed that he "did not know that had been done, for it was before I had anything to do with the property. It must have been done previous to 13½ years ago, for I have been factor for that time." As the old flooring had been sawn off flush with the joists, the new flooring could not have rested on them, and consequently strips of wood termed "fillets" had been nailed along the joists, and the new flooring rested on these fillets. Two joiners, who (on the landlord's instructions) repaired the place after the accident, deponed that the giving way of the floor was probably due to the nails fixing the fillets to the joists becoming defective or losing their hold. The surface of the floor, though worn, was to all appearance safe and sound. The cellar was about five feet high, and was well lighted. Anyone going below into it could at once have seen that the portion in question of the floor rested on fillets and not on the joists, as the ceiling of the cellar was not plastered; but the joiners already mentioned gave it as their opinion that the defender or his servants would not have noticed that anything was wrong with the fillets merely by looking up at the floor from the cellar.

The defender had at the date of the accident been tenant of the shop for over three years—on a yearly tenancy. The cellar was part of the subjects let to him. He deponed,—" . . . If there is anything I see going to be dangerous I send word at once to the [landlord's] factor to get it sorted. I did not examine this floor carefully at different times, it is not the rule in the trade. I did not ask anyone to go over the floor to see if it was safe. I took the premises to be safe, and I never heard of anyone going over a floor before for that purpose. I never looked up from the cellar to see if the floor was safe, because we never used the cellar. . . . Cross.—It is the landlord's duty to keep my floor in order, and he has always done so.* That is the custom of the trade. For any alterations that we are going to make we require to get the landlord's sanction, and anything the landlord has to do he generally does it immediately. I did not see anything wrong with the floor. That part of the floor

* Lorimer, the landlord's factor, and William Logan, another house-factor in Glasgow, gave evidence to the effect that it was the landlord's duty, according to the custom in Glasgow, to see to the repair of the floor in the case of yearly tenants.

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that gave way is not a place we use greatly [and was, as witness explained in another part of his evidence, back from the counter, and out of the ordinary line used by customers]. We generally put barrels or boxes on it. If there had been any possible weakness, that would have found it out, because there are sometimes good weights on the floor with these barrels and boxes. I have seen as much as 2 hundredweights and 2½ hundredweights there, and I have seen as high a weight as 3 hundredweights, but I never saw any signs of weakness or of the thing giving way."* Witness further, and in answer to the Court, gave this evidence,—"During the three years I have been in the shop two or three repairs were made at the back of the counter, and I think there was a small repair made at the front of it, but not at that part that gave way . . . I must say the building is in a rotten condition. I had no reason to suppose that the floor was in a rotten condition; when it was always kept in repair I thought it safe enough. I did not think the floor was rotten. . . . I did not know the floor was patched. I did not know that the floor was not nailed on to the joists. . . ."

On 18th December 1895 the Sheriff-substitute (Balfour) pronounced this interlocutor (after findings in fact):—"Finds that it was the duty of the defender to use reasonable care in examining the condition of his shop so as to discover defects and dangers to prevent accidents to his customers, but there is nothing to shew that the defender did not exercise such care and diligence: Finds that the accident happened through the pursuer (who weighs fourteen stone) standing upon a patched portion of the floor which gave way with her, and that patched portion was quite unknown to the defender, and he could not have discovered it by the exercise of ordinary care: Therefore assoilzies the defender from the conclusions of the action," &c.

The pursuer appealed, and argued;—The defender, the tenant, by inviting customers to his shop, impliedly undertook that his premises should be in a safe condition.[1] If it was necessary to shew that he had been guilty of personal fault that was established. The proof shewed that the floor had been patched, and the defender admitted that he had taken no means whatever to make such inspection and examination of the premises as he was bound to do. Now, it was clear that both in Scotland and England the landlord, in such a condition of the premises, would be held to be in fault, and therefore liable. If that were so, it followed that the tenant, whose liability was wider, would also be held liable.[2]

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* Samuel M'Ivor, who had been shopman with the defender for over two years, deponed that he had never observed anything wrong with the floor, and corroborated the defender generally as to the use made of the part in question of the floor.

[1] Francis v. Cockrell, 1870, L. R., 5 Q. B. 501, *per* Baron Cleasby at p. 514; Grote v. The Chester and Holyhead Railway Co., 1848, 2 Welsby, Hurlstone, and Gordon's Exchequer Reports, 251.

[2] Weston v. Incorporation of Tailors of Potterrow, July 10, 1839, 1 D. 1218, *per* Lord Medwyn, 1228, 11 Scot. Jur. 597; Moffat & Co. v. Park, Oct. 16, 1877, 5 R. 13; Campbell v. Kennedy, Nov. 25, 1864, 3 Macph. 121, 37 Scot. Jur. 62; Baillie v. Shearer's Judicial Factor, Feb. 1, 1894, 21 R. 498; Hay v. Littlejohn, Feb. 16, 1666, M. 13,974; Caledonian Railway Co. v. Greenock Sacking Co. and Others, May 13, 1875, 2 R. 671. Cleghorn v. Taylor, Feb. 27, 1856, 18 D. 664, 28 Scot. Jur. 287; Coupland

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Argued for the defender;—The accident was due to a latent defect in the floor, and no one therefore was liable for the accident. At all events, the defender was not liable, or fault had not been proved against him. It was not clear upon the evidence that the defender could have discovered any patching even if he had gone into the cellar below. The defender, at anyrate, was under no duty of inspection. It was said that the pursuer having been invited by the defender to enter his shop was entitled to rely upon the shop being safe, and thus was entitled to damages from the defender on account of injuries due to its insecurity. But in law the landlord was liable for the sufficiency of the premises, and if he failed to keep the floor in repair, and the tenant did not know and had no reason to suspect that anything was wrong, the landlord might be liable, but not the tenant.[1] The mere fact that the tenant was in occupancy of the premises would not make him liable.[2]

At advising,—

LORD YOUNG.—On 27th June 1895 Mrs Dolan, wife of a bricklayer, after making some purchases in a grocer's shop kept by Robert Burnet in Stevenson Street, Glasgow, turned to leave the shop by the door by which she entered, when she walked upon a weak part of the floor, which gave way under her weight, with the result that she fell into the cellar beneath and suffered personal injuries.

In this action of damages against the grocer I think the only fact which is distinctly admitted is that the floor did give way under Mrs Dolan's weight, and that she suffered the injuries complained of.

The pursuer says (and this is the ground of her action) that the floor gave way because, owing to age, tear and wear, and its being repaired by patching in an improper manner, it was insufficient for the purpose to which it was put.

The defender, on the other hand, says that although it gave way it was quite sufficient for the purpose of a shop floor. He says, in statement 5, "The floor of the shop in question was an old floor, but quite sufficient for the purpose required, and never shewed any signs of giving way, or the floor would have been put right"; and it would appear from his third plea in law that he maintains that the accident is unexplained.

Now, in point of fact, I am prepared to affirm on the evidence the pursuer's averment as regards the insufficiency of the floor, and to negative that of the defender that it was sufficient. In short, I am prepared to affirm what the pursuer says in the fourth article of her condescendence.

That being so, the question of law only remains whether there was fault

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v. Hardingham, 1813, 3 Campbell, 397; Robbins v. Jones, 1863, 33 L. J. C. P. 1, *per* C. J. Erle, p. 5; Gwinnell v. Eamer, 1875, L. R., 10 C. P. 658, *per* J. Brett, 661; Beven on Negligence, pp. 487 to 490.

[1] Campbell v. Kennedy, Nov. 25, 1864, 3 Macph. 121, *per* Lord Neaves, 125, 37 Scot. Jur. 62.

[2] M'Martin v. Hannay, Jan. 24, 1872, 10 Macph. 411, 44 Scot. Jur. 230; M'Ewen v. Lowden, Oct. 26, 1881, 19 S. L. R. 22; Miller v. Hancock, L. R. [1893], 2 Q. B. 177, *per* Lord J. Bowen, p. 181; Moffat & Co. v. Park, Oct. 16, 1877, *per* Lord Gifford, 5 R. 17; M'Nee and Others v. Brownlie's Trustees, June 24, 1889, 26 S. L. R. 590; Henderson v. Munn, July 7, 1888, 15 R. 859; Ross v. Fedden, 1872, L. R., 7 Q. B. 661.

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or anything in the defender's conduct affording a ground of action against him. I am of opinion that there was.

Now, I confess that I had not, till this case occurred, thought it doubtful that a shopkeeper who opens the door of his shop to the public and invites them to enter as customers for his own gain and profit, is bound to have the floor of his shop in a safe and sufficient condition, and that a floor which will not bear the weight of those entering, but gives way, is not in a safe and sufficient condition. I think it will be admitted that when a shop is first constructed there is a duty to construct the floor so that it shall be safe as a shop floor,—that is to say, that it shall be of sufficient strength to bear the weight of customers invited to come to the shop, and that if it is not, but is nevertheless used as a shop, there is blame in someone.

Then I suppose it is equally clear that a shop floor, however safe it is made at first, will not remain so unless it is attended to.

Then I should say it is also a clear proposition that a person who takes a shop as tenant, or buys it as proprietor, or takes it over as a gift, or gets the use of it from a friend as a favour without paying any rent for it, and who uses it as a shop, is bound to see that it is in a safe condition for the use to which he puts it, and if it is not, he will be responsible to those who suffer, and if when he acquires it in property, or lease, or by gift, or by mere permission, it is in a safe condition, it will be for him to see that it continues so as long as he continues to use it.

Now, I do not think that a person who suffers from its not being attended to and becoming insufficient is interested to inquire whether the man who puts it to use has a contract with another person regarding it or not. If the person who uses it has a contract with the landlord, it will depend upon the contract whether the landlord was bound to him to keep it safe during the tenancy. We have laws on the subject, and one permanent one is that the contract between them is such as they choose to make it—either that the tenant is to take it as it is and see that it is sufficient for his use without any claim against the landlord, and maintain it, or that the landlord is to put it in a safe condition, and the tenant is to keep it so. All that depends upon the contract between them. If the landlord fulfils his contract, the tenant will not have any relief against him. If the landlord fails to fulfil his contract, then the tenant will have relief. But, in my opinion, the persons whom the tenant invites into his shop, and who frequent it, have no occasion to inquire into the contract between the shopkeeper and another person.

Now, the defender here says it was for the landlord to keep the floor in repair. I cannot enter into that. If it was, and the landlord failed in his obligation, he will be liable to relieve him of the consequences. If it was not, then the result is, the shopkeeper has no claim against him for relief; but his duty remains the same to his customers—to see that the shop shall be in a good condition while he uses it as such. Of course nothing I have said is meant to indicate the idea that a shopkeeper guarantees that the floor will not ever give way. He would not be responsible if the floor gave way under an earthquake, or from the effects of a dynamite explosion.

On the whole matter I am prepared to affirm what I stated previously,

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that the floor was in a rotten condition owing to age and bad patching, and gave way from inattention; that the shopkeeper was bound to see that it was in a safe condition, and was kept so; and that having failed in this he is liable for the accident to the pursuer.

LORD TRAYNER.—This is an action for damages, and before the defender can be found liable, it must be shewn that the damage or injury complained of, and for which compensation is sought, has been occasioned by his fault. This rule is well settled, and needs no citation of authority in its support, but I take leave to quote a single sentence from the opinion of Lord Gifford in the case of *Moffat & Company* v. *Park*,[1] as a sound expression of the rule. His Lordship says,—"In all cases of damage for which reparation is sought, I think it may be regarded as the leading principle that the damage or injury must be caused by the *culpa* or fault of the defender. The pursuer must shew that the defender is to blame."

The pursuer in this case has shewn that she was injured, but has she shewn that she was injured through the fault of the defender—that the defender was to blame? That is the one question raised here. I have considered this case very carefully, but have failed to find any evidence that the defender was in fault.

I admit that the defender, by keeping open shop for the sale of certain commodities, invited the public to enter his shop for their purchase; that the pursuer, in acceptance of that invitation, entered the defender's shop; that while there she fell through the floor of the shop and was injured; and that the shop floor was defective and in an unsafe condition.

It is proved to my satisfaction—I do not think the matter is open to doubt or controversy—that the defender was not aware of the defective condition of the floor. On the contrary, he had reason to believe that the floor was in a safe condition, as he had used it for some three years, in a way which tested its sufficiency for all the purposes of his business, sufficient to bear the weight of any and all customers who had used it, and sufficient to bear the still greater weight of goods placed upon it. At the place where the floor gave way there had been a repair executed, and perhaps badly executed, but of this the defender had no knowledge. It was a repair executed before he entered on the tenancy of the shop. So far, it appears to me, there is no room for imputing any fault or blame to the defender in connection with the defective floor. The only fault alleged against him is that he could have discovered the defect which led to the pursuer's injury if he had gone down to the cellar below and there examined the floor, the floor of the shop being the ceiling of the cellar. I am by no means satisfied on the proof that he could have done so. The proof is certainly not all one way on this subject. I doubt—indeed more than doubt—whether the defender, who is a grocer, was competent to make such an examination, and whether any examination by him would have informed him that the floor of the shop was defective or unsafe. But I am far from thinking that any such examination was a duty incumbent on the defender for the neglect of which he would be liable in damages as for fault. The cellar, although

[1] Oct. 16, 1877, 5 R. 17.

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part of the premises let to the defender and occupied by him, was never used by him. It still contained, and only contained, some old boxes and other rubbish which the preceding tenant had left when he vacated the premises years before. The defender had therefore, in ordinary course, no occasion to visit or inspect the cellar.

I demur to any finding to the effect that a tenant of a house or shop, into which he invites others for the purposes of business, is bound in all circumstances to guarantee its safety and stability to all comers. He is bound undoubtedly to make secure anything which he knows to be defective or dangerous, and if he has any reason to doubt or suspect the safety and stability of his premises, to examine, inquire, and so far as may be necessary to repair or strengthen. But when a tenant takes a house or shop, he is entitled, in my judgment, to rely (having no knowledge or reason to suspect the contrary) upon the premises let to him being reasonably sufficient for the purposes for which they are so let. If he is not, then every tenant of a shop will be bound to examine floor, ceiling, walls of the premises proposed to be leased by him, so as to insure that they are as represented, or take the risk of an action of damages if through any cause, short of a *damnum fatale*, injury or damage may be caused to any customer who takes advantage of his open door. Such a burden has never, so far as I know, been placed upon a tenant before.

The judgment which your Lordships propose to announce appears to me to be contrary to the views expressed by the Court in the case of *M'Ewen* v. *Lowden*,[1]—a case in all material respects (so far as any legal principle is involved) not distinguishable from the present.

For the reasons I have stated I must respectfully dissent from the proposed judgment. I am of opinion that no fault has been established against the defender, and that the interlocutor appealed against is well founded and should be affirmed.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Young, and in the grounds of his judgment.

The defect in the floor was one which was visible from part of the premises, viz., a cellar. The defender, it is true, did not use the cellar below. But it was let to him, and it is in evidence that if an inspection had been made of the ceiling of the cellar the defect would have been seen.

The view I take is, that when a tenant of a shop invites customers to do business with him in that shop, he must be found liable if anything happens which could have been prevented by his inspecting the premises with a view to thus seeing that they were in safe condition.

It may be that a tenant in such a case will not be the ultimate sufferer for the consequences of the accident to a person visiting the premises. He may have such terms in his contract with his landlord as will enable him to recover from him any damages he may be found liable to pay to the injured party. But with this the injured party is not concerned. His injury is caused to him by the insecure state of premises which the tenant throws open to him. It is a question of fact whether such injury was the result of

[1] 19 S. L. R. 22.

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fault. Such an accident may happen from a latent fault which reasonable inspection could not bring to light. But if the defect was easily observable by a person exercising reasonable care, either directly or by the employment of persons competent to make inspection, then I think that to a member of the public who comes on invitation, the tenant in occupation who so invites him must be primarily liable for injuries resulting from the bad state of repair of the premises.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—"Sustain the appeal and recall the interlocutor appealed against: Find in fact . . . that the said accident was caused owing to the floor being through old age insufficient and not reasonably safe; that the said defective condition of the said floor was due to the fault of the defender: Find in law that the defender is responsible for said accident: Therefore ordain the defender to make payment to the pursuer of the sum of £25 sterling," &c.

A. C. D. VERT, S.S.C.—JOHN VEITCH, Solicitor—Agents.

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Mar. 4, 1896.
Millar v. Trustees for Endowment Committee of Church of Scotland.

JAMES MILLAR, Petitioner (Appellant).—*Ure—Sym.*
TRUSTEES FOR THE ENDOWMENT COMMITTEE OF THE CHURCH OF SCOTLAND, Respondents.—*Cheyne—Clyde.*
ROYAL EDINBURGH ASYLUM FOR THE INSANE, Respondents.—*R. E. M. Smith.*

Property—Superior and Vassal—Building Restrictions—"Villa."—A feu-charter provided that the vassal should not be entitled to erect on the feu "buildings other than villas." He proposed to erect thereon a row of contiguous self-contained houses of two storeys, with separate gardens, before and behind. The superior objected.

Held that the proposed buildings were not "villas."

2D DIVISION. Dean of Guild Court, Edinburgh.

By feu-charter dated 29th January 1870, David Deuchar, of Morningside, disponed to the Corporation of the Royal Edinburgh Asylum for the Insane part of the lands of Morningside under certain conditions, including (2) "that the said Corporation shall not be entitled to erect on any part of the stripe of ground hereby disponed houses or buildings, other than villas or offices, except with the consent of me and my heirs and successors, and said stripe of ground shall not be used for any purpose injurious to the amenity of the adjoining ground."

By disposition dated 1890, Mr Deuchar conveyed the superiority of the ground to the trustees of the Endowment Committee of the Church of Scotland.

By disposition dated 9th January 1895, which imported the conditions of the feu-charter dated 29th January 1870, the Asylum Corporation disponed the ground to James Millar, builder, Edinburgh.

In November 1895, Millar presented a petition to the Dean of Guild Court, Edinburgh, for warrant to erect "six self-contained dwelling-houses" on the south side of Morningside Park, Edinburgh, and on the ground disponed to him.

The plans produced with the petition shewed a row of contiguous houses of two storeys, with gardens in front about 15 feet square, separated by iron railings and with separate gardens behind.

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The superiors, the trustees of the Endowment Committee of the Church of Scotland opposed the petition, *inter alia*, on the ground that the houses which it was proposed to erect were not "villas" within the meaning of the feu-charter.

On 2d January 1896 the Dean of Guild sustained this defence and refused the warrant.*

The petitioner appealed, and argued;—Restrictions upon property such as the one in question fell to be construed as favourably as possible to the disponee. The houses proposed fulfilled all the conditions of the modern idea of a "villa." They were houses of an ornamental character, such as were used in the suburbs of a town, each occupied separately as a dwelling-house, and with plots of ground in front. It was not essential that they should each be surrounded on three sides by vacant ground. The undernoted cases[1] shewed that where it was intended that a villa should stand by itself, the feu-contract provided that it should be "self-contained" and "detached."

Argued for the respondents;—The petitioner's contention involved the unwarrantable view that "villas" and "dwelling-houses" were synonymous terms. The cases cited by him did not aid him, for it was clear that in them the word "detached" was inserted into the feu-charters in order to avoid the risk of "semi-detached" houses being erected. The skilled opinion of the Dean of Guild and his council made it clear that the proposed buildings were not "villas" in the present sense of that term.

At advising,—

LORD JUSTICE-CLERK.—The question in this case is whether what the appellant proposes to do is in accordance with the condition in the title, which requires that no houses or buildings shall be erected on the feu "other than villas or offices," that being one term for a building for residence with suitable offices.

The term "villa" is an expression the meaning of which may change or be modified at different times. It is a term to be interpreted by practical men engaged in the building trade and other trades connected therewith.

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* "NOTE.— . . . In order to be able to pronounce an authoritative opinion on this point, whether the proposed buildings were truly 'villas,' the Dean of Guild thought it right to call a special meeting of his Court, which was attended by all the members except two, who are merchants. The members present included, besides the Dean of Guild, who is a civil engineer, an architect, house-agents, licensed valuators, and masters of the trades of builders, joiners, and cabinetmakers. The members of the Court were unanimously of opinion that the term 'villa' still denotes exclusively a self-contained house of individual and separate character, standing within its own grounds; further, that if any modification of the term were intended, it would require to be expressed, as by the use of the term 'semi-detached villa'; and that at the present day the semi-detached villa represented the furthest extent to which the qualification of the original meaning of the term villa had been recognised by the building trade.

"The Dean of Guild and his Court are unanimously of opinion that the houses proposed by the petitioner would form a row or short street of self-contained houses. . . . "

[1] Meldrum v. Kelvinside Estate Trustees, June 21, 1893, 20 R. 853. Miller v. Carmichael, July 18, 1888, 15 R. 991; Buchanan, &c. v. Marr, June 7, 1883, 10 R. 936; Naismith v. Cairnduff, June 21, 1876, 3 R. 863.

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Here we have the decided opinion of the Dean of Guild, who is a civil engineer, and other members of his Court—builders and other men of business, skilled and experienced in these matters, and having no interest in the case—that the houses in question being built up against one another and joined together are not "villas," as the term is at present understood. I think we must accept the opinion of these gentlemen on these subjects, and affirm the judgment of the Dean of Guild Court.

LORD TRAYNER.—The petitioner is by his title restricted from erecting on his land anything but "villas or offices," which I take to mean villas for residences with suitable accommodation offices.

The question here is, whether the buildings proposed to be erected are of this character. From the discussion before us it appears that the term "villa" has a somewhat technical meaning, and we are thus under the necessity of resorting to the opinions of experts to ascertain what the technical language of the petitioner's title imports. The Dean of Guild and his council (whom he has consulted) are all experts in this matter, and are just the class of men whose opinion or evidence in such a matter would be taken. As they are unanimous in thinking that the proposed buildings are not villas, I think the only course open to us is to affirm the judgment appealed against, and dismiss this appeal.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT dismissed the appeal, and affirmed the judgment of the Dean of Guild Court.

A. & A. S. GORDON, W.S.—MENZIES, BLACK, & MENZIES, W.S.—SCOTT-MONCRIEFF & TRAIL, W.S.—Agents.

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Mar. 4, 1896.
Metcalfe v. University of St Andrews.

THE REV. WILLIAM M. METCALFE AND OTHERS, Pursuers (Reclaimers). —*Sol.-Gen. Murray—Dickson—Pitman.*
THE UNIVERSITY OF ST ANDREWS, Defenders (Respondents).—*Johnston—Clyde.*

Jurisdiction—Privy Council—Ordinance of University Commissioners—University (Scotland) Act, 1889 (52 *and* 53 *Vict. c.* 55), *sec.* 16—*Agreement under this section.*—An action was brought for reduction (1) of an agreement bearing to be on behalf of the University Court of St Andrews University and on behalf of the Council of University College, Dundee, consenting to the affiliation of the said College to the University of St Andrews, and relative documents; and (2) of an order by the University Commissioners proceeding on the agreement affiliating the College with said University. The Second Division assoilzied the defenders.

In an appeal the House of Lords pronounced a judgment finding that the pursuers were entitled to reduction of the order, on the ground that it was an ordinance in the sense of the Universities (Scotland) Act, 1889, and that it had not been laid before both Houses of Parliament, and thereafter submitted for the approval of Her Majesty in Council in terms of the statute, and remitting to the Second Division to pronounce decree to that effect, and "to dispose of the conclusions of the summons with respect to" the other documents sought to be reduced.

At the date when the Second Division were called on to dispose of these conclusions a second ordinance had been issued by the University Commis-

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sioners to the same effect as the former, and proceeding on the same agreement; but with regard to this ordinance the statutory procedure had been followed, and the ordinance was before the Privy Council for approval.

The Court *dismissed* the remaining conclusions for reduction on the ground that the validity and effect of the documents sought to be reduced were questions within the jurisdiction of the Privy Council in dealing with the second ordinance.

2D DIVISION.
Ld Stormonth-Darling.

(ANTE, Dec. 21, 1894, vol. xxii. p. 210, and May 7, 1895, vol. xxii. (H. L.) p. 14.)

On 8th April 1895 the House of Lords pronounced a judgment declaring that the pursuers and appellants were entitled to a decree reducing and setting aside the orders of the Scottish Universities Commissioners of the 21st of March and the 10th of April 1890, and remitted the cause to the Second Division of the Court of Session with directions "to pronounce decree to that effect, and to dispose of the conclusions of the summons with respect to the documents first, second, and third called for and sought to be reduced." These documents were (1) a minute of the University Court of the University of St Andrews dated 15th February 1890, bearing to consent to the union of University College, Dundee, and the University of St Andrews; (2) the agreement between the University of St Andrews and the University College, Dundee, dated 15th February 1890, on which the order of the Commissioners was based; and (3) a docquet appended to a copy of a letter of the clerk of the Commissioners dated 4th March 1890, bearing to be a consent by the University Court of the University of St Andrews to the alteration made by the Commissioners on the terms of the agreement.

On 4th June 1895 the Court applied the judgment of the House of Lords and reduced the affiliation order of the Commissioners dated 21st March 1890, and the order constituting the new University Court of the University of St Andrews dated 10th April 1890, and continued the cause *quoad* the first three documents called for. The parties were subsequently heard upon them.

The grounds of reduction were, *inter alia*;—1. That the agreement was *ultra vires*, in respect (1) that the agreement provided that the union should be dissoluble by Act of Parliament only, and that this was at variance with section 15, subsection 3, of the Act of 1889; (2) that the 6th article of the agreement made the principal and professors of the Dundee College professors of the University of St Andrews and members of the Senatus Academicus, and that this was contrary to the Universities Act of 1858, 21 and 22 Vict. cap. 83, sec. 5. 2. That the docquet was invalid, as it had not been considered by the University Court, but had only been signed by individual members thereof.

It was stated at the hearing that after the ordinance had been challenged the Commissioners had issued another ordinance,* in regard

* The ordinance, dated 3d February 1894, bore,—"And whereas, by an order issued by the said Commissioners on the 21st day of March 1890, by virtue of the powers conferred by section 16 of the first mentioned Act, the University College of Dundee was affiliated to, and made to form part of, the said University of St Andrews, with the consent of the University Court, and also of the Council of the said College, and upon the conditions set forth in an agreement between the said bodies scheduled to the said order. Therefore the Commissioners under the first mentioned Act statut-

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to which the statutory procedure had been observed, and which, at the date of the present hearing, had been laid before the Privy Council for approval, in terms of section 20 of the Universities (Scotland) Act, 1889.

Argued for the pursuers;—The agreement must stand or fall as a whole. To erase the clause as to the permanence of the union would be to strike out an important condition of the agreement, and would result in making an agreement for the parties different from their original intention. The only course was to set aside the agreement. Under the remit from the House of Lords the pursuers were entitled to have the question as to the validity of the agreement disposed of before the new ordinance was considered by the Privy Council. The Universities Committee of the Privy Council were not a judicial body; some of the members were laymen.

Argued for the defenders;—(1) The first point was whether the questions argued were before the Court at all. The Court was not competent, and the Privy Council was the proper judicatory for their consideration. But (2) the agreement was not inconsistent with the statute. If it was it might be amended. It had been acted upon, and could not be resiled from, even although an erroneous term of duration had been agreed to. But the main point was that the new ordinance of the Commissioners proceeded upon these documents, and the Privy Council must consider them in dealing with the ordinance. The action, *quoad* the documents, should therefore be dismissed.

At advising,—

LORD JUSTICE-CLERK.—When this case was formerly before us, the question was whether an order pronounced by the Universities Commission professedly under section 16 of the Universities Act should be reduced, because it was an order not issued after the procedure prescribed in the Act, as applicable to ordinances to be pronounced by the Commission. The Commission had proceeded on the footing that they had special powers in regard to the matter they dealt with, which made the other parts of the Act in regard to ordinances inoperative. That view was held to be unsound in the House of Lords, and accordingly that order has been reduced. The question now before the Court is whether the pursuers are further entitled to reduction of certain documents, viz., a minute of agreement between the University of St Andrews and University College, Dundee, as the basis of arrangement for affiliation of the latter to the former, and a relative minute and docquet of the University Court of St Andrews.

The position of matters is this, that the Universities Commission have now to proceed by ordinance in the manner prescribed by the statute in dealing with the affiliation of these two educational bodies. The statute in its clauses regarding such procedure provides the most ample means for securing that no arrangement shall be sanctioned without the fullest consideration by responsible authorities, and that the consent of Parliament shall

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and ordain with reference to the University of St Andrews as follows:—1. Without prejudice to, but in corroboration of, the order made by the said Commissioners on the 21st day of March 1890, the University College of Dundee is hereby affiliated to, and made to form part of, the University of St Andrews, subject to the conditions set forth in the agreement scheduled to the said order, and which order and agreement are set forth in schedule I., hereunto annexed."

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also be necessary. Ordinances before being passed must be sent in draft to the University and College authorities affected, and must be published by the Commissioners, and they must hear all objections to the terms proposed by those directly interested, or any public body or persons directly affected, and three months are to be allowed for such procedure (section 19). When an ordinance is issued it must be published in the *Gazette*, and laid before both Houses of Parliament, and submitted for the approval of Her Majesty the Queen in Council, and either House may present an address praying that consent be withheld from the ordinance in whole or in part. Further, the University Court, Senatus Academicus, or the General Council, or any governing body, or any trustee or patrons of any foundation, mortification, bursary, or endowment, or any other person directly affected, may petition Her Majesty to the same effect, and Her Majesty may remit the matter to the Universities Committee of the Privy Council, who must report specially to Her Majesty in Council. Her Majesty may then by Order in Council approve in whole or in part, or disapprove in whole or in part.

It appears to me that the Legislature has thus provided the machinery for dealing with ordinances issued by the Commission, and that it is for the authorities nominated in the statute to deal with any case which may be brought before them. The documents which we are asked to deal with depend necessarily for the operative effect of anything contained in them—whether the whole or a part—upon their receiving the imprimatur of the authorities provided by the statute for dealing with them. I am therefore of opinion that they are not documents with which this Court should deal as the pursuers propose, by considering the question of subjecting them to reduction. It is for the Queen in Council to deal with questions relating to them.

LORD YOUNG.—I concur. The only difficulty which occurred to me was the direction in the judgment of the House of Lords. Their judgment bears,—"It is further ordered that the cause be, and the same is hereby remitted back to the Second Division of the Court of Session with directions to pronounce decree to that effect." We have done that. But it goes on "and to dispose of the conclusions of the summons with respect to the documents first, second, and third called for and sought to be reduced." I read upon consideration that word "dispose" as meaning merely to deal with—to deal with these conclusions—and we deal with them, and in that sense dispose of them as your Lordship has proposed, in which proposal I concur.

LORD TRAYNER.—This action was instituted primarily for the purpose of having reduced and set aside an ordinance issued by the University Commissioners by which they affiliated University College, Dundee, to the University of St Andrews, and declared that College to be part of the University. Other writs, which I shall notice immediately, were also sought to be reduced, and certain declarators were sought as following upon or in connection with the reductive conclusions. By a judgment of the House of Lords, reversing a judgment of this Court, the ordinance issued by the University Commissioners has been reduced, along with a declaration or order by the Commissioners, dated 10th April 1890, being two of the

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writs reduction of which was concluded for. The case has come back to us under remit from the House of Lords to dispose of the conclusions of the summons "with respect to the documents first, second, and third called for and sought to be reduced," and under that remit we have heard the parties on the matters remitted. The documents referred to in the remit are (1) minute of the University Court of St Andrews bearing to consent to the College being affiliated to and made to form part of the University; (2) an agreement between the University Court and the Council of the College setting forth the terms and conditions of the affiliation and union; and (3) a minute consenting to certain alterations in the agreement. A decree reducing these writs is still sought by the pursuers.

The ordinance of the Commissioners which has been reduced was set aside by the House of Lords (to state it generally) in respect it was *ultra vires* of the Commissioners, they having failed to observe certain procedure prescribed by statute and necessary to give their ordinance validity. After that ordinance had been challenged, and before any judgment on the merits had been pronounced in this action, the Commissioners issued another ordinance, in regard to which, so far as we know, the prescribed statutory proceedings were observed. The last ordinance is now before the Privy Council for approval or disapproval under the second subsection of the 20th section of the Universities (Scotland) Act, 1889. It appears to me that the effect of that section is to reserve to Her Majesty in Council the right to approve or disapprove in whole or in part of any such ordinance, and of the conditions on which such approval, if given, should proceed. The three writs I have above mentioned as being still unreduced are challenged on the ground that they were *ultra vires* of the parties to them. They all related to the same subject-matter,—that is, they all have reference to the terms and conditions on which the representatives of the University and the College respectively consented, or are said to have consented, to the affiliation in question; and on a consideration of which, *inter alia*, the Commissioners proceeded in issuing the ordinance now before the Privy Council. Any reduction of them appears to me to be unnecessary, because if they are lawful and proper agreements and conditions, they will be given effect to, if not, they will be disregarded by the Privy Council. In a word, their legality and effect will be considered as bearing directly on the question whether the ordinance is to be approved of or disapproved, and if approved, on what conditions. Not only do I think reduction of these writs unnecessary, but I venture to think that in the circumstances any judgment of this Court in regard to them would be encroaching on a jurisdiction expressly reserved for another tribunal.

Lord Rutherfurd Clark was absent.

The Court dismissed the action *quoad* the first three documents sought to be reduced, and found no expenses due to or by either party.

J. & F. Anderson, W.S.—J. Smith Clark, S.S.C.—Agents.

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Mar. 6, 1896. Morrison v. M'Ara.

WILLIAM MORRISON, Pursuer (Respondent).—*Guy.*
ALEXANDER M'ARA, Defender (Appellant).—*D. Dundas—Salvesen.*

Reparation—Negligence—Precautions for safety of the public—Lorry standing in street unattended to—Child—Proximate cause of injuries—Glasgow Police Act, 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *sec.* 149.—A carter in charge of a horse and lorry left his lorry standing unattended on a crowded street in Glasgow and went into a public-house to have a drink. After an absence of a few minutes he returned, and without looking underneath the lorry drove off, seriously injuring a child of six, who had during his absence gone underneath the lorry.

In an action of damages by the father of the child against the carter's employer, *held* (*diss.* Lord Trayner) that the defender was liable in damages, in respect that the child's injuries were due to the fault of the carter in driving away after he left the public-house without looking underneath the lorry to see that all was safe.

Opinion (*per* Lord Trayner) that—assuming the driver to have been guilty of a contravention of the Glasgow Police Act, 1866, sec. 149, which subjects to a penalty any person who, on any public street, suffers a cart to "stand longer than is necessary for loading or unloading goods"—such contravention did not render the defender liable in damages for the injuries to the child, in respect that the driver's absence from his lorry was not the proximate cause of the injuries.

Opinion (*per* Lord Young) *contra.*

2D DIVISION. Sheriff of Lanarkshire.

IN July 1895 William Morrison, baker, Crookston Street, Glasgow, as tutor and administrator-in-law for his pupil son Hector Morrison, raised an action in the Sheriff Court of Glasgow against Alexander M'Ara, lime and cement-merchant, Glasgow, for £500 as damages, on account of injuries sustained by Hector Morrison through coming in contact with a wheel of a lorry belonging to the defender.

The general nature of the circumstances out of which the action arose appear from the following findings in fact in the interlocutor of the Sheriff-substitute, which were affirmed by the Court on appeal:—"Finds that on the 21st of March 1895 the defender's lorry, loaded with bags of lime and driven by his servant Hugh Connell, was standing in Crookston Street, S.S., Glasgow, opposite the public-house of Craig: Finds that Connell, the carter, on the invitation of an acquaintance, went into the public-house to get a dram, and was absent for a few minutes: Finds that the horse's head could be seen from the counter of the public-house: Finds that the pursuer's son Hector Morrison, then less than six years of age, was playing with two companions in the street; that he threw the cap of one of these, named Black, under the lorry while the carter was absent; that Black went under the lorry, got his cap and returned, and then threw Hector Morrison's cap under the lorry; that Morrison went between the wheels on the off-side of the lorry to get his cap, and was under the lorry when Connell returned and got on the lorry from the near side (which was next the public-house) and drove away: Finds that when the lorry moved away the boy attempted to get out between the wheels, as he had got in, and was seriously injured."

The pursuer averred that the accident was caused through the fault and negligence of the defender's servant Connell in leaving his horse and lorry in the street unattended,* or in negligently driving off without looking to see that all was right.

* The Glasgow Police Act, 1866 (29 and 30 Vict. c. cclxxiii.), sec. 149, subsection 16, enacted,—"Every . . . person who suffers any waggon,

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The defender denied that his carter had been guilty of any negligence, and further pleaded contributory negligence.

A proof was allowed. The details of the evidence sufficiently appear from the notes of the Sheriffs, and the opinions of the Lord Justice-Clerk and Lord Young.

On 13th November 1895 the Sheriff-substitute (Guthrie) pronounced an interlocutor, in which, after the findings in fact narrated above, he found "that Connell was in fault in driving away without looking whether the wheels of the lorry were clear, and that the injury was due to his negligence; therefore finds the defender liable in damages: Assesses the damages at the sum of £150, and decerns against the defender therefor," &c.*

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cart, or carriage . . . to stand longer than is necessary for loading or unloading goods . . ." shall be liable to a penalty.

* "NOTE.—I do not accept the view put forward by the pursuer that the defender is liable because his carter contravened a section of the Glasgow Police Act by leaving his horse unattended while he visited a public-house. There are many necessary, or usual and venial occasions for which a carter may or must leave his horse, and having regard to all the circumstances I could not find damages due merely because the man by doing so gave occasion to boys to indulge in larks about the lorry. Had the horse run off during his absence, perhaps the question might be different. However we look at the facts of the case, and whatever effect we give to the statute referred to, the man Connell's absence was not the proximate cause of the accident.

"Contrary to the impression which I had formed during the leading of the proof, and before I had directed my attention to the structure of the lorries one sees in the street—especially to the height of the body above the ground—I am now satisfied that the carter's failure to use his eyes, so as to make sure that his lorry was clear of all obstruction and all danger to the lieges before he jumped on it and drove off, was the immediate cause of the injury to the boy. No one can look attentively at an ordinary lorry without being aware that, if Connell while crossing the footway from the public-house door had looked at all at his vehicle, he must have seen that the child was underneath it. That this was the state of things seems to be clearly proved by the evidence of the boys who were playing with the injured child; and that it was the carter's business so to look about is admitted by Connell himself.

"There is no doubt that the boy was in fault himself in going under the lorry, and some reference has been made to the cases in which the contributory negligence of children has been considered. I do not go into this question, because assuming the boy to be capable of negligence, and in a certain measure guilty of it, I am of opinion that the facts do not support what is called the plea of 'contributory' fault. It seems clear, on the evidence, that the proximate cause of the accident, looking at the critical moment and final stage of the occurrence, was the carter's failure to look whether he could safely drive on. The boy was foolishly and recklessly below the lorry, yet (to adopt the language of Lord Penzance in *Radley* v. *London and North-Western Railway Company*, 1 App. Ca. 759), the carter could in the result, by using ordinary care and diligence, have avoided the mischief which happened, and therefore the pursuer's negligence will not excuse him.

"One observation remains to be made. It may be argued that even on this view the boy was in fault in trying to escape from his position by going between the wheels. It rather seems that the boy's instinctive effort to escape when he found the lorry in motion is not to be regarded as a fault causing the accident. It was a blunder made by a child in an emergency, in a moment of excitement and danger, such as is not to be regarded as

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On appeal the Sheriff (Berry) adhered.*

M'Ara appealed, and argued;—(1) Connell's contravention of section 16 of the Glasgow Police Act was not sufficient to render the defender liable.[1] It was not the proximate cause of the accident. (2) The child's recklessness was the cause of the accident.[2] (3) The damages were extravagant.

Argued for the pursuer;—The accident, though directly due to Connell's want of examination of the lorry before he started off, was nevertheless partly due to his stopping to have a drink in the public-house, and leaving his horse unattended to while he was there.

At advising,—

LORD JUSTICE-CLERK.—The facts of this case, shortly stated, are these. Connell, the defender's carter, left his cart and went into a public-house to get a drink. A school was coming out at the time, and the children were playing on the footpath and street. One of the boys threw the pursuer's child's cap under the lorry, and the child went underneath to get it out. While he was there Connell came out of the public-house and drove off. The child tried to creep out between the wheels, and while doing so was caught by them and injured.

I quite agree with the Sheriffs that the proximate cause of the accident was not Connell's going into the public-house. A public-house was no

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culpa—(See some illustrations and *dicta* cited in Guthrie Smith on Reparation, pages 24 and 99). When one considers how low the axle-bar between the hind wheels of the lorry is, and that even a child to avoid it would have to be flat on the ground, while there is a wide space between the wheels at the side, it is not surprising that in his excitement the child should have taken the wrong way of escape."

* "NOTE.—The witnesses are not altogether at one as to the way in which the accident to the boy Morrison occurred, but the explanation on which the Sheriff-substitute has proceeded seems to me that to which the proof points as the most probable, namely, that the boys had been larking about the lorry while Connell, the carter, was in the public-house, and that Morrison's cap being the last that had been thrown in, he was under the lorry at the time when the carter came out and started it again. If Connell's evidence were to be accepted, the inference would be that Morrison was not under the lorry at the time when he started it, but went under it afterwards while it was going, or after Connell had taken his seat. That seems to me an improbable story, and the substantially concurring account given by the three boys as to what was going on, and as to Morrison sitting under the lorry at the time it started, is to be preferred. Taking that to be the true state of matters, I am of opinion that the Sheriff-substitute has correctly applied the law to the facts. Whether there was any transgression of the Police Act by Connell in going into the public-house and leaving his horse and lorry standing at the door, need not be considered. His doing so was in no respect the immediate cause of the accident. The real cause was his starting his horse again without giving a sufficient look to see that nobody was about or under his lorry, so as to make it safe for him to go on. He says, no doubt, that he did look under it, but I am afraid that his statement on that point cannot be accepted as in accordance with the fact. At all events, the look he may have given had not been sufficient. . . ."

[1] Shaws v. Croall & Sons, July 1, 1885, 12 R. 1186; Hayman v. Hewitt, 1798, Peake's Additional Cases at Nisi Prius, 170.

[2] Frasers v. Edinburgh Street Tramways Co., Dec. 2, 1882, 10 R. 264.

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doubt a place in which he had no business to be at that time, but the only weight I attach to that is that being where he had no right to be he may have come out quickly and driven off hastily to escape observation, without much thought as to any person being about his lorry.

The evidence he gives us is that he did look under the cart before driving off. This is the natural and proper course for a person in charge of a vehicle to take before driving off when he finds a school coming out and a number of children about. Connell himself says it is the usual course, and says he did it. But I am satisfied that if he had done what he thinks he did, he could not have failed to see the child.

In that state of matters we have to consider whether there is any ground for interfering with the judgment of the Sheriffs. After giving the best consideration I can to the matter, I think there are no such grounds, and am of opinion that we should affirm the judgments appealed against.

On the question of damages, I think these are too high. No doubt one leg is a little shorter than the other, but looking to the child's age, and the walks of life which he has to follow, I do not think his prospects are materially injured by reason of the accident; but I cannot say that they are so high that we ought to interfere.

LORD YOUNG.—I also see no ground for interfering with the judgment of the Sheriffs.

I have, as I shall presently explain, my own views, which do not concur with those of the Sheriff as to the effect of the conduct of the carter in stopping his lorry at the public-house in order that he might have a drink, which was admittedly an improper proceeding on his part.

But the facts of the case otherwise, and including that, must be attended to.

Hugh Connell, the carter, says that he went on the invitation of an old friend to a public-house to have a glass of whisky, leaving his lorry unattended to at the door while he was absent. He excuses himself by saying he was always in such a position that he could see the lorry standing on the street, and could run out if he saw it moving on, and that he did not take a minute to drink his whisky, and then jumped on the lorry and drove off.

But it is quite certain that during his absence in the public-house—it could not be more than a few minutes—the child got into a position of danger. If he had not stopped his lorry at the public-house door I think the accident would not have happened.

There were a number of children playing on the street, and amongst them the injured child, and two other little boys, Black and Muirhead. It appears that Morrison threw Black's cap under the lorry, and Black got it out, and then proceeded to retaliate on Morrison, throwing Morrison's cap under the lorry, and then Morrison ran after his cap to get it from under the lorry. Black says,—"I threw Morrison's bonnet in below the lorry. He threw in mine first, and when I came out I threw his in, and he went in for his," and then Muirhead says,—"The wheel would only be about an inch from the pavement. Hector Morrison took Black's bonnet off and threw it under the lorry, and Black went in for it, and came out again, and

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then Black took off Morrison's bonnet and threw it under the lorry, and the carter came out and jumped on the lorry, and made the horse go. Morrison was trying to run out, and the wheel knocked him down and ran over him. . . . The boy Morrison was not long under the lorry. He lifted his bonnet and put it on his head, and sat under for a wee while." Then a witness, Mrs Findlay, depones,—"He would be about two minutes under the lorry." You cannot take measurements of time from the witnesses, but it appears that one of the boys called to Morrison to come out from the lorry, and he replied he would not come for him or for anyone else.

Now, I say here that these things would take some little time, and could not have happened at all if the carter had done his duty, and had been attending to his horse when it was standing on the street,—indeed, one may confidently affirm that there would have been a good prospect of this accident not happening at all.

I think the section of the Glasgow Police Act which this carter transgressed was enacted for the very purpose of keeping the street safer than it would have been had the lorries been allowed to stand without attention. He distinctly transgressed the section, no doubt for a short time, but it would have been the same in the result had he done so for an hour. There is, of course, greater risk of an accident during a long than during a short period, but the risk is there during the period, and it was caused by him. That is the meaning of the expression *versans in illicito*. An accident which happens when a man is not *versans in illicito*,—when he is not doing anything illegal although damage ensues,—is in a different position as regards his responsibility, or that of those who are responsible for him, from an accident which happens when he is doing something illegal,—when he is *versans in illicito*.

He was *versans in illicito* in stopping his horse when he had no occasion to do so. It was on account of the fault involved in that that the child got into a position of danger which it could not have got into if he had done his duty.

But I also think that there is no ground for arriving at another conclusion on the view of the Sheriff-substitute, that if he had used that care in coming out of the public-house which he himself says he did use, he would have seen what all the children say they saw. He could from the position of the lorry have seen this from inside the public-house. It is plain he just came out and jumped on to the lorry and drove off. Now, I cannot say that that was legitimate conduct on the part of a man who was *versans in illicito* by being in the public-house at all, and therefore, so far as my own opinion is concerned, I can see no ground for saying that the Sheriff came to an erroneous conclusion.

On the whole matter, therefore, I am of opinion that there was fault here. As regards the damages I am not of opinion that £150 is too large a sum to award where a child has his leg so smashed that there is a probability of his having one leg shorter than the other for the rest of his life.

LORD TRAYNER.—I think the Sheriffs were right in disregarding in this case the alleged infraction by the defender's servant of the Glasgow Police

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Act, they being both of opinion—an opinion in which I concur—that such infraction was not the proximate cause of the injury for which damages are sought. My agreement with the Sheriffs ends there, for I am of opinion that no fault has been established against the defender's servant for which the defender could be made liable. It appears clear to me on the evidence that the injured boy was to blame, and following the judgment in the case of *Fraser*[1] (and there are others to a like effect) I am for recalling the interlocutors appealed against, and granting absolvitor.

THE COURT pronounced this interlocutor:—"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-substitute of 13th November 1895; therefore of new find the defender liable in damages, and assess the damage at the sum of £150."

CLARK & MACDONALD, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

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Assets Co., Limited, v. Lamb & Gibson.

THE ASSETS COMPANY, LIMITED, Pursuers (Reclaimers).—*Balfour—Salvesen.*
LAMB & GIBSON, Defenders (Respondents).—*Lees—D. Dundas.*
ROBERT AND JAMES ANDERSON, Defenders (Respondents).—*Younger.*

Property—Restrictions on building—Superior and Vassal—Feu-disposition—Plan annexed to disposition.—A proprietor who had prepared a general feuing-plan of his estate sold part of it and bound himself in the disposition granted by him "to adhere to the general feuing-plan of our said lands, and to erect on the lands houses of the character and style indicated thereupon . . . a reduced copy whereof is hereto annexed, and signed as relative hereto, and to give effect to this condition in all feu-contracts, dispositions, and other conveyances of the plots of ground shewn on the said feuing-plan, and which declaration is also hereby declared to be a real lien and burden upon our said lands."

The plan was merely a ground-plan shewing the building line of the streets. On the line of the building were written the words "for self-contained lodgings and corner tenements."

In an action by the disponer against the disponees for declarator that the restriction was not binding, the Lord Ordinary (Kincairney) *held* that the clause was to be construed as meaning that if the disponer erected buildings on his lands they should be of the style and character indicated on the plan, and that the restriction was binding on the disponer.

On a reclaiming note *held* (*reversing* the judgment) that the clause imported no more than it expressed, viz., an obligation on the disponer to build houses of a certain description, and that, as it was not contended that anyone could compel the disponer to build, the clause had no effect.

2D DIVISION. Lord Kincairney.

THIS was an action by the Assets Company, Limited, the singular successors of the City of Glasgow Bank, for ascertainment of the building restrictions applicable to the lands of North Woodside, Glasgow, of which the pursuers were proprietors. The pursuers concluded for declarator that they were duly vest and seised in, and were in right of fee of certain pieces of ground, and were "entitled to erect on the said subjects tenements of dwelling-houses or tenements of dwelling-houses and shops or such other buildings as they think fit, provided that such tenements or buildings are not inferior in character and design to the houses already built upon the said subjects."

[1] 10 R. 264.

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Separate defences were lodged for three sets of feuars. It is only necessary to refer to those lodged for Lamb & Gibson and Robert and James Anderson, singular successors of Baird & Brown.

The facts were these:—

On 30th June 1871 the City of Glasgow Bank disponed to Messrs Baird & Brown, timber-merchants, Glasgow, a portion of the lands of North Woodside, under, *inter alia*, the following declaration:—"And further declaring that we and our foresaids shall be bound, as we hereby bind and oblige ourselves and our foresaids, to adhere to the general feuing-plan of our said lands, and to erect on the said lands houses of the character and style indicated thereupon, a copy whereof was signed as relative to the foresaid agreement between us and our said disponees, a reduced copy whereof is hereto annexed and signed as relative hereto, and to give effect to this condition in all feu-contracts, dispositions, and other conveyances of the plots of ground shewn on the said feuing-plan, and which declaration is also hereby declared to be a real lien and burden upon our said lands."

The plan annexed to the disposition was only a ground-plan. It did not indicate the character or style of the buildings by any elevation or sketch. It shewed only the line of terraces and streets. On the line of the buildings so indicated were the words "for self-contained lodgings and corner tenements."

Baird & Brown disponed the land to the defenders Messrs Lamb & Gibson, builders, who disponed parts of it to the defenders Robert and James Anderson.

The defenders pleaded that the pursuers, being bound by the terms of the disposition of 30th June 1871, were restricted from erecting any buildings other than self-contained houses and corner tenements.

On 20th December 1895 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"(2) Finds that the pursuers are bound by the conditions in regard to building on the lands of North Woodside contained in the disposition granted by the pursuers' authors, the City of Glasgow Bank, in favour of Baird & Brown, dated 29th and 30th June 1871, and forming No. 16 of process: (3) Finds that the defenders Lamb & Gibson, and Robert and James Anderson, are the singular successors of Baird & Brown, and are in right to insist on the conditions contained in said disposition: (4) Finds that the second conclusion for declarator is inconsistent with the conditions in reference to building on said lands of North Woodside contained in said disposition, and that as in a question with these defenders the pursuers are not entitled to insist on decree in terms of the said second conclusion, and that the said defenders are entitled to absolvitor from the said declaratory conclusion, and assoilzies the said defenders therefrom accordingly: Finds them entitled to expenses, and decerns."*

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* "OPINION.—This is an action relating to building restrictions affecting the lands of North Woodside, in the vicinity of Glasgow. Questions of the kind have been frequently before the Court, but this action raises the question in an unusual, perhaps unprecedented form. Generally such actions have related to alleged infringements of the building restrictions by an individual feuar, and have taken the form of actions of interdict by the superior or by a co-feuar, or of appeals from judgments of a Dean of Guild Court. But this action is raised by the superior or disponer, and it seeks to have the building restrictions which restrained him defined by decree of declarator. These restrictions are usually ascertained by the feu-right

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The pursuers reclaimed, and argued;—The declaration relied on by the defenders was only an indication of intention, and did not amount to an enforceable obligation. If total prohibition of shops and flats had been intended, this should have been clearly expressed. This was the first attempt to construe a clause in a deed by a plan. The plan did not enter the record. It was incompetent even to read an obligation written on a plan into a deed, but there was no such obligation here. The plan only shewed the building line, and although it might indicate something of character, it failed to do so with the definiteness necessary to restrictions on property. Elevations, at least, were essential, and the words on the plan were not sufficient.[1] Plans were only imported into a contract for the particular purpose for which they were intended,[2] and here the plan only shewed the situation, and not the character of buildings. The tendency of the Court was to interpret strictly restrictions such as those here.[3] *Ewing* v. *Hunter*[4] was distinguishable, and did not bear on the present. It was a case of prohibition as to use, not as to building.

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which have been granted by the superior, combined with a feuing-plan, and it seems a difficult and delicate task to gather up the conditions expressed in different words in various dispositions, and express them all in one decree of declarator.

"The action in its terms relates to the whole of the lands of North Woodside which have not been feued or disponed, but the debate before me was conducted with reference to a certain part of the lands, shewn conveniently on a small feuing-plan, on which are laid down certain terraces and rows, which are now called Doune Terrace and Doune Gardens, and Carlton Terrace and Carlton Gardens. The whole of Doune Terrace and Doune Gardens has been given out and built on, and so have the western parts of Carlton Terrace and Carlton Gardens. But the eastern portions of Carlton Terrace and Carlton Gardens are still in the hands of the superior, and the main immediate purpose of this action is to ascertain the superior's rights as to building on these portions, although the conclusions of the action relate to the whole lands of North Woodside still in the hands of the superior.

"The pursuers, the Assets Company, are the singular successors of the City of Glasgow Bank, and no question has been raised about their title, neither has it been questioned on either side that they are bound by the conditions in the feu-dispositions granted by the City of Glasgow Bank, and are entitled to enforce these conditions, in precisely the same manner as the City of Glasgow Bank was bound and entitled.

"The defenders are all the persons who hold feu-rights of the lands of North Woodside, and they have all lodged defences founding on the clauses in their several feu-contracts.

"The conclusion is for declarator that the pursuers 'are entitled to erect on said subjects tenements of dwelling-houses, or tenements of dwelling-houses and shops, or such other buildings as they think fit, provided that such buildings are not inferior in character and design to the houses already built on said subjects'—that is to say, it affirms that the pursuers are entitled to erect on the unfeued portions of Carlton Terrace and Carlton Gardens tenements which are not self-contained,—shops and buildings of any

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[1] Middleton v. Leslie, May 23, 1894, 21 R. 781.

[2] Keith v. Smyth, Nov. 7, 1884, 12 R. 66.

[3] Moir's Trustees v. M'Ewan, July 15, 1880, 7 R. 1141; Buchanan v. Marr, March 7, 1883, 10 R. 936; Millar v. Carmichael, July 19, 1888, 15 R. 991.

[4] Ewing v. Hunter, Jan. 12, 1878, 5 R. 439.

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Argued for the defenders;—There was a valid and enforceable prohibition respecting buildings. It was validly imposed. The plan was referred to at every turn, and was intended to bind parties. The plan was part of the contract, and did not only shew intention.[1] It was objected that the plan did not enter the record, but the purchaser was put on his inquiry as to what was in the plan, and accepted his bargain with reference to it. The words meant that the superior must abstain from doing anything else. This practically amounted to offer and acceptance. The cases shewed that the Court would not interfere with the internal arrangement of a house, but it would uphold an obligation respecting the outside character if this was clearly expressed by plan.

At advising,—

LORD TRAYNER.—The pursuers in this action are the proprietors of certain lands situated in the west of Glasgow, known as the lands of North Woodside, and the purpose of this action is to have it declared that the said lands are free from certain building restrictions which the defenders

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sort, provided they reach a certain character and design. Now, seeing that the pursuers are entitled to do what they please with their own property, so far as not restricted by contract, they are, no doubt, entitled to declarator in these terms, unless they are inconsistent with the conditions in any of the defenders' titles. But if they should be shewn to be inconsistent with any of the conditions of any of the dispositions or contracts constituting the titles of the defenders, decree of declarator to that effect cannot be pronounced, unless circumstances have intervened which make these conditions inapplicable or incapable of enforcement. . . .

"Lamb & Gibson are singular successors of Baird & Brown, whose feu-disposition from the City of Glasgow Bank is No. 16 of process, and is dated 29th and 30th June 1871. I understand that their feu was the earliest given off, and it consisted of about five acres at the northern extremity of the lands of North Woodside, separated from Doune Terrace and Carlton Terrace by a road called on the record Wilton Terrace Road.

"This feu-disposition contains the following declaration by the City of Glasgow Bank:—(His Lordship read the declaration above quoted).

"There seems to be a question in regard to the general feuing-plan here mentioned; it seems doubtful whether it is extant, and the parties are not at one about it. But there is no doubt that the plan to which this contract relates is the reduced copy appended to the disposition No. 16 of process, and signed on behalf of the bank. The clause may be read as if no other plan had been mentioned; and I think it clear that that plan is written into the deed and forms a part of it.

"Now the obligation of the superior, as regards buildings under this clause, is no more than this, that he binds himself and his successors to erect on the lands houses of the character and style indicated on the plan annexed to the feu-disposition, and I understand that these words express the only restriction on the pursuers' right to build on the unfeued land contained in the disposition. The words, however, no doubt require construction, for the clause cannot mean what the words express. They express a positive obligation to erect buildings. But it is certain that that is not what the parties meant. Nobody contends that the superior was bound to build on the lands. He was free to leave them unbuilt on, if and as long as he chose. The words must mean that, if the superior erected buildings on the lands, they should be of the character and style indicated on the

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[1] Deas v. Magistrates of Edinburgh, April 10, 1772, 1 Pat. App. 259.

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maintain were imposed thereon by the terms of a conveyance executed in June 1871 by the pursuers in favour of Messrs Baird & Brown. With regard to the defenders who derive their right from Baird & Brown, the Lord Ordinary has held that the alleged building restrictions are binding on the pursuers, and he has assoilzied these defenders. The question argued before us, and which we have now to determine, relates only to that part of the interlocutor which holds the building restrictions binding on the pursuers, as in a question with Messrs Lamb & Gibson and Messrs Anderson, who derive their rights through Baird & Brown.

The general principle of law on which the question now to be decided depends is a well-settled one, and it is this, that no restriction on the right of property is ever presumed, that any such restriction to be binding and enforceable must be duly imposed in language which is express and unambiguous, and that failing this, the presumption is in favour of liberty. If therefore the restrictions which the defenders contend for are so imposed on the pursuers' property, the restrictions will be binding and enforceable,

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plan. Unless the clause means that, it has no meaning at all; and that is what, in my opinion, the clause does mean. Now this clause, as so interpreted, depends for its meaning on the plan; apart from the plan there is no building restriction at all.

"But the plan is nothing but a plan of the surface. It does not indicate the character or style of the buildings by any elevation or sketch. It shews only the line of the terraces and streets; and it does not even require uniformity in the character and style of the buildings. On the line of the buildings so indicated there are the words 'for self-contained lodgings and corner tenements.' On other parts of the plan there are the same words, and on other parts the words are different. There is one space shewn as a line of houses on which are the words 'tenements and shops.' Now, it is clear that the reference to the plan in the feu-disposition is not for identification, but for obligation; and I therefore read the clause in the disposition as an obligation imposed on the superior to build no houses in Carlton Terrace or Doune Terrace except self-contained houses and corner tenements. If that be so, the question comes to be whether the declarator asked in this action is consistent with that condition or not.

"I am of opinion that it is not, but is in direct contradiction of it. I think that the words 'for self-contained lodgings' import a prohibition of tenements not self-contained, and a prohibition of shops. I do not know that it can be said to be a settled point that a limitation to dwelling-houses implies a prohibition of shops. That was decided in the case of *Greenhill* v. *Allan*, 6th July 1825, 4 S. 160; but that must be regarded as a somewhat early case, having in view the nature of the question, and it is very shortly reported. In *Ewing* v. *Hunter*, 12th January 1878, 5 R. 439, a restriction to a dwelling-house was held to import a prohibition to use the house as a school. Cases were referred to in which, when detached or self-contained buildings only were permitted, operations which converted the buildings into two-flatted tenements were held not to violate the prohibitions —See *Moir's Trustees* v. *M'Ewan*, 15th July 1880, 7 R. 1141; *Buchanan* v. *Marr*, 7th March 1883, 10 R. 936; *Millar* v. *Carmichael*, 19th July 1888, 15 R. 991. But these cases fall very far short of holding that a prohibition against any buildings except self-contained lodgings can be consistent with a declarator which would sanction dwelling-houses not self-contained and shops. On the whole, I think it fairly clear that there is a radical inconsistency between the clause in the feu-disposition to Baird & Brown and that in the conclusions of declarator.

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if otherwise, not. Of necessity this sends us to the clause of the deed by which the restrictions are said to be imposed, and it is in the following terms:—"Declaring that we and our foresaids shall be bound, as we hereby bind and oblige ourselves and our foresaids, to adhere to the general feuing-plan of our said lands, and to erect on the said lands houses of the character and style indicated thereupon, a copy whereof was signed as relative to the foresaid agreement between us and our said disponees, a reduced copy whereof is hereto annexed and signed as relative hereto, and to give effect to this condition in all feu-contracts, dispositions, and other conveyances of the plots of ground shewn on the said feuing-plan, and which declaration is also hereby declared to be a real lien and burden upon our said lands."

The first observation that occurs on reading that clause is, that it expresses a direct obligation on the granters of the deed (the superiors of the subjects) to build houses on the said lands of a certain character and style. But, as the Lord Ordinary observes, that is an obligation in which there is no creditor—no one can compel the superior to build anything on these lands unless he pleases. "Nobody contends (says the Lord Ordinary) that

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"But then it is said that circumstances have altered, and that Lamb and Gibson have now no interest, and therefore no right, to enforce this condition. In a recent action between Lamb & Gibson and the present pursuers, it was held that Lamb & Gibson were not bound by the clause under consideration, because they were creditors under the clause and not obligants; and it is said that, in consequence of that decision, tenements of dwelling-houses (I understand not self-contained) have been built on their feu. But I am unable to see how that should affect their right or interest to enforce the obligation of the contract in regard to adjoining lands.

"Again, it is said that in the immediate vicinity large tenements have recently been built, and, among other things, workmen's houses; that the quarter has ceased to be residential; and that there is now no demand for self-contained houses in that locality.

"The pursuers—naturally desirous to utilise their land to the best advantage—wish to feu it for the sort of buildings which are in request in the neighbourhood, and they maintain that all interest to insist that the houses to be built on the unfeued parts of Carlton Terrace and Doune Terrace shall be self-contained has ceased to exist. There have been cases in which the Court has refused to enforce building restrictions, as for example in *Fraser* v. *Downie*, 22d June 1877, 4 R. 942, and other cases noticed in Rankine's Land Rights, p. 419. But these have been cases in which the person seeking to enforce the restrictions has been met by a plea of personal bar, or where he has acquiesced in deviations from the building-plan. But there is nothing of that kind in this case. It is not averred that the conditions in the contracts granted by the superior have ever been infringed, and there is therefore no basis for the contention that the right to enforce the building conditions has been abandoned. The fact that buildings of a different character from those stipulated have been built on other lands in the immediate vicinity is, I think, totally irrelevant; and in this question with Lamb & Gibson there is no need to inquire into the averments about that matter.

"I am therefore of opinion that the pursuers cannot prevail against Lamb & Gibson, and that these defenders are entitled to object to the decree of declarator concluded for, and to be assoilzied from the action; and it follows that the decree of declarator concluded for against them cannot be granted."

the superior was bound to build on the lands. He was free to leave them unbuilt on if and as long as he chose." If, however, there is no obligation to build at all, there can be no obligation to build of a certain character and style. The Lord Ordinary, however, goes on to say that the clause must have some meaning, and that the only meaning it can have is, that if the superior does build, he shall only build houses of a certain character and quality as indicated on the plan, and that interpretation of the clause his Lordship adopts. I suppose the Lord Ordinary has adopted this view on the principle that where a contractual clause admits of two constructions, that construction should be preferred by which the clause will be made of some avail, rather than that which would destroy it. Against that principle I have nothing to say. But the construction so preferred must be one which the words of the clause or contract admits of, not one which is only inferred from what may in the circumstances be supposed to have been the intention of parties. Now, here, the contract as expressed is not ambiguous—the obligation is clearly expressed, but there is no one in right to enforce it. To reach the meaning which the Lord Ordinary puts upon the clause, some word or words must be read into it which are not there. For example, if the clause had said that the superior, "if he built," should be bound to erect "only" houses of a certain character—the Lord Ordinary's view might have been sustained. But it is not permissible to add words to a clause in that way. Especially when, as it stands, the clause is apparently complete. On the clause, as it stands, I am unable to give that construction or meaning to it which the Lord Ordinary has done. This is no doubt dealing very strictly with the clause, but that is what I think we are bound to do in construing deeds affecting real rights. The clause in question, as expressed, appears to me to impose an obligation to build, and not a clause restraining building except of a certain character.

Even if I were to adopt the meaning of the clause which the Lord Ordinary gives to it, I doubt whether I could give it the effect which he has done. The restriction in that view of the case would be to the building of houses "of the character and style indicated" on the plan annexed to the disposition. But "character and style" are words which indicate appearance and architectural design rather than size, or use by the occupier. Now, of character and style in that sense, nothing is indicated on the plan. No doubt the plan may be said to indicate "character" by noting "self-contained lodgings and corner tenements." But a full observance of these words might lead to a somewhat curious result. One building might be a very humble brick erection of two apartments—that would be a self-contained lodging. The next building to it might be a house of two storeys in which one family might reside, the lower storey occupied as their dwelling-house, the upper as their warehouse or workroom. This again would be a self-contained lodging, and yet, while compliance with the directions in the plan would thus be given, no uniformity of building would be observed, and the amenity of the place seriously injured. Yet the preservation of uniformity of building and amenity were the only two purposes suggested as in the contemplation of the clause. Again, the phrase "corner tenements" places no restriction on the extent of ground which they are to occupy. Accordingly, a "corner tenement" might extend indefinitely along the two

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streets at the corner of which it is placed. It might therefore, while still in strict accordance with the words on the plan, be much more in the street than at the corner.

To restrict the rights of property by the use of terms so vague as those on the plan in question, would be going farther, I think, in that direction than has ever yet been done. I can find no precedent for doing so, and am not inclined to make one.

I think the decision of the question before us is attended with considerable difficulty, but on the best consideration I can give it, I am of opinion that we should recall the second, third, and fourth findings of the Lord Ordinary's interlocutor, and decern as concluded for against the defenders Lamb & Gibson and Robert and James Anderson, and *quoad ultra* adhere, and remit to the Lord Ordinary to proceed with the cause.

LORD JUSTICE-CLERK.—That is the opinion of the Court.

THE COURT [the LORD JUSTICE-CLERK, LORD YOUNG, and LORD TRAYNER] pronounced the following interlocutor:—"Recall the second, third, and fourth findings in the interlocutor reclaimed against, including the finding as to expenses in favour of the defenders Lamb & Gibson, and decern in terms of the conclusions of the action against Lamb & Gibson and Robert and James Anderson, and find them liable to the pursuers in the expenses of process, including expenses since the date of the reclaiming note. . . ."

J. SMITH CLARK, S.S.C.—CLARK & MACDONALD, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

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Somerville v. Thomson.

ANN SOMERVILLE, Pursuer.—*A. M. Anderson.*
COLIN THOMSON, Defender.—*M'Lennan.*

Process—Proof—Diligence—Breach of Promise of Marriage—Diligence for recovery of documents disclosing defender's financial position.—In an action of damages for breach of promise of marriage the pursuer moved for a diligence to recover the defender's business books and bank books in order to disclose his financial position. Circumstances in which the Court *refused* the motion.

Opinion (*per* Lord Young) that the pursuer of an action of damages for breach of promise of marriage is not entitled to a diligence to recover documents to shew the defender's financial position.

Opinion (*per* Lord Trayner) on the general question reserved.

2D DIVISION.

ANN SOMERVILLE, Elder Park Street, Govan, sued Colin Thomson, livery stable keeper, High Street, Cromarty, for £1000 as damages for breach of promise of marriage.

The pursuer averred that in his business the defender employed three horses and seven or eight conveyances.

The defender explained that his business consisted of a small posting establishment employing two horses, and his farm or croft of £20 rent per annum.

Notice of trial having been given for the Spring Sittings, the pursuer moved the Court for a diligence to recover the business books of the defender relating to his posting business and farm, and the bank

account books and deposit-receipts of the defender, and the bank books belonging to the defender's banks shewing the state of his account. No. 108. Mar. 6, 1896. Somerville v. Thomson.

Argued for the pursuer;—The information sought was material to the issue. The pursuer alleged a substantial financial position on the part of the defender which he denied. If the jury were in the pursuer's favour they would require some definite ground for their award of damages.

Argued for the defender;—The diligence craved was incompetent. The ordinary rule was that a person was entitled to exclude his private business from inspection. This case raised no exception.[1] The case was different where the pursuer puts his business affairs in issue.[2]

LORD JUSTICE-CLERK.—I think that we ought not to grant the diligence asked for.

LORD YOUNG.—I concur.

LORD TRAYNER.—I think that in this case there is no necessity for the diligence which the pursuer craves, for the parties are practically at one with regard to the defender's financial position. I wish, however, in consequence of some observations made in the course of the discussion, to guard myself from being supposed to hold that there is any principle or general rule which would exclude the pursuer of an action of damages for breach of promise from obtaining such a diligence if the extent of the defender's business or the state of his financial position were important to the proper determination of the case.

LORD YOUNG.—Perhaps it is right that I should state my opinion on the general question without going into details. I am of opinion that the pursuer of an action of damages for breach of promise of marriage is not entitled to a diligence to disclose the defender's financial position.

THE COURT refused the motion.

JOHN VEITCH, Solicitor—ALEX. ROSS, S.S.C.—Agents.

JOHN BALLENY MONCRIEFF, Pursuer (Respondent).—*Dickson—Forsyth.*
THOMAS LAWRIE AND OTHERS, Defenders (Reclaimers).—*Johnston—Constable.* No. 109. Mar. 6, 1896. Moncrieff v. Lawrie.

Sale—Sale of heritage—Sale by auction—Essential error—Implement in knowledge of ground of challenge—Personal objection—Private knowledge of prior right.—Two contiguous properties within a burgh belonging to Morison's trustees, held under different titles, were exposed for sale by public roup as lot No. 1 and lot No. 2. The articles of roup described the lots by their respective descriptions in the titles, but as Morison's trustees intended to sell as part of lot No. 1 certain back buildings which were

[1] A v. B, July 14, 1875, 12 S. L. R. 621; British Publishing Co., Limited v. Heidderwick & Sons, July 14, 1892, 19 R. 1008.

[2] Craig v. North British Railway Co., July 3, 1888, 15 R. 808; Johnston v. Caledonian Railway Co., Dec. 22, 1892, 20 R. 222.

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within the description in the titles of lot No. 2, but were occupied in connection with lot No. 1, the following marginal addition was made to the description of lot No. 1 in the articles, "as the said subjects are presently occupied and possessed by" the persons then in occupation of lot No. 1 and of the back buildings. This marginal addition was not referred to in the testing-clause, and no corresponding addition was made to the description of lot No. 2 in the articles.

At the roup lot No. 1 was knocked down first—to Lawrie—but one of the instrumentary witnesses never signed the minute of enactment in his favour.

Lot No. 2 was knocked down to Moncrieff, in whose favour a minute of enactment was duly executed.

Moncrieff, after the sale, claimed a conveyance, including the back ground and buildings, as falling within the description of the subjects sold to him. Morison's trustees at first objected, but subsequently granted a conveyance in his favour of lot No. 2 as described in the articles, without any qualification. This conveyance was delivered and recorded before the conveyance to Lawrie of lot No. 1, which was described in that conveyance as in the articles with the marginal addition.

Lawrie having entered into possession of the back ground and buildings, Moncrieff brought an action against him for declarator of property and for removing. Morison's trustees having been sisted as defenders along with Lawrie, the defenders maintained that they ought to be assoilzied on the ground that Morison's trustees were, to the knowledge of the pursuer, at the time of the sale under essential error as to the extent of the subjects sold as lot No. 2; and the defender Lawrie further maintained that he ought to be assoilzied on the ground that a sale of the back subjects to him had, to the knowledge of the pursuer, been completed prior to the sale of lot No. 2.

The Lord Ordinary (Kyllachy) after a proof *granted* decree in favour of the pursuer, holding (1) that it was not open, either to Morison's trustees or to Lawrie, to plead essential error on the part of Morison's trustees after Morison's trustees had granted an unqualified conveyance to the pursuer in the knowledge that he claimed the back subjects; and (2) that the special defence maintained by Lawrie was ill founded, no prior contract of sale having been completed, owing to the absence of the signature of the instrumentary witness to the minute.

On a reclaiming note the Court *adhered*, but on the ground that, as the titles stood, the buildings in question must be held to belong to the pursuer and not to Lawrie.

Opinions reserved whether the pursuer's title was open to reduction at the instance of the defenders.

2d Division.
Ld. Kyllachy.

In 1894 the trustees of Stephen Nicol Morison, bookseller and publisher, Alloa, were proprietors of two properties in Alloa, viz. (1) certain shops and houses in Mill Street, and (2) certain shops and houses in Mar Street, which was at right angles to Mill Street. These two properties were contiguous, but were held under different titles. A back shop, bedroom above, and wash-house adjoining, were situated on certain back ground, which was within the titles to the Mar Street property, but these back buildings themselves had been erected and were used in connection with the Mill Street property.

On 3d March 1894 Morison's trustees exposed both properties for sale by public roup, under the same articles, the Mill Street property being lot No. 1, and the Mar Street property being lot No. 2. The original description of each lot was taken from the titles, according to which the back buildings would have gone with the Mar Street property (lot No. 2), but as it was the intention of the trustees that these buildings should go with the Mill Street property (lot No. 1), a

marginal addition was made to the description of lot No. 1 in the articles in these terms, "as the said subjects are presently occupied and possessed by the representatives of the late Mr Stephen Nicol Morison and the London and Newcastle Tea Company,"—the Mill Street subjects, including the back buildings, having been occupied in part by the truster's representatives and in part by the London and Newcastle Tea Company. This marginal addition was read at the roup as part of the articles, but it was not mentioned in the testing-clause, nor was there any corresponding alteration in the description of lot No. 2 (Mar Street.)

Lot No. 1 (Mill Street) was first exposed, and was knocked down to Thomas Lawrie, temperance hotelkeeper, Alloa, but the minute of enactment in his favour was not subscribed by one of the instrumentary witnesses.

Lot No. 2 (Mar Street) was knocked down to John Balleny Moncrieff, insurance-agent, Ochil Street, Alloa, and a minute of enactment in his favour was duly executed.

After the sale Moncrieff intimated to Morison's trustees that he claimed the back ground and buildings thereon as falling within the description in the articles of the subjects sold to him. Morison's trustees repudiated this claim, but after some correspondence they granted a conveyance in favour of Moncrieff in which the subjects were described as in the description of lot No. 2 in the articles, without any qualification. This conveyance was dated 14th, and was recorded in the Register of Sasines 16th May 1894.

Morison's trustees also granted a conveyance in favour of Lawrie of the subjects forming lot No. 1, the subjects being described as in the articles of roup, including the marginal addition thereto. This conveyance was dated 14th May 1894, but was delivered after the delivery of the conveyance to Moncrieff, and was not recorded in the register of sasines until the 25th May.

Lawrie having entered into possession of the back ground and buildings thereon, Moncrieff, on 4th May 1895, brought an action against him for declarator of property in these subjects, and for removing.

Lawrie lodged defences, and on 16th October 1895 Morison's trustees were allowed to sist themselves as defenders, and they adopted the defences.

A proof was allowed. The defenders led at the proof. The evidence established the foregoing facts, in so far as they had been in dispute, and the questions at issue between the parties, as arising upon the proof, were shortly these:—

(1) The defenders maintained that they ought to be assoilzied on the ground that the pursuer had bought lot No. 2 in the knowledge that Morison's trustees had no intention of selling the back ground and buildings as part of that lot, and were consequently under essential error as to the extent of the subjects sold. The defenders further maintained that they were not barred from taking this plea by reason of Morison's trustees having granted an unqualified conveyance in favour of the pursuer, in respect that in granting the conveyance Morison's trustees had no intention of giving up their legal rights, and that they *bona fide* believed, at the date when the conveyance was granted, that the back subjects in question were not carried by the conveyance, the defenders' contention being that Morison's trustees at the date of the conveyance were under the belief that the old titles carried the back subjects as part of lot No. 1, or at least that

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these titles were ambiguous and required to be explained by the state of possession. In answer, the pursuer maintained that the sale to him was not invalid on the ground of essential error, and in any event that the defenders were barred from taking that plea, in respect that Morison's trustees had granted in his favour an unqualified conveyance of the subjects, in full knowledge of the dispute that had arisen.

(2) Lawrie further maintained that the subjects in question having, to the pursuer's knowledge, been sold to him (Lawrie) prior to the alleged sale to the pursuer, the pursuer was barred from claiming the subjects. In answer the pursuer maintained that there had been no prior completed sale of the subjects in question to Lawrie, in respect that the marginal addition was not authenticated by reference in the testing-clause, and, further, in respect of the absence of the subscription of one of the instrumentary witnesses to the minute of enactment in favour of Lawrie.

On 8th January 1896 the Lord Ordinary (Kyllachy) granted decree of declarator against Lawrie and Morison's trustees, and decree of removing against Lawrie.*

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* "OPINION.—The pursuer in this case seeks to have it declared that certain back premises adjacent to a certain tenement belonging to him in Mar Street, Alloa, belong in property to him (the pursuer). He also seeks to have decree of removal against the defender—the owner of a neighbouring tenement—who is in possession of the back premises. Both parties derive right from a common author, viz., Morison's trustees, and these trustees have been allowed to sist themselves as defenders to the action, and to adopt the defences. The case has accordingly been taken as if these trustees had been called as defenders, and as if the conclusions of the summons—or at least the declaratory conclusion—had been directed also against them.

"One peculiarity of the case is that the pursuer has undoubtedly obtained a title to the premises in question, and a title prior in date to that alleged by the defender. This is not admitted on record, but the proof shews, I think, conclusively, that the description in the pursuer's title includes the ground on which the buildings in dispute stand. It also appears, and indeed was not disputed, that the pursuer's title was prior in date, and was first recorded in the Register of Sasines.

"It is therefore perhaps doubtful whether the defenders should have been allowed to try the question raised upon this record without bringing, in the first place, an action of reduction. I have not, however, felt bound to decide the case upon that technical point. I incline to think that the defenders, having come into Court in response to the pursuer's challenge, are entitled to table all defences which go to negative the pursuer's right. At all events, as some proof was necessary, I (rightly or wrongly) allowed proof in general terms, and, the whole case being now before me, I propose to decide it upon its merits.

"The facts are shortly these. Morison's trustees were owners of two sets of subjects in Alloa, viz., (1) certain shops and houses in Mill Street; and (2) certain shops and houses in Mar Street. The two properties were contiguous, but held under different titles, and there was certain back ground between them, which, beyond doubt, belonged to the Mar Street property, but on which a back shop, bedroom above, and wash-house adjoining, had been erected and used in connection with the Mill Street property. Both properties were exposed for public sale on the same day, and under the same articles—the Mill Street property being the first lot and the Mar Street the second. The description of each lot was taken from the old titles, by which, as I have said, the back buildings went with Mar Street (lot No. 2). This, however, not being intended, a marginal note was added

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The defenders reclaimed, and argued;—(1) The evidence shewed that Morison's trustees had no intention of selling the back ground and subjects thereon as part of lot No. 2, and that the pursuer was aware of this prior to the sale to him. He was not entitled, therefore, to take advantage of the error.[1] The conveyance in favour of the pursuer did not bar the defenders from pleading this essential error. In order that the conveyance should have that effect it was necessary that the granters should have known that the contract upon which the conveyance proceeded was open to objection on the ground of essential error, and that they should have intended to waive this objection by granting a conveyance which should have the effect of barring them from pleading the error.[2] The evidence did not establish these conditions. Morison's trustees at the time of the sale, and when they granted the conveyance, thought that the titles carried the subjects in dispute as part of lot No. 1, or at least that the titles were ambiguous, and required to be explained by the state of possession. That might be an error, but if the error continued down to the granting of the conveyance it was a sufficient answer to the plea

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to the description in the articles of lot No. 1 (the Mill Street subjects) in these terms, 'as the said subjects are presently occupied and possessed by the representatives of the late Mr Stephen Nicol Morison and the London and Newcastle Tea Company, &c.' (the Mill Street tenants). This marginal note was read at the roup as part of the articles, but was not authenticated by being mentioned in the testing-clause, nor was any corresponding alteration made in the description of lot 2. The roup having proceeded, lot 1 (Mill Street) was (subject to the point which I shall presently notice) purchased by the defender Lawrie. Lot 2 (Mar Street) was similarly purchased by the pursuer, Moncrieff. And I have no doubt whatever that the pursuer and his agent knew quite well (1) that according to the description of lot 2 in the articles (read in connection with the situation and history of the premises) he (the pursuer) was purchasing the back premises in question; and (2) that the exposers (Morison's trustees) were under a different belief, and had no intention of selling these premises as part of lot 2.

"In these circumstances, if the question had been at once raised and tried whether the pursuer could hold to his bargain and enforce implement of it according to its legal construction, I should have had little doubt that the decision must have been in the negative. The exposers were in error as to the extent of the subjects sold, and the pursuer knew of their error, and took advantage of it. The pursuer allowed the exposers to agree with him in certain terms, knowing that the exposers attached one meaning to those terms, while he, the pursuer, attached to them another and different meaning. A contract so made the law will not enforce, and will, if necessary, reduce. The case would have come within the principle of *Steuart's Trustees* v. *Hart*, 3 R. 192. See also the English cases collected in Addison on Contracts, 6th ed. pp. 133-139.

"What happened, however, was this. The pursuer at once tabled his construction of the articles, and claimed a conveyance of the Mar Street property as therein described—avowing that he held, and meant to maintain, that the back shop, bedroom, and wash-house were within the description. The exposers demurred, but after some correspondence, they gave way; and in

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[1] Steuart's Trustees v. Hart, Dec. 2, 1875, 3 R. 192.

[2] Crave v. Ballard, 1790, 2 Cox Eq. Cases, 253; Murray v. Palmer, 1805, 2 Scho. and Lef. 474; Morse v. Royal, 1806, 12 Ves. jun. 355; Cockerell v. Cholmeley, 1830, 1 Russ. and Thy. 418; Mulhallen v. Marum, 1843, 3 Dr. and War. 317; Kempson v. Ashbee, 1874, L. R, 10 Ch. 15; Kerr on Fraud and Mistake, 2d ed. p. 330.

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of bar. (2) As in a question with the defender Lawrie, at all events the pursuer's case failed since he knew that prior to his contract for the purchase of lot No. 2 the back subjects in question had been sold to Lawrie.[1] It might be that the sale to Lawrie was open to technical objections, although even that was doubtful, since the subscription of an instrumentary witness might be adhibited *ex intervallo*, and it was not clear that the failure to mention a marginal addition was fatal to the validity of the addition. But assuming the soundness of the objections *per se*, they were *res inter alios* as in a question between Lawrie and the pursuer, who was no party to the contract between Morison's trustees and Lawrie.

Argued for the pursuer;—(1) As in a question with Morison's trustees the case for the pursuer was clear. The contract between them and him was *ex facie* unobjectionable, and it was now not disputed that, according to its terms, it carried the subjects in question. This contract was followed by a conveyance of precisely the same subjects, without qualification or reservation, as had been sold under the contract, and the conveyance was granted after the very question

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the full knowledge not only of the pursuer's contention, but of its unsoundness in point of fact, granted him the conveyance which he claimed. In other words, having power to repudiate the contract of sale, they preferred not to do so, but accepted it as valid, and executed it; and did so by disposition delivered prior to the defender's disposition, and with the result, as I have already said, that the pursuer's disposition was the first to be made real by infeftment.

"I cannot, I confess, see how in that state of the facts the defenders, or either of them, can appeal to the doctrine of *Steuart's Trustees* v. *Hart*. Whatever may have been their error as to the effect of the articles, the trustees and exposers were under no error as to the effect of the disposition. They had ample notice of the pursuer's contention, and for reasons, good or bad, they accepted it. That is their position, and as regards this ground of defence, it does not appear to me that the defender Lawrie is in a better position or can have higher rights than his authors.

"It remains to consider whether the defender Lawrie has not, in virtue of his prior purchase of the Mill Street subjects, and of the pursuer's knowledge of what was embraced in that purchase, a separate and independent ground of challenge of the pursuer's title so far as applying to the premises in dispute. There is no doubt that the Mill Street subjects were first exposed and sold at the roup. There is also no doubt that by the marginal addition to the articles of roup, these subjects were described in terms which may be held to cover the out-buildings in question. It is also certain that the pursuer heard the articles of roup read, including the marginal addition, before he himself bought the Mar Street subjects, and saw and heard the Mill Street subjects knocked down and sold to the defender Lawrie. If therefore the sale of the Mill Street subjects was a completed sale—if Lawrie had a completed contract right to those subjects before the Mar Street subjects were exposed and sold—I do not at present see reason to doubt that the defender Lawrie might reduce the pursuer's title as a title obtained and taken by the pursuer in the knowledge of his (Lawrie's) prior right. That would appear to follow from the legal doctrine established by the cases in the Dictionary under the head of 'Private Knowledge of a Prior Right,' Mor. 1689, *et seq.*; and by the more recent cases of *Marshall* v. *Hynd*, 6 S. 384; *Petrie* v. *Forsyth*, 2 R. 214; *Stodart*

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[1] Morrison, *sub voce Bona et Mala Fides*, p. 1689 *et seq.*; Marshall v Hynd, Jan. 18, 1828, 6 S. 384; Petrie v. Forsyth, Dec. 16, 1874, 2 R. 214; Stodart v. Dalzell, Dec. 16, 1876, 4 R. 236.

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now in dispute had been discussed by the pursuer and Morison's trustees. In these circumstances it was vain for Morison's trustees to plead essential error, and equally so for Lawrie, whose only remedy, if he had any remedy, was an action against his authors, Morison's trustees. (2) The special defence stated by Lawrie was also ill-founded. It might be that Lawrie would have had a good ground of defence if to the knowledge of the pursuer there had been a concluded contract for the sale to Lawrie of the subjects in dispute. But in the first place the marginal addition did not form part of the contract, as it had not been validly incorporated with the articles, not having been mentioned in the testing-clause. Then the addition, even if it were taken as part of the articles, had not the effect of carrying the subjects in dispute as part of lot No. 1. Further, it had not been shewn that the pursuer either knew or was bound to know the terms of the description of lot No. 1, which he had no thought of buying. Apart, however, from these objections, there was this conclusive answer to Lawrie, that no contract of any sort between him and Morison's trustees had been constituted by the articles of roup and the minute of enactment. The absence of the subscription of one of the instrumentary witnesses to the minute made the minute valueless unless the defect could be remedied, and it was too late to remedy it

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v. *Dalzell*, 4 R. 236. See also the English cases noted in Lord Shand's note in the last of these cases.

"But the difficulty here is that, by an unfortunate oversight in the conduct of the sale, there was not only an omission to authenticate the marginal addition on which the defender Lawrie's case depends, but also an omission to have the minute of enactment which constituted his purchase subscribed by one of the instrumentary witnesses. The pursuer maintains that these omissions are fatal to the defender's case, inasmuch as the alleged prior right was, as it now appears, not a completed right. He says—what is clear—that writing was necessary, and the only writing being improbative, he contends that at the time of his (the pursuer's) purchase of the Mar Street property there was *locus pœnitentiæ* with respect to the Mill Street subjects on the part of all concerned.

"So far as the marginal addition is concerned, I am disposed to think that this difficulty might be met. There appears to be some doubt how far a marginal addition requires, as matter of solemnity, to be noticed in the testing-clause (Bell's Lect. i. p. 75); and in any case it may perhaps be held that the defect of authentication was here redressed by *rei interventus*. But the failure to obtain the subscription of one of the instrumentary witnesses to the minute of enactment is a more serious matter, and after full consideration I have been unable to see any answer to the objection. It may be that the non-subscribing witness might have subscribed *ex intervallo*. That is a question not, I think, quite settled (see *Thomson* v. *Clarkson's Trustees*, 20 R. 59). But in point of fact the witness has not yet subscribed, and it can hardly be suggested that he can now do so. The 38th and 39th sections of the Conveyancing Act of 1874 do not, I am afraid, either of them apply, and under the old law there can, I think, be no doubt that the minute of enactment is still improbative.

"On the whole, therefore, I have been compelled to the conclusion that the pursuer is entitled to decree. I regret that such is the result, because I think it clear that he took and obtained an unfair advantage. But as against Morison's trustees, he obtained that advantage while the latter had their eyes fully open; and as against the defender Lawrie, he prevails by reason simply of the unfortunate mistake made with respect to the authentication of the minute of enactment."

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now.[1] That being so, it was clear in law that no contract for the sale of heritage had been completed between Lawrie and Morison's trustees[2] —prior, that was to say, to the delivery of the conveyance to Lawrie. Either he or Morison's trustees might have resiled. It was open to the pursuer to take the objection, for it was an objection patent on the face of the alleged contract which was pleaded against the pursuer's otherwise (on the assumption of the present branch of the argument) undoubted title to the subjects. Besides, Lawrie's only remedy on the contract was by action against Morison's trustees, who, if sued by Lawrie, would be bound to state the objection after having given the present pursuer a title to the subjects to which, *ex hypothesi*, Morison's trustees could state no objection.

At advising,—

LORD JUSTICE-CLERK.—The facts in this case are these :—Morison's trustees were owners of two sets of subjects, one situated in Mar Street and the other in Mill Street, Alloa. These two properties were contiguous, but they were held under different titles. There was a certain piece of back ground, now in question, belonging to the Mar Street subjects on which certain buildings were erected. After these buildings were erected they were used not in connection with the Mar Street subjects, but in connection with the Mill Street subjects. Both properties were exposed for sale under articles of roup, the descriptions in which were taken from the old descriptions in the titles, and accordingly the description of the Mar Street subjects included the back premises, which had been used in connection with the Mill Street property. To correct this a marginal addition was added to the description of the Mill Street subjects, which I need not quote. The effect of that addition was to indicate that the piece of ground which under the descriptions of the two properties really belonged to the Mar Street subjects was to go with the Mill Street subjects. Accordingly, the sale was conducted under that supposition. It is not disputed that this was announced and well known to Mr Moncrieff. What happened was very peculiar. The pursuer bought the Mar Street property, and at once claimed the back premises as being included under the description in the articles of roup. Correspondence followed, but after some letters had passed between the parties the trustees gave the pursuer a disposition with a description in terms of the old titles, thus including the back premises in question. Accordingly, I think we must hold that that conveyance carried these back premises and gave the pursuer a good title to them.

Another question has arisen, whether the pursuer, who had perfect knowledge before he bought the Mar Street property that the Mill Street property as described, subject to the marginal addition, had been knocked down to Mr Lawrie, can, in spite of his knowledge of what was intended, succeed in his contention as in a question between him and Mr Lawrie? In this respect we have also a very extraordinary state of matters. Not only was

[1] Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), secs. 38 and 39.

[2] Goldston v. Young, Dec. 8, 1868, 7 Macph. 188, 41 Scot. Jur. 122; Shiell v. Guthrie's Trustees, June 26, 1874, 1 R. 1083; Allan v. Gilchrist, March 10, 1875, 2 R. 587; M'Arthur v. Lawson, July 19, 1877, 4 R. 1134.

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the marginal addition never authenticated, by being mentioned in the testing-clause, but the signature of the second witness was never appended to the minute of enactment which concluded the contract of sale with Mr Lawrie. Assuming that a marginal addition must be authenticated by being mentioned in the testing-clause, in this case the question would arise whether there had not been *rei interventus;* but in my opinion the failure to obtain the signature of the instrumentary witness is a much more serious defect, and indeed fatal to the validity of the deed. I agree with the Lord Ordinary that for the purpose of defeating the rights of Mr Moncrieff the omission cannot be supplied now.

On the whole matter I agree with the Lord Ordinary, and think his judgment is correct.

Upon the question whether or not the defender may have a right to have the pursuer's title set aside in other proceedings, I give no opinion, —indeed I expressly reserve my opinion.

LORD YOUNG.—My opinion is to the same effect, but without any disposition to make any reservation or give any encouragement to any such proceedings as your Lordship has mentioned.

My opinion on the merits is clear and simple, and can be shortly expressed.

This is a summons at the instance of a Mr Moncrieff as proprietor of certain property. The conclusions are (1) for declarator that these back premises are comprehended under the description of the property, and that the same pertain heritably in property to the pursuer; and (2) for decree of removing against the defender Lawrie. I am of opinion, and indeed it was not disputed, that the property in question is included under the pursuer's title, his title being such as to give him a good title to it. The defender, on the other hand, is in possession of the property, and he has no title except the disposition produced, which does not include it. He has no other title. I am therefore of opinion that the pursuer, who has a title to these premises, is entitled to have the defender, who has none, removed.

Whether the defender Lawrie, by other proceedings, can have this property taken out of the pursuer's title and included under his, I give no opinion; but I would not like to say one word to encourage the defender to believe that such proceedings would be successful. I make no reservation except this, that the defender can take any proceedings which the law allows.

I think the interlocutor of the Lord Ordinary should be affirmed.

LORD TRAYNER.—I agree in the result arrived at by the Lord Ordinary. The property here in dispute is certainly within the pursuer's title. It was duly conveyed to him, and he is infeft therein. It is equally certain that the property in dispute is not in the defender Lawrie's title—was never conveyed to him. In this state of the title I see no answer to the pursuer's case. It may be that there is a question behind this, whether in the circumstances the pursuer can maintain his title as it now stands, or whether it is liable to reduction at the instance of either of the defenders. That question may be a very serious one for the pursuer, but it is not the question now before us.

No. 109. LORD RUTHERFURD CLARK was absent.

Mar. 6, 1896. Moncrieff v. Lawrie.

THE COURT refused the reclaiming note, and adhered.

WILLIAM RITCHIE RODGER, S.S.C.—CONSTABLE & JOHNSTONE, W.S.—Agents.

No. 110. THE SCOTTISH ACCIDENT INSURANCE COMPANY, LIMITED, Petitioners. —*Lorimer—Crole.*

Mar. 12, 1896. Scottish Accident Insurance Co., Limited.

Company—Resolution to alter Memorandum of Association—Extension to new business—Confirmation by Court—Conditions—Change of name to indicate extended business—Companies (Memorandum of Association) Act, 1890 (53 *and* 54 *Vict. c.* 62) *sec.* 1.—The Scottish Accident Insurance Company, incorporated in 1877, under the Companies Acts, 1862 and 1867, for the purpose of carrying on the business of insurance against accident, presented a petition under the Companies (Memorandum of Association) Act, 1890, for confirmation of a special resolution altering its memorandum of association so as to extend its business to life, sickness, employers' liability and fidelity insurance. The Court *granted* the petition on condition that the name of the company was changed to the Scottish Accident, Life, and Fidelity Insurance Company, or to such other name as might be approved of by the Board of Trade, and by the Court, to indicate the extended nature of the company's business.

1ST DIVISION. THIS was a petition presented under the Companies (Memorandum of Association) Act, 1890,* by the Scottish Accident Insurance Company, Limited, for confirmation of a special resolution unanimously adopted at two extraordinary general meetings of the company altering its memorandum of association.

The company was incorporated in 1877, under the Companies Acts, 1862 and 1867, the object for which it was established, as set forth in its memorandum of association, being generally the carrying on of the business of assurers, either as principals or agents, against or upon accidental injuries to human life. The original memorandum included the further object of insurance against injury to or destruction of property arising from any accident other than fire, but it was

* By the Companies (Memorandum of Association) Act, 1890 (53 and 54 Vict. c. 62), section 1, subsection (1) it is, *inter alia*, provided that: "Subject to the provisions of this Act, a company registered under the Companies Acts, 1862 to 1886, may, by special resolution, alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified. . . . but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding up the company."

By section 1, subsections (3) and (5), it is provided:—Subsection (3) "An order confirming any such alteration may be made on such terms and subject to such conditions as to the Court seems fit. . . ." Subsection (5) "The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company (*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved means; or (*c*) to enlarge or change the local area of its operations; or (*d*) to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (*e*) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement."

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provided that that object could only be carried out if authorised by a special resolution of the company.

The objects proposed to be added by the alteration of the memorandum were the carrying on of life, sickness, employers' liability, and fidelity insurance. It was also proposed to abandon the power of insuring property against injury or destruction from accident other than fire.

On 5th December 1895 the Court remitted to Mr C. B. Logan, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed alteration of the memorandum of association.

Mr Logan, *inter alia*, reported as below.*

* "It will be seen that the proposed extension is very wide, including in fact all the ordinary business of life insurance, accident and sickness, employers' liability and guarantee companies. . . .

"Although the various kinds of insurance above referred to are quite distinct in character, there are a considerable number of companies in the United Kingdom which combine the various classes of insurance business which the petitioners now propose to embrace under the powers sought for. Life insurance is of wider and greater importance than accident insurance, and that portion of accident insurance which relates to fatal accidents is obviously a description of life insurance, limited to a special risk. In that respect the businesses may be said to be similar. It has been pointed out to me, in support of the view that life and accident insurance business is closely allied, that in 1894 the Board of Trade, acting on the advice of the Law Officers of the Crown, refused to permit the registration of new companies seeking to transact fatal accident insurance business, unless the requirements of the Life Assurance Companies Act of 1870 were complied with, on the ground that a policy of insurance covering payment of a sum of money in the event of death by accident is a policy of insurance upon human life within section 2 of the 1870 statute. Your Lordships have in a previous case sanctioned, under the Act of 1890, the extension of the business of a life assurance company so as to include accident insurance, and have also permitted an accident insurance company to obtain powers to transact fidelity and guarantee business, but I have not been able to ascertain that there have been any cases, either in Scotland or in England, in which the Courts have authorised under the statute of 1890 so important an extension of business as is now sought for. . . .

"I have therefore some difficulty in reporting whether the proposed extension can be held to be covered by the provisions of the Act, or whether it may not be necessary to reconstitute the company in order to accomplish the change. This is a matter which I feel it to be my duty to bring specially under your Lordships' consideration. . . .

"Another matter which I think should be brought under your Lordships' attention in the event of the proposed powers, or any of them, being granted, is the name of the company. In certain cases in the English Courts the extension of powers has been granted only upon the name of the company being changed so as to indicate the addition of the new business. . . . It humbly appears to me that if the extension of powers asked for is granted by your Lordships, either in whole or in part, it would be proper that the name of the company should be altered so as to indicate the increased nature of the business. The petitioners are willing that the name of the company be changed to 'The Scottish Accident, Life, and Fidelity Insurance Company, Limited,' and they are in communication with the Board of Trade for its approval to this change, as provided for under section 13 of the Companies Act of 1862.

"I have examined the proceedings, and have to report that they have been carried out with due regularity."

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Mar. 12, 1896. Scottish Accident Insurance Co., Limited.

The petitioners argued;—It would be for the undoubted advantage of the company if the alteration were allowed. Alterations of a memorandum were sanctioned by the Court in cases where the new business which it was proposed to combine with the original business was of the same class or kind.[1] That was so here, for all the new business was insurance business. The practice in England was the same.[2] It was only where the object of the alteration was to empower the company to carry on a business entirely foreign to the purposes of the original memorandum,[3] or where the powers sought were vague and indefinite,[4] that the Court refused its sanction.

THE COURT [the LORD PRESIDENT, LORD ADAM, LORD M'LAREN, and LORD KINNEAR] pronounced the following interlocutor:—"Confirm the alteration of the memorandum of association with respect to the objects of the company set forth in the special resolution of the company passed on 31st October and 15th November 1895 with the exception of" [one head, which is not above referred to, having been withdrawn by the petitioners], "but subject always to the condition that the name of the company be changed to 'The Scottish Accident, Life, and Fidelity Insurance Company, Limited,' or such other name as may be resolved upon by the company and approved of by the Board of Trade, as provided for by section 13 of the Companies Act, 1862, and be approved by the Court under this petition; and for this end continue the cause, and decern."

J. & R. A. ROBERTSON, S.S.C., Agents.

No. 111.

Mar. 12, 1896. A v. B.

A, Reclaimer.—*D. Dundas.*
B, Respondent.—*Jameson—Cook.*

Husband and Wife—Divorce for desertion—Separation—Cruelty—Charge of immoral conduct not amounting to adultery, and unknown to spouse founding on it until actions in Court—Relevancy.—A husband brought an action of divorce for desertion against his wife, who stated in defence that she had left her husband on account of his continued cruelty. The wife also brought an action for separation on the ground of cruelty against the husband. After the records had been closed the wife craved leave to add in both cases an averment of facts which had come to her knowledge subsequent to the closing of the records, to the effect that, while she was still living with her husband, he had attempted on one occasion to have connection with her niece.

The Lord Ordinary (Low) having allowed an amendment in both actions, the Court refused to interfere with his decision, *holding* that proof of the alleged misconduct of the husband might be relevant as shewing his animus towards his wife, although that misconduct, being unknown to the wife, could not constitute a case of cruel maltreatment.

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[1] Metropolitan Life Assurance, Co., 16th November 1892 (not reported); Northern Accident Insurance Co., June 30, 1893, 30 S. L. R. 834.

[2] Foreign and Colonial Government Trust Co., L. R. [1891], 2 Ch. 395; Alliance Marine Insurance Co., L. R. [1892], 1 Ch. 300; National Boiler Insurance Co., L. R. [1892], 1 Ch. 306.

[3] Glasgow Tramway, &c. Co. v. Magistrates of Glasgow, March 13, 1891, 18 R. 675.

[4] Young's Paraffin, &c. Co., Jan. 16, 1894, 21 R. 384.

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A v. B.

1ST DIVISION.
Lord Low.

On 12th November 1895 A brought an action of divorce for desertion against B, his wife. He stated that they had been married in March 1890, and that she had deserted him in January 1891.

In defence B averred that she had left her husband because of his continued cruelty towards her.

On 25th November 1895 B brought an action for separation against her husband on the ground of cruelty.

After the records had been closed and proof allowed the wife lodged a minute in both actions craving leave to amend the records by adding an averment (of facts which had come to her knowledge after the records had been closed) to the effect that, while she was still living with her husband, he had attempted on one occasion to have connection with her niece, who was staying with them.

On 22d February 1896 the Lord Ordinary (Low) allowed the proposed amendment in both actions.

The husband reclaimed, and argued;—The averments contained in the amendment were irrelevant in both cases. (1) *Separation Case.*—While adultery was a good ground for separation,[1] it was not legal cruelty,[2] and the conduct alleged in the minute did not amount to adultery. The cases of *Lessly*[3] and *Letham*,[3] relied on by the other side, established no more than that the protracted adultery of a husband in the house where his wife resided amounted to cruelty. In any case there could be no cruelty to the wife in conduct of which she confessedly knew nothing. (2) *Divorce Case.*—A wife could not plead as an excuse for non-adherence conduct on her husband's part of which she was ignorant when the action was brought, just as under the old law an offer to adhere was too late after decree of adherence—then a necessary preliminary to an action of divorce for desertion—had been pronounced.[4]

Argued for the wife;—The conduct alleged in the minute of amendment would have justified the wife in refusing to live with her husband. The allegations would accordingly have been a good answer to an action of adherence. They were therefore a good answer under the present procedure to an action of divorce for desertion.[5] Non-adherence might be justified on grounds which would not support an action for separation.[6] Moreover, the minute contained relevant averments of cruelty.[7] If not sufficient by themselves as an answer to the action for divorce or as a ground for separation, these averments were at least relevant to shew the character of the husband's feelings towards his wife, and proof of them would assist the Court in judging of the truth of the charge of cruelty made against him.

LORD PRESIDENT.—I take the action of separation first, and the question

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[1] Wilson v. Wilson, May 23, 1866, 4 Macph. 732, 38 Scot. Jur. 387.

[2] Beauclerk v. Beauclerk, L. R., 1891, Prob. 189.

[3] Lessly v. Nairn, 1712, 4 Br. Sup. 880; Letham v. Proven, March 8, 1823, 2 S. 284 (N. E. 250).

[4] Fraser on Husband and Wife, ii. 1214.

[5] Auld v. Auld, Oct. 31, 1884, 12 R. 36.

[6] Fraser on Husband and Wife, ii. 1211; Stevens v. Stevens, June 23, 1881, 18 S. L. R. 80; Mackenzie v. Mackenzie, March 18, 1893, 20 R. 636, May 16, 1895, 22 R. (H. L.) 32; Russell v. Russell, L. R. [1895], Prob. Div. 315.

[7] Lessly v. Nairn, 1712, 4 Br. Sup. 880; Letham v. Proven, March 8, 1823, 2 S. 284 (N. E. 250).

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is, not whether the conduct averred in the new article constitutes a case of cruel maltreatment falling under the terms of this summons. If that were the question, I confess that my opinion would be that it should be decided in the reclaimer's favour, because I cannot see how a case of suffering from the misconduct of the defender—which is the essential quality of cruelty—can be made out when the pursuer was unconscious of the misconduct in question. But that is not the question. The question is, whether this alleged conduct on the defender's part can have any bearing on the case of cruel maltreatment alleged on record. The suggestion is that the animus of the defender is necessarily in controversy, and in the question of how he treated his wife it may be material to know that he really was diverting his affection from his wife and had been tampering with this other woman. I do not think that the averment in question is so manifestly irrelevant that we should interfere with the manner in which the Lord Ordinary has exercised his discretion.

As regards the divorce case, it is clear that the same reasoning applies. The allegation against the husband is in that case made by way of defence, but its relevancy rests on substantially the same grounds, as the cruelty of the husband is the subject of investigation. Accordingly, I think we should refuse the reclaiming note.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

SMITH & WATT, W.S.—KINMONT & MAXWELL, W.S.—Agents.

No. 112.
Mar. 12, 1896.
Simpson v. Paton.

MRS MARGARET SIMPSON, Pursuer (Appellant).—*Baxter—Guy.*
BURRELL & SON, Defenders (Respondents).—*M'Clure.*
JOHN PATON, Defender (Respondent).—*Constable.*

Reparation—Master and Servant—Responsibility of stevedore for defect in ship.—Held that a stevedore was not liable for injuries sustained by one of his servants in consequence of defects in the ship upon which the stevedore was employed, there being no particular circumstances to lay the duty of inspection upon him.

Nelson v. *Scott, Croall & Sons*, 19 R. 425; *Robinson* v. *John Watson, Limited*, 20 R. 144, *followed.*

1ST DIVISION. Sheriff of Lanarkshire.

MRS MARGARET SIMPSON raised an action in the Sheriff Court at Glasgow, for herself and as tutrix for her pupil children, against Burrell & Son, and John Paton, jointly and severally, for payment of damages on account of the death of her husband.

The pursuer alleged that her husband had been killed while in the employment of John Paton, who was a stevedore in Glasgow. Paton had been employed by Burrell & Son, who were the owners of the s.s. "Strathavon," to do some work in connection with that vessel, and had ordered the deceased to remove the hatch covers from the forehold. (Cond. 3) "After receiving this order the deceased went to the forehold of the said vessel to remove the hatch covers in order to get below. The hatch covers in said vessel are divided into two sections, which are supported by fore and aft and thwart-ship beams. These fore and aft and thwart-ship beams fit into sockets. While engaged taking off one of the covers of the hatch, the supports suddenly and with-

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Mar. 12, 1896.
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out warning gave way, and the deceased was precipitated to the bottom of the hold, a distance of about 24 feet, and received such injuries that he shortly thereafter died." (Cond. 5) "The said accident was . . . caused through the fault of the . . . defender, Paton, in culpably failing to see (as was his duty before setting his men to work) that the ways and plant used by the deceased in the course of his employment were sufficient and in good order, in so far as the said thwart-ship beam was weak and bent, the said hatch covers were off the square and had not sufficient hold, and there was only one defective fore and after, in place of four strong fore and afters. It is usual, necessary, and safe in ships of the class in question for the stevedore to see that the ways and plant are in sufficient order before setting his men to work, to have the thwart-ship beam straight and of sufficient strength and length to support the fore and afters, and the covers in their places, to have the hatch covers fitted evenly and with sufficient hold of the supports, and to have four strong fore and afters supporting the covers. The said accident was also caused through defender Paton culpably ordering the deceased to remove the hatch covers. It was his duty as stevedore to remove said hatch covers, as is usual, necessary, and safe in vessels of this description at the Queen's Dock, Glasgow."

The defender Paton pleaded that the action was irrelevant.

On 7th February 1896 the Sheriff-substitute (Balfour), before answer, allowed a proof.

The pursuer appealed to the First Division for jury trial.

The defender Paton objected to the relevancy of the action as against him, and argued;—A stevedore was not responsible for defects in a ship on which he was employed. No duty lay upon him to inspect the ship before ordering his men to start work.[1]

Argued for the pursuer;—It was the duty of a stevedore to see that the parts of a ship where his men were going to work were in proper order. The defects alleged were not latent. There was therefore a sufficient allegation of fault against the stevedore.

LORD PRESIDENT.—It seems to me to be clear that there is no case against the stevedore, there being no allegation of particular circumstances such as to impose on him the wide duty of examining the ship on which he was employed, and an entire absence of all grounds to constitute liability against him.

LORD ADAM.—I do not think that there is a stateable case against the stevedore.

LORD M'LAREN.—I agree, and after the two cases which have been referred to I should have thought it hopeless, or at least unnecessary, to bring an action against a stevedore in respect of the insufficiency of the ship on which he was employed.

LORD KINNEAR concurred.

THE COURT dismissed the action as against Paton, and approved an issue for trial of the case against Burrell & Son.

HENRY ROBERTSON, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—MILL, BONAR, & HUNTER, W.S.—Agents.

[1] Nelson v. Scott, Croall, & Sons, Jan. 30, 1892, 19 R. 425; Robinson v. John Watson, Limited, Nov. 30, 1892, 20 R. 144.

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LORD PRESIDENT.—It seems to me to be clear that there is no case against the stevedore, there being no allegation of particular circumstances such as to impose on him the wide duty of examining the ship on which he was employed, and an entire absence of all grounds to constitute liability against him.

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HENRY ROBERTSON, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—MILL, BONAR, & HUNTER, W.S.—Agents.

[1] Nelson v. Scott, Croall, & Sons, Jan. 30, 1892, 19 R. 425; Robinson v. John Watson, Limited, Nov. 30, 1892, 20 R. 144.

No. 113. THE GOVERNORS OF THE JONATHAN ANDERSON TRUST, Petitioners.—*Jameson—Craigie.*

Mar. 12, 1896. Governors of Jonathan Anderson Trust.

Charitable Trust—School—Alteration of scheme framed under Educational Endowments Act, 1882 (45 *and* 46 *Vict. cap.* 59).—In a petition presented by the Governors of a charitable institution for the alteration of a scheme framed by the Educational Endowment Commissioners for the administration of the charity, the Court sanctioned a scheme for transferring the use of school buildings and funds applicable to teachers' salaries, which had hitherto been devoted to the free elementary education of poor children, to a school board for the sole purpose of providing efficient secondary education to which a certain number of poor children should be admitted without charge, secondary education being a purpose for which the school board was not entitled to levy rates.

Kirk-Session of Prestonpans v. *School Board of Prestonpans*, 19 R. 193, *commented on.*

1ST DIVISION. THE JONATHAN ANDERSON TRUST, Forres, held certain funds and estates bequeathed for educational purposes, since 1888. The Governors administered these under a scheme framed by the Commissioners under the Educational Endowment (Scotland) Act, 1882, which provided, *inter alia*, that it should be in the power of the Court of Session to alter the scheme upon application made to them with consent of the Scotch Education Department by the governing body or any person interested.

In October 1895 the Governors of the trust, with consent of the Scotch Education Department, presented a petition to the Court "to alter the provision of the scheme, dated 3d May 1888, and numbered 280 under the Education Endowments (Scotland) Act, 1882, for the administration of the endowments known as Jonathan Anderson's Institution and Fraser's Bequest, as at 1st January 1896, in terms of the schedule hereto annexed." *

The petitioners stated that under the present scheme they maintained a school in the buildings of the Institution for the elementary education of children, and that since free education was now provided in the board schools it was unnecessary to continue to do so. They

* The schedule contained, *inter alia*, the following proposed alterations,—"(4) Section 27 of the scheme shall be cancelled, and the following section shall be substituted therefor:—'The Governors shall make over the use of the buildings of Jonathan Anderson's Institution, the playgrounds, teacher's house, outbuildings, and garden, to the School Board of the Burgh of Forres for educational purposes, and shall also pay over annually to the said board that portion of the revenues of the trust which, by section 27 of the said scheme hereby cancelled, is available for the salaries of teachers, and the said school board shall administer the same for that purpose with a special view to the establishment and maintenance of an efficient Secondary Department in connection with the Forres Public School.' (5) Sections 28 and 29 of the scheme shall be cancelled, and section 30 shall be amended by substituting for the first paragraph thereof the following paragraph:—'The school board shall admit into the Forres Public School, or any department thereof, without charge, a number of children (herein referred to as free scholars), not exceeding at any time one hundred, who shall be natives of or resident in the parish of Forres, Kinloss, or Rafford, and whose parents or guardians, not being in receipt of parochial relief, are in such circumstances as to require aid for providing elementary education. The Governors shall provide, without charge, such books, stationery, and other school material as may be necessary for the said free scholars in the said school, or any department thereof.' (The remainder of the section to remain as at present.)" [The remainder of the section provided for the selection of the free pupils by competitive examination.]

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accordingly asked the Court to sanction amendments on the scheme to the effect of transferring the site of the school buildings and the management of the school to the School Board of the Burgh of Forres, and of transferring to them annually that portion of the revenues of the trust available for teachers' salaries, with a special view to the establishment and maintenance of an efficient Secondary Department in connection with the Forres Public School.

The Court remitted to Mr James A. Fleming, advocate, to inquire into the facts set forth in the petition, and to consider the proposed alteration of the scheme, and to report.

Extracts from Mr Fleming's report are given below.*

To obviate the objection taken by the reporter, the petitioners altered the concluding part of article 4 of their proposed amendments so as to read "and the said School Board shall administer the same solely for the establishment and maintenance of an efficient secondary department," and by substituting the word "secondary" for the word "elementary" in article 5, and moved the Court to grant the prayer of the petition as thus amended.

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* "The primary object of the petitioners' scheme is to provide free elementary education for poor children in the parishes of Forres, Kinloss, and Rafford. With this object the petitioners are directed to carry on a school on the same lines and teaching the same subjects as a School Board, at which fees should be charged, except in the case of poor children. Now that elementary education is practically free, the petitioners find that their school provides no exceptional benefit for the favoured class, and results in overlapping and waste of teaching power and money. They, therefore, ask your Lordships to alter their scheme so as to enable them to apply the trust funds, so far as not required for providing elementary education for poor children, in providing secondary education in Forres. I venture to think that this alteration, due provision being made for giving a preference to poor children, would result in a much more beneficial employment of the trust funds than is possible at present, and is desirable.

"But I think that the method in which the petitioners propose to make this change is open to criticism. They propose that they should hand over to the Forres School Board their school with the use of their school buildings, and pay annually to them as much of the revenue of their endowments as has hitherto been expended in maintaining the school. In return for this the School Board is to give free education to poor children selected by the petitioners, and is to relieve the petitioners of all their powers, duties, and responsibilities as managers of the said school. This obligation on the School Board to give free education to poor children is merely nominal, as education is given free to all children in Forres, and it is difficult to see how it could be enforced, for the annual transfer of income to the School Board is not made conditional upon their obligation being duly fulfilled. A further consideration arises from the doubt whether such an application of these funds would not be truly in relief of rates. The School Board have already in operation a secondary department, and to allow charitable funds to be applied as proposed, to render this department more effective, seems to be a violation of the principle laid down in the *Prestonpans* case (*Kirk Session* v. *School Board of Prestonpans*, 19 R. 193). I would submit that it is inadvisable to divest the petitioners of their duties to such an extent and under such an arrangement. The petitioners state that they do not desire powers to carry on their own school as a secondary school, as, exclusive of Government grants, their income is quite insufficient, and such a change would simply continue the evil of overlapping in a worse form. . . ."

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Argued for the petitioners;—The *Prestonpans*[1] case was different. There the Court rejected a scheme, under which aid was to be given to elementary education, on the ground that the proposed application of the funds would virtually be in the relief of the rates. Here the funds were to be applied for the establishment and maintenance of secondary education, for which the ratepayers were not liable.

At advising,—

LORD PRESIDENT.—We have a careful and useful report from Mr Fleming, and he has very properly called our attention to what at first sight seems a formidable objection to the proposed scheme. The petitioners, however, have now made an important amendment of the proposed scheme, in view of which I think that we may safely grant the prayer. By that amendment it is now made clear that the trust funds are to be administered "solely for the establishment and maintenance of an efficient secondary department in connection with the Forres Public School."

This being so, the moneys of this trust will, under the proposed scheme, in no way go in relief of the ratepayer. It is true that this "school board have already in operation a secondary department." But the school board, while it may quite well have such a department in operation, are not, in a fair exercise of their statutory powers, entitled to impose rates for its establishment or its maintenance, nor could they legitimately so administer the establishment, of which the secondary department forms part, as to make a deficit caused by the secondary department fall upon the ratepayers. Accordingly, I think that the amendment of the scheme enables it to escape the just criticism of the reporter.

I may add that the principle to which the reporter refers was only incidently illustrated in the *Prestonpans* case,[1] but it is of unquestionable soundness. If some educational or charitable purpose be one for which it is lawful to impose rates, or to the accomplishment of which public moneys are already dedicated, then it is plain that to give the money of a charitable trust to that purpose is not to further the purpose, which is already provided for, but to relieve the ratepayer or the taxpayer, as the case may be, who is by statute made the debtor in an obligation. The Court, if it were to make such application of trust money, would, under the guise of promoting a purpose which once depended on charity, be ignoring the facts that by legislation that purpose had passed out of the region of charity into that of obligation on the ratepayers, and that a charity devoted to the recipients of education is misapplied, if devoted to the givers of education, whether voluntary or compulsory.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT granted the petition as amended.

ROBERT STEWART, S.S.C., Agent.

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[1] Kirk-Session of Prestonpans v. School Board of Prestonpans, Nov. 28, 1891, 19 R. 193.

MRS CECILIA PRENTICE OR MARQUIS, First Party.—*Salvesen—Clyde.* No. 114.
ALEXANDER PRENTICE, Second Party.—*Rankine—Crabb Watt.*
MRS JESSIE MACDONALD OR HALBERT, Third Party—*Hunter.*

Mar. 12, 1896.
Marquis v. Prentice.

Lease—Long Lease—Destination—Vesting—Succession—Conditio si institutus sine liberis decesserit.—Certain subjects were leased for 950 years to A. P., "and his heirs as after mentioned," and failing him "then the whole subjects to and in liferent only to the present wife of the said A. P. . . . and after the death of the said spouses . . . then to the children of their marriage equally between them, share and share alike, in fee."

A. P. was survived by his wife. Three children of their marriage were alive at the date of the lease, of whom two survived their father.

Held in a competition as to the right to the lease on the death of the widow, that the right to the lease, subject to the widow's liferent, had vested on the death of the father in the two children then alive to the extent of one half each, and that a daughter of the third child who had predeceased that date had no right, as the *conditio si sine liberis* did not apply, the lease having been granted by a stranger to the family, and not as a parental provision.

2D DIVISION.

BY lease dated 12th July and 17th September 1845, entered into between Lord Belhaven and Stenton and Alexander Prentice, residing at Beltonfoot of Wishaw, Lord Belhaven and Stenton "let and in tack and assedation set to the said Alexander Prentice and his heirs as after mentioned, but always with and under the burden of the liferent of Cecilia Haddow or Prentice his mother, to the extent of one third of the subjects after described, during all the days of her natural life, and failing both the said Cecilia Haddow and the said Alexander Prentice, then the whole subjects to and in liferent only to the present wife of the said Alexander Prentice during the days and years she may continue his widow allenarly, and after the death of the said spouses, or re-marriage of the present wife of said Alexander Prentice, then to the children of their marriage, equally between them, share and share alike, in fee," certain subjects in Wishaw. The endurance of the lease was "for the whole time and space of 950 years from and after the term of Martinmas 1844," which was declared to have been the term of entry; and Prentice bound and obliged himself, "and his heirs and successors herein," to pay £1, 1s. of yearly rent or tack duty.

Prentice entered into possession of the subjects let and possessed them under the lease until his death. The lease was not registered under the Registration of Long Leases (Scotland) Act, 1857 (20 and 21 Vict. cap. 26). At the date of the lease Prentice had three children alive, Cecilia, William, and Margaret.

Prentice died on 5th November 1877, intestate. He was predeceased by his mother, and by his daughter Margaret, and he was survived by his wife and by two children, Cecilia and William.

Mrs Prentice, the widow, died on 17th July 1895, without having married again. After her death questions arose as to the persons entitled to the lease under the clause in favour of the children of the marriage, and a special case was presented. The questions raised depended on the following state of the family.

Of the two children who survived their father, one, Mrs Cecilia Prentice or Marquis, survived her mother and was the first party to the case; the other, William Prentice, predeceased his mother and was survived by a son Alexander Prentice, who was the second party

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to the case. The child who predeceased her father, Mrs Margaret Prentice or Macdonald, was survived by a daughter, Mrs Jessie Macdonald or Halbert, who was the third party to the case.

The first party maintained that as the only child of the marriage who was alive at the date of the death of the widow, she alone was entitled to succeed to the lease, in virtue of the destination therein. Alternatively, she claimed that she and the second party were entitled to succeed to the lease jointly between them, in respect that the right of succession to the lease fell to be determined as at the date of the death of their father, the original lessee, and that at that date the only children of the marriage alive were the first party and the father of the second party.

The second party as heir-at-law of his father, claimed to be entitled to succeed to the lease jointly with the first party, or to the extent of one half.

The third party maintained, that under the destination in the lease she was entitled to succeed to the extent of one third, along with the first and second parties.

The questions of law were:—"1. (*a*) Is the first party, the said Mrs Cecilia Prentice or Marquis, entitled to succeed to the said lease to the exclusion of the second and third parties? or (*b*) Are the first and second parties entitled to succeed to the said lease jointly, or to the extent of a half each? 2. Is the third party, the said Mrs Jessie Macdonald or Halbert, entitled to succeed to the said lease to the extent of one-third, or jointly with the first and second parties?"

Argued for the first party;—The deed here was a contract of lease, and was to be construed as other ordinary contracts were construed. It was not a testamentary or a *quasi*-testamentary deed, and it conferred no rights on third parties. The landlord and the tenant might have agreed to terminate it if and when they pleased. It made no difference that the lease was one of extraordinary duration; what the effect of registration under the Registration of Long Leases Act, 1857, might have been it was unnecessary to inquire; this lease had not been so registered. The question was—who were entitled to take up the lease under the clause in favour of the children of the marriage, on the death of the widow, the prior tenant? The natural answer was, the child or children, if any, who were then alive. But it was said by the second party that as the widow was liferenter only, the right of fee must have vested on the death of the father, because otherwise the fee would be *in pendente* from the death of the father till the death of the widow. The importation of this principle of the law of fee and liferent into a contract of lease, was wholly illegitimate. A tenant who was described as liferenter did not differ in any essential particular from a tenant who was described as fiar. A fiar might have larger powers of assignation than the liferenter, but in so far as the actual tenancy was concerned the liferenter occupied the subjects and paid the rent, and the fiar could do no more. There was thus no fee to be filled during the tenancy of the widow, for the landlord got all that he contracted for—a tenant who paid the rent.[1] No right therefore vested in the children until her death.[2] Just as foreign to the construction of ordinary contracts was the principle of the

[1] Macallister v. Macallister, Feb. 22, 1859, 21 D. 560, 31 Scot. Jur. 297.
[2] Forrester v. Milligan, July 1, 1830, 8 S. 992.

conditio si sine liberis, to which the third party appealed. That principle, primarily a rule of implied or presumed intention in the construction of testamentary deeds, no doubt appeared to have been extended to deeds of a *quasi*-testamentary, although contractual, character; but to import it into the construction of ordinary contracts between strangers was inconsistent with the settled rules for the construction of contracts. In any case the principle had no application here, for this lease was not a family provision,[1] and the children were substitutes.[2] The word "children" in the lease ought to receive its natural meaning of immediate issue. Even in testamentary deeds that was the general rule; the case of *Rankin*[3] appeared to be the only reported example to the contrary.

Argued for the second party;—On a sound construction of the lease the right of fee vested in the children of the marriage who were alive at the death of their father. Nothing vested in the children prior to that date, because the father was in possession of the subjects as fiar, but vesting took place then, and not at the death of the widow, because the fee had to be filled. The widow's liferent was a mere burden on the children's right of fee; just as their grandmother's liferent had been on their father's right.

Argued for the third party;—The children of Alexander Prentice, the lessee, who were in existence at the date when the lease was granted took a vested right under the lease, which their father could not have defeated. It was as if their names had been inserted in the lease. Had they been mentioned by name in the lease, their right would have been clear.[4] The lease had not been registered, but possession under it was equivalent to registration. The third party's claim therefore to a one-third share of the lease was well founded. At all events her claim ought to be sustained on the ground that the *conditio si sine liberis* applied. It was not an answer to her that this was not a general family settlement; the *conditio* had been held applicable to legacies.[5] Nor was it an answer that the lease was not a testamentary deed; the *conditio* had been held to apply to marriage-contracts and to bonds of provision.[6] Looking to the terms of the destination and the whole character of the lease, it was *ejusdem generis* with such deeds.

At advising,—

LORD TRAYNER.—In arriving at a determination upon the questions here submitted to us, I think there are two things to be kept especially in view: first the character of the deed in which the destination to be construed occurs, and second, the person by whom that deed is granted.

The deed is a lease whereby certain lands are let for a period of 950 years to the late Mr Prentice. The language of the deed in some respects is inappropriate, and would more suitably have been used in a disposition or conveyance of land rather than in a lease. The language of the deed however, such as it is, is sufficient to make quite clear what the granter of it meant and did. He leased to Mr Prentice "and his heirs as after men-

[1] Crichton v. Howat, Dec. 18, 1890, 18 R. 260.
[2] Carter's Trustees v. Carter, Jan. 29, 1892, 19 R. 408.
[3] Rankin, June 17, 1870, 8 Macph. 878, 42 Scot. Jur. 523.
[4] Macallister v. Macallister, *supra*.
[5] Bryce's Trustee, March 2, 1878, 5 R. 722.
[6] M'Laren, Wills and Succession, i. 719.

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tioned" the subjects there described; provided that on Mr Prentice's death his widow (during viduity) should enjoy the subjects in liferent only, and on her death "then to the children of their marriage equally between them, share and share alike, in fee." Under such a destination the real right conferred by the lease vested at once in Mr Prentice, and on his death vested in the children of the marriage then alive, subject to the burden of the widow's liferent. The children of the marriage surviving at Mr Prentice's death were two in number—the first party to the case (Mrs Marquis) and William Prentice, the father of the second party. The right which vested in William Prentice descended to the second party, who was William Prentice's eldest son and heir-at-law. The third party is the daughter of a child of Alexander Prentice who predeceased her father, and in whom no right had vested at her death. The third party therefore cannot claim as representing her mother under the destination in question, for nothing vested in her mother; and the destination to "children of the marriage" as matter of destination does not include grandchildren. The third party, however, maintains that, notwithstanding this, she is entitled to a share of the subjects on the implied *conditio si sine liberis*, and I think this view is excluded by the fact (1) that the deed is granted by a stranger to the family, and (2) that the deed was not granted, and is not said to have been granted, as a parental provision.

Accordingly I think the second branch of the first question should be answered in the affirmative, to the effect that the first and second parties are entitled to the lease to the extent of one-half each. The second question I would answer in the negative.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the second alternative of the first question by declaring that the first and second parties were entitled to succeed to the lease to the extent of a half each, and answered the second question in the negative, and found and declared accordingly, and decerned.

PATRICK & JAMES, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

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Garland's Trustees v. Macaulay's Executors.

JOHN FAIR AND OTHERS (Thomas Fair's Trustees), First Parties.—*Cullen.*

REV. NATHANIEL ARTHUR GARLAND AND OTHERS (Garland's Trustees) AND OTHERS, Second and Third Parties.—*Salvesen.*

REV. DONALD M. MACALISTER AND OTHERS (Macaulay's Executors), Fourth Parties.—*J. H. Millar.*

MRS HICKLING'S TRUSTEES AND OTHERS, Fifth and Sixth Parties.—*Mackay.*

REV. ALEXANDER W. KINMONT AND OTHERS (Kinmont's Trustees) AND OTHERS, Seventh and Eighth Parties.—*Balfour.*

Succession—Vesting—Direction to divide among children of daughter in event of daughter "leaving issue."—A testator directed his trustees to pay the interest of a sum of £36,000 equally amongst his three daughters, and continued—"On the death of my said daughters respectively leaving lawful

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issue, I hereby direct my trustees to divide amongst the issue of each of my said daughters," one-third of the foresaid sum of £36,000. A, one of the daughters, who survived the testator, died leaving two children, and predeceased by two other children, who had survived the testator, but had died childless. *Held* that the gift to the issue of the daughters did not vest until the death of the daughters respectively, and consequently that the representatives of the predeceasing issue of A took nothing.

2D DIVISION.

THOMAS FAIR, residing at Woodlands, near Edinburgh, died in 1865, leaving a trust-disposition and settlement dated 5th September 1862, by the fifth purpose of which he directed that his trustees should "within five years from the period of my decease invest on good heritable or other eligible security the sum of £30,000 sterling, and pay the interest or annual profits thereof from the date of such investment equally to each of my daughters Margaret Fair or Spence, Harriot Fair or Macaulay, and Mary Jane Fair or Thomas, during all the days of their lives, respectively and allenarly . . . and on the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of £10,000 sterling, being one-third of the sum directed to be invested as aforesaid, and should any of my said daughters die before the succession to the foresaid provisions opens up to them, without leaving lawful issue, the share of the interest or annual profits of the said sum of £30,000 sterling directed to be invested as aforesaid, to which my daughter so dying would have been entitled had she survived, shall be divided equally, share and share alike, between my surviving daughters, or paid to the last surviving daughter during all the days of their lives or of her life allenarly, and the share of the said capital sum of £30,000 sterling, which would have fallen to be divided equally amongst the issue (if any) of my daughter so dying shall be divided equally between the issue of my surviving daughters, or should there only be one surviving daughter having issue, to be paid equally to such issue." The testator left the residue of his estate to his sons.

By codicil dated 1st March 1865 the sum to be liferented in terms of the fifth purpose of the trust-disposition and settlement was increased from £30,000 to £36,000, and "the sum to be divided equally amongst the issue of each of my said daughters shall be £12,000 sterling instead of £10,000 sterling."

The testator was survived by his three daughters named in the settlement.

Mrs Macaulay, one of the daughters, died on 16th February 1895. She was survived by two daughters, Mrs Garland and Mrs Kinmont, and was predeceased by a son Thomas Fair Macaulay, and by a daughter Mrs Hickling. Both Thomas Fair Macaulay and Mrs Hickling survived the testator, and neither of them left issue.

In these circumstances a special case was presented for determination, *inter alia*, of the question whether a share in the fee of the £12,000 liferented by Mrs Macaulay had vested in Thomas Fair Macaulay and Mrs Hickling.

Mr Fair's trustees were the first parties to the special case.

The second, third, seventh, and eighth parties were the representatives of Mrs Macaulay's surviving daughters, Mrs Garland and Mrs Kinmont. These parties maintained that no share of the £12,000 had vested in Thomas Fair Macaulay and Mrs Hickling, and consequently that that sum fell to Mrs Garland and Mrs Kinmont equally.

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The fourth parties were the executors of the Rev. George Macaulay, Thomas Fair Macaulay's father (who had died on 22d March 1895), and as such among the representatives of Thomas Fair Macaulay, who had died intestate; and the fifth and sixth parties were respectively the marriage-contract trustees and the testamentary trustees of Mrs Hickling. These parties maintained that a right to a one-fourth share in the £12,000 liferented by Mrs Macaulay had vested in each of Thomas Fair Macaulay and Mrs Hickling.

Argued for the second, third, seventh, and eighth parties;—The period of vesting in the children and the period of division were intended to be coincident, and consequently nothing vested in the children until the death of their mother, when the division was appointed to take place. The gift to the children was conditional on Mrs Macaulay, their mother, "leaving" children; if she left no children there was no effectual gift of the fee. The only gift was a direction to divide among the issue of Mrs Macaulay if she died "leaving" issue. It was thus a gift which was conditional on the occurrence of an event which might never occur, and that postponed vesting. Children who did not survive Mrs Macaulay were consequently excluded. The construction on the other side treated the words "leaving issue" as equivalent to "having issue," and that was the same thing as treating the words "leaving issue" *pro non scriptis*, for the gift to Mrs Macaulay's children was necessarily conditional on her having children.

Argued for the fifth and sixth parties;—On a sound construction of the fifth purpose of the trust-disposition and settlement the fee vested in the issue of the daughters respectively *a morte testatoris*, or as soon thereafter as issue were born to the particular daughter. Where there was a direction to divide among the children of a liferenter as a class at the death of the liferenter, there was a strong presumption that the whole children of the liferenter took (if they survived the testator) whether they survived the liferenter or not. The language of the will must be very clear before the Court would infer that it was a condition of the gift to the children that they should survive the liferenter, the general presumption being for vesting *a morte testatoris*, and there being nothing in reason to warrant the supposition that the testator intended the children to take or not to take according to the accident of their survivance or predecease of the liferenter. Here the natural construction of the deed did not lead to the inference that survivance of their mother was a condition of the gift to Mrs Macaulay's children. No doubt the gift began "on the death of my said daughters leaving lawful issue," but the condition of survivance was not imported into the actual words of gift; the direction was to divide among "the issue" without qualification—it was not a direction to divide among "such" issue, for example. This construction of similar clauses had frequently been adopted by the Courts in England, where also the words "leaving issue" had been construed as equivalent to "having issue," if that reasonably appeared to be the intention of the testator.[1]

[1] Boulton v. Beard, 1853, 3 De G., M., and Gord. 608; *In re* Orlebar's Settlement Trusts, 1875, L. R., 20 Eq. 711; White v. Hill, 1867, L. R., 4 Eq. 265; *In re* Brown's Trusts, 1873, L. R., 16 Eq. 237; Maclachlan v. Taitt, 1860, 2 De G., F., and Jon. 449; Jarman on Wills (5th edit.), ii. p. 164; Theobald on Wills (4th edit.), 471.

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If then the gift was to "the issue" of Mrs Macaulay, it was immaterial that the only words of gift were contained in the direction to divide at her death. Such a form of gift was material if there was uncertainty as to the persons in whose favour the division was to take place—if there was a destination over, for example;[1] but where there was no uncertainty as to the persons or class of persons to be benefited, the direction to divide was a direction as to the date of payment only, and had no effect on vesting.[2] The construction contended for by the present parties logically led, it might be, to the result that even if all Mrs Macaulay's children had predeceased her, their representatives would nevertheless have taken, but there was nothing unreasonable in such a result.

The fourth parties adopted the argument for the fifth and sixth parties.

LORD YOUNG.—The question before us is one of vesting under the fifth provision of the will of the late Mr Thomas Fair. That provision is—"On the death of my said daughters respectively, leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of £10,000 sterling." There were three daughters, and to each of these he gave a liferent of £10,000, or £30,000 in all. This was afterwards increased to £36,000, giving £12,000 to each daughter and her issue. One of the daughters, Mrs Macaulay, died in February 1895, leaving two daughters. She had had another daughter, Mrs Hickling, who was married and had died without issue sometime before her mother, and the question is whether this daughter is one of the issue entitled to a share of the £12,000 appointed to be divided by the clause of the settlement to which I have just referred. That question depends, as I have stated, entirely and exclusively upon the construction of that clause.

I may say at once that I attach no importance to the view which was suggested that the meaning of this clause is affected by the fact that the word "issue," when it occurs for the second time in the clause, is not preceded by the word "such."

It was suggested to us by Mr Mackay that the benefit of the provision is not limited to the issue "left," in the ordinary sense of that expression, by the deceasing daughter, but extended to her whole issue whether surviving her or not. I think that the meaning of the clause as employed by a Scotch conveyancer is to create a provision in favour of issue surviving the deceasing daughter, and not a provision in favour of issue predeceasing the deceasing daughter. If it did apply to issue predeceasing it would apply in the case which I put to Mr Mackay. Suppose a daughter should have died who was not survived by two children, but was survived by none, but who had a son or a daughter who had predeceased her by any number of years, is this a provision in favour of the creditors or of the legatees or disponees of such predeceasing child? I put that case to Mr Mackay and he accepted it as a fair test of the argument, and maintained that if the argument was good for anything it was good for this, that the

[1] Bryson's Trustees v. Clark, Nov. 26, 1880, 8 R. 142.

[2] Home's Trustees, July 14, 1891, 18 R. 1138; Hay's Trustees v. Hay, June 19, 1890, 17 R. 961; M'Alpine, March 20, 1883, 10 R. 837.

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trustees or the creditors of the sole predeceasing child of the daughter would take the fee of the whole provision liferented by the daughter. I am of opinion that that is not so, that that is contrary to the import of the words, and contrary to the construction which we must put upon them.

I should desire to guard myself against expressing any opinion now as to the case of a child predeceasing her mother and leaving lawful issue of her own. I say nothing as to whether, in such a case, upon the *conditio si sine liberis*, or upon some analogous principle of law, such grandchildren of the testator would take in the same way as children. It is a provision by a father in favour of his daughters and the issue of his daughters, and it may be a question whether that would take the fee not merely to the issue of a daughter but to the issue of the issue of a daughter. There is, however, nothing of that kind here. There is no question of issue having right according to the presumed will of the testator as coming in place of a deceased parent.

My opinion is that under this provision no one is entitled to share in the division of the fund which Mrs Macaulay liferented except the issue which she left. I do not attach any importance to the word "divide," because if she had left only one child that child would have taken the whole. In my opinion there was no vesting *a morte testatoris* in the children of Mrs Macaulay, and the right to participate in the division of the money liferented by her was exclusively in the children who survived her—the date of her death being the date of vesting. I am of opinion, therefore, that your Lordships should answer the questions accordingly.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the questions now reported to the effect that no right in the £12,000 liferented by Mrs Macaulay had vested in Thomas Fair Macaulay or Mrs Hickling.

HORNE & LYELL, W.S.—J. S. & J. W. FRASER-TYTLER, W.S.—KINMONT & MAXWELL, W.S.—Agents.

No. 116.
Mar. 12, 1896.
Graham v. Magistrates of Perth.

JAMES GRAHAM, Pursuer (Respondent).—*Balfour—W. Campbell.*
THE LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF PERTH, AND OTHERS, Defenders (Reclaimers).—*C. S. Dickson—Dewar.*

Burgh—Royal Burgh—Common Good—Petty Customs—Liability to petty customs of area added by statute to royal burgh—General Police and Improvement (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 13.—The General Police Act, 1862, contains provisions under which, where a royal burgh is within the boundaries of a parliamentary burgh, the boundaries of such royal burgh may, by application to the Sheriff, be extended to the parliamentary boundaries, it being provided by the 13th section of the Act that on a deliverance of the Sheriff to that effect being recorded in the Sheriff Court books, "the parliamentary boundaries aforesaid shall thereafter be the boundaries of the royal burgh for all municipal purposes, and all matters connected with police, including the right of voting for town-councillors."

A royal burgh, the magistrates of which under its charter, dated in 1600, had power to levy petty customs within the area of the burgh as described in the charter, was extended in terms of the General Police Act, 1862.

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Held that the magistrates had no power to levy petty customs in the portions of the burgh which were outside the ancient royalty.

Burgh—Royal Burgh—Common Good—Causeway-mail—Roads and Bridges (Scotland) Act, 1878 (41 *and* 42 *Vict. cap.* 51), *secs.* 3 *and* 33.—Section 33 of the Roads and Bridges Act, 1878, abolishes causeway-mail within burgh, and section 3 defines causeway-mail to include "through customs and all exactions of whatever kind . . . made or which may be made in respect of the use of or passage over the streets or roads within any burgh, but shall not include petty customs . . . except in so far as they are exacted, payable, or leviable in respect of goods, articles, things, or animals passing or carried through such burgh."

Held that dues levied under the charter of a royal burgh on cattle, horses, &c., passing through the ancient royalty to and from markets within portions of the burgh added under the powers of the General Police Act, 1862, were within the definition of causeway-mail in section 3 of the Roads and Bridges Act, 1878, and were therefore illegal under section 33 of that Act.

2D DIVISION.
LdStormonth-Darling.

IN January 1894 James Graham, farmer, Scone's Lethendy, by Perth, raised an action against the Lord Provost, Magistrates, and Town-Council of Perth, and against James Dunbar, Thomas Mackenzie, and John Malcolm, all of Perth, tacksmen of the customs of the burgh, concluding for declarator that the defenders "have no legal right or title to ask, crave, demand, exact, or levy from the pursuer any duty, custom, or impost whatever upon any animals, commodities, or goods in respect of their being sold, or exposed for sale, or purchased by him at the auction markets kept by Messrs Macdonald, Fraser, & Company, Limited, live stock salesmen, Perth, situated at Caledonian Road and Glasgow Road, Perth, and the auction market kept by Messrs John Swan & Sons, live stock salesmen, Perth, and situated at Newtown, Perth, or upon any animals, commodities, or goods in respect of their being imported by the pursuer into or exported by him from any of the said auction markets." There was also a conclusion for interdict.

Two minutes of admission by the parties disclosed the following facts:—

From time immemorial and in virtue of a charter granted by King James VI., dated 15th November 1600,* the Magistrates and Town-

* The charter, after confirming several former charters in favour of the burgh, of new set and demitted and perpetually confirmed "totum et integrum dictum nostrum burgum regium de Perth . . . cum annuis reditibus particatarum et burgagiorum firmis toloniis ac parva custuma dicti nostri burgi de Perth portarum portuum ejusdem commoditatibus privilegiis devoriis et casualitatibus eorund. dicti nostri burgi de Perth ac portarum portuum fororum nundinarum viarum et platearum ejusdem et lie pynorie ac purgationis platearum lie gait dichting et lignorum ac fori lignarii lie tymber et tymber market solitis et consuetis et omnibus custumis et divoriis seu colligi solitis et consuetis per quascunque personas aut personam pro quocunque genere rerum aut bonorum asportandorum ad plateas dicti nostri burgi de Perth ut ibi vendantur."

The authorised ancient translation of this clause was as follows—"All and Whole our said royal burgh of Perth . . . together with the yearly rents of the roods of land and burgage farms, tolls, and small customs of the ports of our said burgh of Perth, and all things transported thereat, commodities, privileges, and casualties of the samen and of the said port, and transported to fairs and markets, ways, and streets thereof, with the pynorie and gait dichting, with the timber and timber market used and wont, and all customs and exactions collected and

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Council of Perth had been in use to levy dues and customs, in respect of the sale of animals, commodities, and goods within the royalty of the burgh as described in the charter, in terms of the "Customs Tables of the Ports of Perth," which tables were altered and explained by successive Acts of Council, the last of such Acts being dated 4th November 1816; and also to levy the dues and customs set forth in the tables in respect of goods, articles, animals, matters, and things brought into or carried out of the royalty.

The boundaries of the burgh were extended in 1839 by and for the purposes of an Act (2 Vict. cap. xliii.) for more effectually paving the streets of the city of Perth, for the better lighting, watching, and cleansing the said city and suburbs thereof, for maintaining and regulating the police of the same, and for other purposes relating thereto.

The boundaries were again extended in 1866, and again in 1889, under the powers contained in the General Police and Improvement (Scotland) Act, 1862,* and the General Police and Improvement (Scotland) Supplemental Act, 1865 (28 Vict. cap. 7).

One of the auction markets of Messrs Macdonald, Fraser, & Company mentioned in the summons, which was opened in 1875, was wholly without the boundaries of the ancient royalty, but was within the boundaries as extended in 1839. The other auction market of Messrs Macdonald, Fraser, & Company, and the auction market of Messrs Swan & Sons, both of which were opened in 1885, were wholly without the boundaries of the ancient royalty, and also without the boundaries as extended in 1839, but were within the boundaries as extended in 1866.

In the action the defenders averred that the markets in question were within the burgh of Perth in the meaning of the charter, and claimed "right to exact customs on the horses, cattle, &c., purchased and sold by the pursuer at the said auction markets, in respect of such purchase or sale, and that notwithstanding the fact that the said auction markets are beyond the limits of the said ancient burgh"; and they further claimed to exact the customs or dues exigible in respect of animals, &c. brought into or taken out of the ancient royalty, averring "that all animals, &c., passing to or from the said markets come within the ancient royalty," and that "the pursuer, in common with other persons liable, has paid these customs dues over a long period of years."

The pursuer pleaded;—(1) The auction markets before specified being beyond the limits within which the defenders have right to

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accustomed to be collected by whatsoever person or persons for whatsoever kind of things or goods carried to the streets of our said burgh of Perth that the same may be sold there."

* The Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), secs. 11 to 14, contains provisions under which, where a royal burgh is within the boundaries of a Parliamentary burgh, the boundaries of such royal burgh may be extended to the Parliamentary boundaries, section 13 being as follows:—"If the Sheriff shall grant the prayer of the petition, he shall issue a deliverance to that effect on the petition, and such deliverance shall be final, and when recorded along with the petition in the Sheriff Court books of the county, the Parliamentary boundaries aforesaid shall thereafter be the boundaries of the royal burgh for all municipal purposes and all matters connected with police, including the right of voting for town-councillors."

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exact the said customs, decree of declarator and interdict ought to be granted as concluded for, with expenses in the event of opposition. (2) The defenders are not entitled to levy customs upon the pursuer's goods passing through the burgh of Perth, on their way to or from any of the said auction markets, such charges being causeway-mail, and being abolished by the Roads and Bridges (Scotland) Act, 1878."*

The defenders pleaded;—(2) The defenders being, in virtue of their charter and immemorial usage, entitled to levy dues on all goods and others brought into, or carried out of, or passing through the burgh of Perth or any portion thereof, in terms of their customs' table, they are entitled to levy such dues from the pursuer, and ought to be assoilzied from the conclusions of this action. (3) The premises of the said Messrs Macdonald, Fraser, & Co., Ltd., and Messrs John Swan & Sons, being situated within the burgh of Perth referred to in said charter, or at least being so situated that goods, &c., cannot be taken to or brought from the same without passing over said burgh or a part thereof, goods, &c., brought into the burgh thereto, or carried out of the burgh therefrom, are liable in the customs exigible under said charter and customs' table. (4) The premises of the said Messrs Macdonald, Fraser, & Co., Ltd., and Messrs John Swan & Sons, being situated within the extended area of the burgh of Perth, goods and others brought into the burgh thereto or carried out of the burgh therefrom, are liable in the customs exigible under said charter and customs' table, and the defenders are entitled to absolvitor, with expenses.

The minutes of admission disclosed the following further facts:—"The pursuer was in the habit of buying and selling horses, cattle, &c., at the auction markets in question. All goods and animals purchased or sold by him at these auction markets, and coming from, or going to, his farm of Scone's Lethendy, by way of Perth Bridge, passed through or across some portion of the ancient royalty before entering or after leaving the auction markets. One of the auction markets belonging to Messrs Macdonald, Fraser, & Co., was so situated that animals could not be brought in, or taken out, without passing through some part of the ancient royalty.

"The tacksmen of customs have not always confined themselves to collecting customs on goods as they enter or pass out of the ancient burgh; on the contrary, they have even before the establishment of

* The Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), enacts, section 33, that "from and after, at latest, 1st June 1883, all tolls within such county and within any burgh wholly or partly situated therein, shall be abolished," and further, that "all causeway-mail shall be abolished within any burgh from and after the fifteenth day of May first occurring not less than four years after the commencement of this Act in the county within which such burgh is situated or partly situated," and in any case "from and after the fifteenth day of May 1887."

Sec. 3 then defines causeway-mail,—"Causeway-mail shall include through customs and all exactions of whatever kind, and also any sum or duty payable or leviable in lieu or satisfaction thereof, or in respect of any exemption therefrom, other than tolls or assessments made or which may be made in respect of the use of or passage over the streets or roads within any burgh, but shall not include petty customs or any sum or duty as aforesaid, except in so far as they are exacted, payable, or leviable in respect of goods, articles, things, or animals passing or carried through such burgh."

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said auction markets, collected custom at places outside the ancient royalty on goods and live stock entering the burgh. The town of Perth, or at all events the tacksmen, . . . with the sanction of the town of Perth, . . . immediately after the marts of Messrs Macdonald, Fraser, & Co., were erected in the years 1875 and 1885, and John Swan & Sons, in the year 1885 respectively, set up collecting boxes far beyond the ancient burgh limits, and there without challenge collected customs on stock, &c., which entered the extended area and passed to the marts, or came from the marts and passed out of the extended area by traversing roads and streets within the extended area, but wholly outside the ancient burgh. Said boxes were erected with the view of preventing parties escaping the payment of customs by using the side roads, or by passing over fields, or in any other way." Custom was with some exceptions regularly paid on stock, &c., brought into or taken out of the markets in question, down to the year 1892. "The defenders do not levy any custom which is specially appropriated to goods or animals purchased, sold, or exposed for sale in said auction markets. . . . The defenders have never attempted to collect customs from the pursuer except upon such animals, goods, &c., as pass one or other of the said collecting boxes."

"All goods or animals purchased within, and taken out of the ancient royalty, as also goods and animals brought within the ancient royalty and sold there, have always without objection been treated as liable in customs"; but the parties were agreed "that custom was not charged on goods, animals, &c., entering the Burgh Muir (or roads leading from the burgh thereto) and not passing through the burgh. The tenants of the customs of Perth have been in the practice for at least forty years of collecting custom from residents in the Burgh Muir, which is part of the royalty of the burgh of Perth and the said roads leading thereto, as if they were strangers."

On 22d January 1896 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Finds, decerns, and declares, and interdicts, prohibits, discharges, and decerns in terms of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.*

* "OPINION.—The purpose of this action is to establish that the persons making use of three auction markets in the city of Perth, which were opened in the years 1875 and 1885, are exempt from every kind of custom or impost leviable by the magistrates upon animals or goods in respect either of their being exposed for sale at, or their being carried to or from, any of these auction markets.

"The material facts are ascertained by admission of parties, and the questions of law arising thereon are two in number—(1) Whether the right to levy petty customs under the charter of King James VI., dated 15th November 1600, has been extended beyond the ancient royalty of the burgh; and (2) whether the right to levy anything of the nature of a transit due even within the ancient royalty falls under the definition of causeway-mail, and, as such, is abolished by the Roads and Bridges Act, 1878.

"The boundaries of Perth have been extended more than once under the powers contained in the Police and Improvement Act of 1862, and the auction markets in question are situated outside the ancient royalty, but within the extended area. If the right to levy customs outside the ancient royalty has been conferred on the defenders, it can only be by virtue of the Act of 1862. Now the Act from beginning to end says nothing about petty customs. But the defenders profess to discover this important addition to their taxing powers in the section which provides that the new boundaries shall, after the Sheriff has issued his deliverance, 'be the boundaries of the

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The defenders reclaimed, and argued;—Petty customs were admittedly leviable within the ancient royalty, and it was inequitable that they should not also be leviable within the added portions of the burgh, for petty customs were part of the common good of a burgh, given to enable the burgh to perform its public functions,[1] and the added portions, which enjoyed the benefit, ought also to contribute to the cost. The power of assessment did not cover all expenses which a burgh had to incur. Under the 13th clause of the General Police Act, 1862, the area added under the powers of that Act was included in the burgh for "all municipal purposes." That expression was sufficient to extend the right to levy petty customs in the added portions of the burgh. The right did not require to be conferred *per expressum*. Royal burghs in general possessed the right to levy petty customs, and the Legislature must be presumed to have known this, and, in extending the burgh, to have extended the rights of the corporation. The charter was a habile title upon which to acquire right to levy petty customs over a new area. The measure of such rights

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royal burgh for all municipal purposes, and all matters connected with police, including the right of voting for town-councillors.'

"An interesting constitutional argument was addressed to me on the incompetence of Parliament to deal with the prerogatives or patrimony of the Crown without the Crown's antecedent consent. This argument assumes that, when the Crown gave out the right to levy customs within the burgh of Perth, it retained the right to levy customs outside the burgh, and that this right was part of its prerogative or patrimony which Parliament could not touch. I hardly think that so high a view of the Crown's right is consistent with the historical fact that, by the Act 1424, cap. 8, and again by the Act 1455, cap. 41, 'all the great and small customs and burrow mails of the realm' were conferred on the Crown by Parliament, and that Parliament was constantly in the habit of ratifying the charters which the Crown granted to royal burghs.

"But it seems to me unnecessary to consider this constitutional question, because even if it be assumed that it was within the competence of Parliament to confer the right of levying customs within the extended area, I do not think that the Act of 1862 has done so. The truth is that petty customs are part and parcel of an obsolete system of burgh administration. On the one side was the duty of watching and warding, of erecting courthouses and jails, of providing and regulating markets, and of maintaining streets. On the other side were the privileges of exclusive trading, the enjoyment of burgh property, and the right of imposing dues on those who frequented the markets and used the streets. But with the abolition of exclusive trading, and the institution of assessments on property for all municipal purposes, a new state of things was introduced. And it is not to be assumed that Parliament in 1862 intended by any but the most express words to apply to new areas a kind of impost so little in harmony with the modern scheme of municipal government. I answer the first question, then, in favour of the pursuer.

"On the second question I think he is also entitled to prevail. I do not doubt that, under the charter of King James, and the usage instructed by the 'Customs Table of the Ports of Perth,' the defenders, for more than two centuries and a half, lawfully imposed certain dues in respect of animals driven through the ancient royalty, altogether irrespective of their being offered for sale. But the right to do so was brought to an end by section 33 of the Roads and Bridges Act, the purpose of which was to abolish all exac-

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[1] Kerr v. Magistrates of Linlithgow, Jan. 14, 1865, 3 Macph. 370, 37 Scot. Jur. 172.

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was the usage which had followed the grant of the right.[1] Here from 1839 down to 1892 there had been the unquestioned practice of levying petty customs in the new areas as they were successively added. In any view the defenders were entitled to levy dues on the pursuer's animals—as these animals passed into the ancient royalty on their way to the markets. Such dues were petty customs, not causeway-mail, which was a tax on vehicles, not on goods.[2] The definition in section 3 of the Roads and Bridges Act, 1878, was said to be more extensive. Assuming that it was, it abolished only dues levied in respect of goods or animals "passing or carried through such burgh." Here the animals did not pass "through" the burgh, for they went to a market which was within the burgh, and there were sold. Burgh in the Act meant burgh as then existing,—that was, the extended burgh when a burgh had been extended.

Argued for the pursuer;—The General Police Act of 1862 in authorising the extension of the area of royal burghs "for all municipal purposes" did not thereby authorise the magistrates of such extended burghs to levy petty customs in the added portions. The right to levy petty customs was a patrimonial right, not a municipal purpose. Petty customs were part of the Crown patrimony, and the Crown might confer a grant of petty customs on a burgh, but there was no necessary connection between the area of the burgh and the right to levy the customs; they might or might not be coextensive.[3] The burgh of Perth itself illustrated that, for the Burgh Muir, though within the ancient royalty, was extra-burghal in the matter of petty customs. There was therefore no ground for inferring an extension of the right to levy petty customs from an extension of the area of a burgh, and the presumption was against the extension of such methods of taxation, which were out of harmony with modern ideas. Petty customs were the patrimony of the Crown, which could not be diminished by Act of Parliament to which the antecedent consent of the Crown had not been given, as it had not to the 13th section of the Act of 1862. In any view prescription was out of the case, for the earliest of the markets in question was opened only in 1875. The defenders' argument on the Roads and Bridges Act was barely stateable; if the dues were not causeway-mail in the sense of that Act, they were tolls, and as such were abolished.

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tions of the nature of tolls. I do not know whether, apart from the statute, the transit dues exacted by the defenders would have fallen under the description of 'causeway-mail,' but clearly the interpretation clause is sufficient to cover them. Nothing can be more searching than the provision that 'causeway-mail shall include through customs and all exactions of whatever kind . . . made or which may be made in respect of the use of or passage over the streets or roads within any burgh, but shall not include petty customs . . . except in so far as they are exacted, payable, or leviable in respect of goods, articles, things, or animals passing or carried through such burgh.' I confess I think that this part of the case is too clear for argument."

[1] Magistrates of Wigtown v. M'Clymont, Jan. 15, 1834, 12 S. 289; Macpherson v. Mackenzie, May 21, 1881, 8 R. 706.

[2] Boyd & Latta v. Haig & Son, June 28, 1848, 10 D. 1433, 20 Scot. Jur. 525.

[3] Magistrates of Linlithgow v. Edinburgh and Glasgow Railway Co., July 12, 1859, 21 D. 1215, *per* Lord Medwyn, at p. 1230.

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LORD YOUNG.—The auction markets referred to in the summons are situated outside the boundaries of the ancient burgh of Perth, but within the boundaries of that burgh as extended under the powers contained in the Police and Improvement Act of 1862. The Magistrates and Council had, and I assume have, right to exact customs and imposts of the character referred to in the summons and record within the boundaries of the ancient burgh. The question decided by the Lord Ordinary and argued to us is, whether the right was extended by the extension of the boundaries under the powers of the Act of 1862. There is no case averred of extension by ancient and established use and wont.

The Lord Ordinary is of opinion that the Act of 1862 does not authorise an extension of the right of burgh magistrates to exact customs or imposts of the kind here in question, and that an enlargement of burgh boundaries does not import such extension. He thinks the words "for all municipal purposes and all matters connected with police, including the right of voting for town-councillors," do not include an ancient royal grant of right to levy customs such as probably could not and certainly would not be granted now. He assumes that burgh authorities have by modern legislation sufficient taxing powers to meet any increase of expenditure which may be rendered necessary or proper by an enlargement of boundaries under the Act, and that there is no reasonable ground for implying the intention of Parliament to give any others. I concur in the opinion of the Lord Ordinary.

I also concur with his Lordship in his opinion and decision to the effect that the fact that animals or goods pass through a part of the ancient burgh on their way to or from the auction markets outside (assuming the fact to be so) does not subject them to the customs or imposts in question.

The result is that in my opinion the pursuer is entitled to decree of declarator substantially as concluded for. I think, however, that the conclusion for interdict is not only superfluous but quite out of place.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor reclaimed against: Find and declare that the defenders the Lord Provost, Magistrates, and Town-council of Perth, and the defenders their tacksmen have no right to exact from the pursuer any duty, custom, or impost upon animals, commodities, or goods in respect of their being sold or exposed for sale, or purchased by him at the auction markets, 'mentioned in the summons,' or upon animals, commodities, or goods in respect of their being imported by the pursuer into, or exported by him from, any of the said auction markets: Further, dismiss the conclusion for interdict: Find the pursuer entitled to expenses," &c.

CARMICHAEL & MILLER, W.S.—IRONS, ROBERTS, & Co., S.S.C.—Agents.

No. 117. THE MARQUIS OF HUNTLY AND OTHERS, Pursuers (Reclaimers).—*Johnston—W. Campbell.*

Mar. 12, 1896.* Marquis of Huntly v. Nicol. WILLIAM EDWARD NICOL, Defender (Respondent).—*Sol.-Gen. Murray—D. Dundas.*

Game—Construction of interlocutor declaring a right of fowling over lands belonging to another person—Extent of privilege—Right to let shooting—Res Judicata—Heritable Right—Servitude.—In 1808 Innes, proprietor of Ballogie, was infeft in that estate *cum privilegio et libertate aucupandi* in the Forest of Birse, which belonged to the Earl of Aboyne. By a judgment of the Court of Session in 1812, affirmed by the House of Lords in 1819, in an action by the Earl against Innes, it was found that the liberty and privilege of fowling was "a franchise conferred as a heritable right rendered an appendage to the property of Ballogie," and further, "that the said privilege may lawfully be exercised by the defender personally, or by his gamekeeper duly authorised for that purpose, or by any qualified friends whom he may permit, whether his tenants on Ballogie or not, or whether the defender be personally present or not, but always in such way and manner as not to be abusively exercised or encroach unreasonably on or absorb the general right of fowling as well as hunting belonging to the pursuer over the said forest."

In 1896, in an action at the instance of the Marquis of Huntly, a successor of the Earl of Aboyne, to have the right of Ballogie defined, *held* that under the interlocutor of 1812 Ballogie was entitled, *inter alia*, (1) to let his right of shooting in the forest to any persons whether they were or were not tenants on Ballogie; and (2) to sell the game killed by him for sport.

Res Judicata—Construction of interlocutor—Opinions of Judges.—*Question* (*per* Lord M'Laren) whether it is permissible to refer to the opinion of the Court for the purpose of controlling or limiting the effect of its decree.

1st DIVISION. Ld Stormonth-Darling. (SEE *Earl of Aboyne* v. *Innes*, June 22, 1813, F. C., affd. July 10, 1819, 6 Paton's App. 444; *Marquis of Huntly* v. *Nicol*, Jan. 9, 1858, 20 D. 374.)

This action was raised in May 1895 by the Marquis of Huntly and others against William Edward Nicol, proprietor of the estate of Ballogie (formerly called Tilliesnaught), for the purpose of having defined a certain sporting right which Ballogie enjoyed over the Forest of Birse, belonging to the Marquis of Huntly.†

About the beginning of the present century Mr Lewis Innes, the then proprietor of Ballogie, having asserted a right of hunting and fowling in the forests of Birse and Glencat, the Earl of Aboyne (the Marquis of Huntly's author) in 1808 raised an action of suspension in the Court of Session against Mr Innes, and subsequently an action of declarator, which actions were conjoined.[1] In these actions the Earl of Aboyne sought to have it found and declared that he had the exclusive right to the forest, subject only to certain servitudes of grazing specified in a decree-arbitral, "and subject also to the farther personal privilege in favour of Lewis Innes . . . as proprietor of the lands of Tilliesnaught or Ballogie, of shooting wild fowl in the said forests of Birse and Glencat." Defences were lodged for Mr Innes, and the case thereafter came before Lord Meadowbank, Ordinary, who on 12th

* Decided March 5, 1896.

† Among the titles of the defender was an instrument of sasine in favour of Hugh Ross of Tilliesnaught,—"In totis et integris terris de Tilliesnaught . . . cum privilegio et libertate aucupandi et piscandi ac cum communi pastura in forrestis de Bris Glencat Glencaven et Lendrum . . ."

[1] Earl of Aboyne v. Innes, June 22, 1813, F. C.

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May 1809 pronounced an interlocutor to the following effect:—"Finds that franchise, easement, or whatever be its proper class, is a right incident to feudal property in land at common law, but not to rights of the nature of servitudes; and though the right is restricted by statute, *quoad* the autocratic exercise thereof, to proprietors of a certain extent it cannot be lawfully exercised by them on any ground contrary to the will of the proprietor thereof, on the pretext that they have rights of servitude affecting the surface of the same; and with regard to Lewis Innes, in respect of the admission by the Earl in his summons that Mr Innes has a right of hunting and fowling over the forests of Birse and Glencat, and in respect that this privilege implies, from the very nature of it, a right to communicate the same to friends, gamekeepers, and assistants when conferred without an express restriction in that respect, finds the letters orderly proceeded in the suspension, and sustains the defences in the declarator, and decerns." To this interlocutor the Lord Ordinary added a note, in which he stated,—"I have only to add that I should have construed Mr Innes' grant of hunting very differently had it not been for a judicial admission, against which I don't think the Earl can be reponed."

The Earl of Aboyne reclaimed against this interlocutor, and on 19th December 1809 the Court pronounced an interlocutor in which they adhered to the interlocutor reclaimed against in so far as it found that Lewis Innes had a right of fowling, or *privilegium et libertas aucupandi*, over the forests of Birse and Glencat, but recalled the interlocutor in so far as it found he had a right of hunting; and they remitted to the Lord Ordinary to hear parties as to the extent of his privilege, and particularly whether it was communicable as the ordinary right or franchise of hunting or fowling.

Thereafter the Lord Ordinary, having again considered the case, but without any evidence having been adduced, on 13th November 1812 issued an interlocutor in the following terms:—"Observing that the usage alleged by Mr Innes prior and subsequent to the decree-arbitral 1755 is not controverted by the Earl, Finds that the liberty and privilege of fowling conferred by the defender's titles is *præsumptione juris et de jure* a grant by a *verus dominus* effectually burdening the right of property in the forest of Birse belonging to the pursuer, with the office and privilege of forester connected therewith: Finds that the liberty and privilege so conferred on the defender is a franchise conferred as an heritable right rendered an appendage to the property of Tilliesnaught or Ballogie, and as it affects a district created a royal forest, under the guardianship of a forester, and appears to be co-ordinate and co-effective with the rights of the grantee thereof, must be considered as a franchise, entitled, so far as it goes, to the benefit of such an establishment, and to a fair and liberal construction as to the exercise thereof, according to use and wont: Finds that the said privilege may lawfully be exercised by the defender personally, or by his gamekeeper duly authorised for that purpose, or by any qualified friends whom he may permit, whether his tenants on Ballogie or not, or whether the defender be personally present or not, but always in such way and manner as not to be abusively exercised or encroach unreasonably on or absorb the general right of fowling as well as hunting belonging to the pursuer over the said forest, and decerns and declares accordingly." Against this interlocutor the Earl of Aboyne again reclaimed to the Court, but

No. 117. the Court adhered, and their judgment was affirmed on appeal to the House of Lords on 10th July 1819.[1]

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In an action raised in December 1855 by the Marquis of Huntly against James Dyce Nicol, of Ballogie, Mr Innes' successor, concluding, *inter alia*, for declarator that the pursuer had the sole right of hunting and fowling in the Forest of Birse, the Lord Ordinary, *inter alia*, sustained the plea of *res judicata* in bar of this part of his declaratory conclusion. To this interlocutor the Inner-House adhered on 9th January 1858.[2]

The conclusions of the present action were for declarator "that the pursuers, under and by virtue of their titles to the forests of Birse and Glencat, have, subject only to such franchise or privilege of fowling as the defender may establish within the same, the sole and undoubted right of hunting and fowling within the said forests: And further," for declarator, "that the *privilegium et libertas aucupandi*, or privilege and franchise of fowling, which the defender possesses under his titles to the estate of Tilliesnaught or Ballogie, is a privilege or franchise personal to the defender as proprietor of the said estate, and to his successors therein, and that it can only be exercised—(1) by himself, as proprietor foresaid, and his successors foresaid, personally; (2) by his or their gamekeepers and assistant gamekeepers shooting under his or their orders for the supply of his or their house of Ballogie; and (3) by his or their friends to whom he or they may have given permission, whether such friends are tenants in the house and lands of Ballogie or are unconnected with the said estate; and further, that it can only be exercised by the defender and his foresaids in such a way and manner as not to encroach unreasonably upon the pursuers' said rights: And it ought and should be found and declared, by decree foresaid, that the defender and his successors in the said estate are not entitled in the exercise of said privilege or franchise—(1) to kill by himself or themselves, or by his or their gamekeepers or assistant gamekeepers, or by his or their friends foresaid, game for sale either privately or in open market; or (2) to exercise the said privilege or franchise personally, and at the same time communicate the same to his or their friends foresaid not accompanied by himself or themselves; or (3) to communicate the same to more than one friend foresaid at one and the same time; or (4) to lease or otherwise transfer for hire or for valuable consideration in money or money's worth the said privilege or franchise either to his or their friends foresaid, or to strangers not being tenants of the house and lands of Ballogie; or (5) to lease or otherwise transfer for hire or for valuable consideration in money or money's worth the said privilege or franchise either to his or their friends foresaid or to strangers being tenants of the house and lands of Ballogie, or otherwise to include the said privilege or franchise in any lease of the house and lands of Ballogie as a pertinent thereof, or as a part and pertinent of the subject let; or at least (6) that he and they are not entitled to lease or otherwise transfer for hire the said privilege or franchise, and at the same time to exercise the same personally; or (7) to lease or otherwise transfer for hire the said privilege or franchise to more than one tenant at one and the same time: Or otherwise, it ought and should be found and declared that the defender

[1] July 10, 1819, 6 Pat.'s App. 444.

[2] Marquis of Huntly v. Nicol, Jan. 9, 1858, 20 D. 374, 30 Scot. Jur. 211.

is only entitled to exercise said privilege or franchise of shooting in such way and manner and subject to such conditions and under such limitations and regulations as our said Lords may, on consideration hereof and of the process to follow hereon, fix and determine."

The defender referred to and founded on the proceedings in the former actions.

The pursuers pleaded;—(2) In terms of said judgments, the defender's right of shooting can only be exercised by himself, his servants, gamekeepers, and friends. (3) The defender is only entitled to exercise the said right by way of sporting, and is not entitled to exercise it for profit, and, *separatim*, cannot communicate or let it to others for profit.

The defender pleaded;—(2) *Res judicata* in respect of the said proceedings. (3) The pursuers' averments are irrelevant. (4) The defender ought to be assoilzied, in respect that under his titles, and in accordance with the judgments referred to on record, he has sporting rights and privileges in said forests co-ordinate and co-effective with those of the pursuer. (5) The defender being entitled to exercise his said rights, either by himself personally or by his keepers, or by any friends whom he may permit, whether tenants on Ballogie or not, or whether he is personally present or not, but always in such way and manner as not to be abusively exercised, or encroach unreasonably on or absorb the pursuer's said rights, the present action must fail.

On 20th December 1895 the Lord Ordinary (Stormonth-Darling) found "(1) that by final judgment of this Court, pronounced on 9th January 1858, in an action at the instance of the Marquis of Huntly, predecessor of the pursuers, against James Dyce Nicol, predecessor of the defender, it is *res judicata* that the findings in the interlocutors pronounced by this Court and affirmed by the House of Lords in an action between the Earl of Aboyne, as proprietor of the Forest of Birse, and Mr Lewis Innes, as proprietor of the estate of Ballogie, which action depended in this Court in the year 1808 and following years, and was appealed to and determined by the House of Lords in 1819, are and form, as to all matters therein dealt with, *res judicata* between the proprietor of the Forest of Birse and the proprietor of the estate of Ballogie; (2) that, in so far as the conclusions of the present action refer to matters not expressly dealt with by the foresaid interlocutors and judgments, the defender's *privilegium et libertas aucupandi* in the Forest of Birse is not subject to the conditions and limitations contended for by the pursuers"; and therefore sustained the second, fourth, and fifth pleas in law for the defender, and assoilzied him from the whole conclusions of the summons.*

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* "OPINION.—This summons contains conclusions which are expressly covered by the judgments of this Court and the House of Lords, in the action instituted in 1808 by the then Earl of Aboyne against the then Laird of Ballogie. As regards these conclusions there is a double *res judicata*, because the judgments in the action of 1808 were found to be *res judicata* in the case of *Marquis of Huntly* v. *Nicol*, 9th January 1858, 20 D. 374, and that judgment is itself *res judicata* against the present pursuers. As a matter of form therefore it is necessary to sustain the plea of *res judicata* with regard to all matters expressly decided in the earlier of these cases. There remain, however, certain conclusions which were not dealt with in express terms by the judgments of this Court and the House of Lords, though I think they are all, or nearly all, covered by the *ratio decidendi*. A few of these seek to lay down some exceedingly minute and rather fanciful restric-

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The pursuers reclaimed, and argued;—The plea of *res judicata* was not relevant. The pursuers admitted that they were bound by the interlocutor of 1812, so far as it went, but the question was, How far did it go? Did it give Ballogie a right to let the shooting or sell the game? Clearly not, otherwise Ballogie would have just the same right as the owner of the forest, and the terms of the interlocutor were consistent only with his having a limited right. A co-owner even was not entitled to let for profit without the consent of the other owners.[1] There was nothing in the nature of the privilege itself to suggest that the person enjoying it was entitled to make money out of it. That was inconsistent with the opinions of the Judges. The Lord Justice-Clerk had said in terms that Lord Aboyne would be entitled to interfere if Ballogie farmed out the shooting as a means of profit or advantage. The interlocutor must be construed in the light of what was said by the Judges who pronounced it. Letting was really an abuse of the privilege. So was selling the game. The pursuers were entitled to prevent such an abuse. The present action was quite appropriate for regulating the exercise of the right.

Argued for the respondent;—The present action was incompetent,

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tions on the defender's right of shooting, but the main question raised by this action (and that to which I suppose it really owes its origin) is whether the defender is entitled to let his right of shooting in the Forest of Birse either with or without the house of Ballogie.

"The ruling document with regard to the defender's right is Lord Meadowbank's detailed interlocutor of 13th November 1812, which was affirmed by the Inner-House and the House of Lords. The main propositions established by that interlocutor are (1) that the defender's liberty and privilege of fowling is a heritable right attached to the property of Ballogie; (2) that it is co-ordinate and co-effective with the rights of Lord Huntly; (3) that it is entitled to a fair and liberal construction as to its exercise, according to use and wont; (4) that it may lawfully be exercised not only by the defender personally, but by his gamekeeper and by any friends to whom he may give permission, whether his tenants on Ballogie or not, and whether he is personally present or not; and (5) that it must not be abusively exercised so as to encroach unreasonably on or absorb the general right of fowling belonging to the pursuers.

"It is true that these propositions do not expressly affirm Ballogie's right to let the shootings, and the pursuers point to some expressions in the opinion of the Judges to the effect that it would be an abuse if he were 'to dispose of the game for profit,' or 'to farm out the right as a means of profit or advantage.' But these are only expressions of one or two individual Judges, and I think they are to be ascribed to the prevailing sentiment of the time, which was undoubtedly against the notion of making money out of a sporting right. It is consistent with this that Ballogie seems in his pleadings to have disclaimed the idea of letting the shootings for hire, although Ballogie house had been occupied as shooting quarters by a succession of tenants, who had claimed the right to shoot in the forest. That being a fact, in the full view of the Court and the House of Lords, it is significant that they did not insert in their interlocutors any exclusion of Ballogie's right to let, but on the contrary, declared that he might give permission to shoot to any of his friends, whether tenants on Ballogie or not. I observe that Lord Glenlee says, 'As to the tenants in the house of Ballogie, it is very extravagant to say that they must not shoot.' Now these were tenants paying a rent for the house, a rent no doubt enhanced

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[1] Campbell v. Campbell, Jan. 24, 1809, F. C.; *cf.* Earl of Aboyne v. Farquharson, Nov. 16, 1814, F. C., 6 Pat.'s App. 380.

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so far as it sought a judgment that was repugnant to the former interlocutor.[1] The pursuers' contention no doubt was that they only sought to construe the interlocutor of 1812, but then their construction amounted to a plain contradiction, for it proceeded on the assumption that the right in question was a personal privilege. It was *res judicata*, however, that it was a heritable right. The judgment of 1812, as well as that of 1858, very clearly rested, not on the judicial admission of the Earl of Aboyne in the action of 1808, but on the defender's titles. The privilege was none the less a heritable right because it did not fall under any of the known classes of servitudes.[2] The right being heritable was communicable. That would have been decided in terms had the parties proceeded with the second branch of the case in 1858. There was nothing in the interlocutor of Lord Meadowbank to preclude the idea of letting. The *dicta* of some of the Judges might tend in that direction, but these could not be allowed to control the terms of the decree itself. The *dicta*, however, and especially those of Lord Meadowbank, referred rather to the remedy in case of abuse, than to the right itself, and meant that Ballogie could not transfer any higher right to his grantee than he had himself. The fact that Lord Meadowbank contemplated a tack shewed that he recognised the assignability of the right. If assignable at all, why not for value? The word "friends," in the interlocutor of 1809, was explained subsequently by Lord Meadowbank to mean "persons."[3] There was no reason why the defender should not sell the game killed by him, if he shot for sport, and there was no suggestion that he was doing anything that was not reasonable. The action as laid was not one in which regulations could be imposed. There was no warrant in the old interlocutor for the specific restrictions set out in the other conclusions of his summons.

At advising,—

LORD M'LAREN was absent, but his Lordship's opinion was read by LORD ADAM as follows:—

LORD M'LAREN.—By a judgment of the Court of Session, affirmed by the House of Lords in 1819, it was found that the then proprietor of Ballogie had a heritable right of fowling in the forest of Birse, the property of Lord Huntly's predecessor. By a second judgment of this Court, pronounced on

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by the sporting rights attached to it, and it is to my mind too fine a distinction to say that the right may be exercised by a tenant of that description, and not by one to whom the shootings are let *eo nomine*.

"In short, it seems to me that once you reject the idea, as this Court and the House of Lords did, that this was a personal privilege in favour of the Laird of Ballogie (like the privilege of rod fishing in the case of *Duke of Richmond* v. *Duff*, 5 Macph. 310), and affirm that it is a heritable right, coordinate and co-effective with that of Lord Huntly, it follows that there is no limitation in the right except that which arises from the fact that it is a joint one, and therefore to be exercised *civiliter*. The finding to that effect in Lord Meadowbank's interlocutor remains, and there is no averment in the present action that the defender's mode of exercising his privilege has unfairly encroached on the right of the pursuers in its character as a joint right."

[1] Ross v. Mackenzie, May 27, 1836, 14 S. 845; Park's Curator v. Black, March 8, 1870, 8 Macph. 671, 42 Scot. Jur. 332.

[2] Murray v. Peddie, May 25, 1880, 7 R. 804.

[3] *Cf.* Earl of Aboyne v. Innes, 6 Pat.'s App. 444, at p. 448.

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9th January 1858, the first judgment was held to be *res judicata* in a question between the successors in title of the original parties, and it is no longer open to question that the *privilegium aucupandi*, whatever may be its value or extent, is a pertinent of the estate of Ballogie. The present action is instituted for the purpose of defining or limiting the right, the point of chief interest being the conclusion that the defender is not entitled to let the shooting.

When it is proposed to define a right or, which is the same thing, to determine its quality and incidents, it is best to begin by referring it if possible to some known category. But in this case I am at a loss to understand what species of right the Court and the House of Lords intended to award to Mr Nicol's predecessor. As the right is of the nature of a qualified use of another man's property, the nearest analogue would be a right of servitude; yet I should not call it a servitude, because the servitudes which the law has recognised are motived by some consideration of convenience or utility to the dominant estate as an estate, and I cannot see how it can be represented as an advantage to the estate of Ballogie that its proprietor should have the right of shooting in the Forest of Birse. Again, I can understand that the proprietor of Birse should come under a perpetual obligation to permit Ballogie to shoot in the forest. But such an obligation would only be binding on the obligant and his heirs, and not as in this case on purchasers or singular successors. Lastly, if there had been a relation of tenure between the estates of the pursuer and the defender, the privilege might be referred to the principle of conditional grant, but there is no evidence that the one estate ever held of the other, or that the two had ever formed parts of a larger estate.

It is, however, satisfactory to find that the original judgment stands in little need of explanation. I agree in the ground of judgment suggested by the Lord Ordinary, that we are merely interpreters of the original decree. Now, by that decree it is found that the privilege may be exercised by the defender personally, by his gamekeeper, and by any friends to whom he may give permission, whether his tenants on Ballogie or not. This is a very wide power of delegation, going far beyond predial servitude. Even if the decree had said no more than that the privilege should be communicable to tenants, I should have held that the defender was entitled to let the shooting along with a residence on Ballogie estate, because in such a case it is an impossible position to say that you may let the house and give the shooting but shall not let the house and let the shooting. Whatever rent is given by a tenant who has the house and shooting is necessarily a consideration for the shooting as well as the use of the residence. But I am prepared to go further and to hold that, consistently with the original decree, the defender may let the shooting to one who does not hold a lease of any part of the lands of Ballogie. I also agree with the Lord Ordinary in thinking that some of the expressions used by individual Judges are not consistent with the decree. In a question of *res judicata* I doubt whether it is permissible to refer even to the collective opinion of the Court for the purpose of controlling or limiting the effect of its decree, and it is quite certain that the opinions of individual Judges not concurred in by a majority of the Court cannot be used for such a purpose.

The only other point which was specially argued at the debate before us

was the conclusion that the defender and his tenants were not entitled to shoot the game for sale. Now, this is not an action of regulation; but I understand it to be admitted that the defender's privilege is a sporting privilege, and that the shooting must be conducted in a fair and sportsmanlike manner, and consistently with the existence of an equal right in the pursuer.

But if the defender uses his right of shooting fairly, and does not encroach, it can be of no consequence to Lord Huntly what becomes of the birds which may be killed in the exercise of the defender's privilege. The absence of interest on the part of the pursuer seems to me to be a sufficient reason for negativing this conclusion.

The considerations which I have stated suffice, in my opinion, for the disposal of the whole case, and I think that the reclaiming note should be refused.

LORD ADAM.—I concur in Lord M'Laren's opinion.

LORD KINNEAR.—I agree with Lord M'Laren that if we had been called upon by this action to determine the validity of the right in question or to found its character upon the general principles of law, it would have been necessary for us to consider how far it answered to the legal definition either of servitude or of estate in land, or of some other recognised legal right; because although the owners of land may confer what rights of use and enjoyment over an estate they please by personal contracts, which may be binding on themselves, they cannot create new heritable rights or new incidents of property which will affect successors or successive owners of land beyond such as are already recognised by the law of the country. But then it is decided in terms, in the first place, that this is a valid right, and in the second place, that it has certain legal consequences and incidents, and that being finally determined by a judgment of the House of Lords, it appears to me that the question whether it is more or less analogous to servitude on the one hand or some other legal right on the other, becomes a mere question of classification which it is not necessary for us to determine in order to dispose of this action. We have the very high authority of Lord Corehouse for saying that it is a predial servitude in as much as the law does not recognise a right of shooting as a separate estate which can be created by tack or infeftment apart from property in land, and on the other hand, as his Lordship points out, the law has recognised the possibility of annexing to a dominant estate a right of this kind to be exercised over a servient estate. However that may be, it appears to me, as Lord M'Laren has said, that all we have to do now is to apply the conclusions of this summons to the terms of the interlocutors affirmed by the House of Lords in order to see whether we can sustain any of the conclusions of the summons or not. Now, I think that the determining consideration is that it has been decided that this right is not a mere personal privilege, but a heritable right, and I should have been disposed to think that, if that were all that had been decided, it would follow as a consequence from that determination that it might be exercised, not only by the person in whom it was originally vested, but also by any person to whom he communicates it; because the moment it has been established that it is a heritable right, constituted by the infeftment of the owner of the dominant tenement, all the considerations that can be suggested for its limitation on

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the ground of its being a personal privilege necessarily fly off. It must be one or the other. It is either personal privilege or a real right, and the House of Lords have determined that it is the latter. But then the interlocutor goes on to describe the method by which it may be exercised. That appears to me to place all the questions raised in the summons beyond dispute, because it comes to this, that being a heritable right it may be exercised either by the proprietor of Ballogie personally or by his servants whom he authorises to exercise his own right, or by anybody to whom he chooses to transfer it, subject to only one qualification,—that he is to transfer to his friends, whether they are his tenants or not, provided only they be qualified, and he may also so transfer it to them that they may exercise it whether he is personally present on the ground or not. Now, that appears to me to express an unqualified power to transfer the right subject to this condition only, that the transferee shall be qualified according to law to exercise the right of fowling upon the land; and that refers, I think there can be no doubt, to the property qualification by which the privilege of hunting and hawking was confined to persons holding a plough of land in heritage. We are not to consider how far that qualification or limitation of the right is now operative, if it be operative at all, for no question is raised by the summons upon that special point, but subject to that qualification, which appears to me to explain the peculiarity by which the extent of the rights of parties is previously defined in the interlocutor, the judgment finds that the proprietor, vested in the right, may transfer it as he pleases. Then it goes on to express another limitation, which Lord M'Laren has put into the appropriate language which we should use now in such a case—that the right is to be exercised in a sportsmanlike manner—by saying that it is not to be unreasonable or absorbing the general right of fowling belonging to the granter of the right. I have therefore come to the same conclusion as Lord M'Laren, that there are no grounds for introducing into this right any of the specific limitations for which the summons concludes. In the first place, it would be directly contrary to the terms of the interlocutor if we were to find that the defender is entitled only to exercise his right as proprietor either personally or by his friends when he is personally present. Then I can find no grounds in the interlocutor for holding that it is to be exercised only for the supply of the house of Ballogie, which is in the second conclusion of the summons. The final terms of the third conclusion of the summons may be perfectly correct, that the right can only be exercised by the defender and his foresaids in such way or manner as not to encroach unreasonably on the pursuer's rights, but that is a conclusion leading up to specific regulations for the exercise of the right; and, as Lord M'Laren has pointed out, this is not an action for regulation, or one in which we could proceed to make regulations. Therefore that, as a mere general declarator, is unnecessary, and does not give the pursuer any sufficient title or interest to have that qualification declared in his favour, if the more specific conclusions are unsound. Then when the summons goes on to have it found and declared that the privilege is not to be exercised except in a certain specific manner, I agree with Lord M'Laren, for the reason given, that all these limitations are unsupported by the terms of the judgment and finding. If the proprietor of Ballogie, as

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having a right in connection with that estate to shoot over the pursuer's lands, is entitled to transfer that right, and to exercise it by his servants as well as by himself, I am unable to find any ground for the limitations suggested—viz., that he is not to make such conditions as he pleases with his assignee as to the terms on which, between them, the right is to be exercised. And again, if he has the right to kill game unlimited by any condition except a concurrent right in the pursuer to shoot over the lands, I am unable to see any ground for limiting the uses that he may make of the game that has been killed so as to exclude its being used for any other purpose than the consumption of his own house of Ballogie. I entirely concur with the opinion of Lord M'Laren, and with the Lord Ordinary's interlocutor.

The LORD PRESIDENT concurred.

THE COURT adhered.

HENRY & SCOTT, W.S.—AULD & MACDONALD, W.S.—Agents.

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Fraser v. Malloch.

JOHN MILLIGAN FRASER, Pursuer.—*Ure—Younger.*
JAMES MACGREGOR MALLOCH, Defender.—*Shaw—A. S. D. Thomson.*

Process—Expenses—Dominus litis.—Held (*per* Lord Kyllachy, Ordinary), that in order to make a person liable as *dominus litis* for expenses decerned for in an action to which he was no party, it must be established that he was truly the principal in the action, and that the actual litigant was merely his agent.

OUTER-HOUSE Ld. Kyllachy.

IN December 1892 an action was raised at the instance of Donald & M'Culloch, power-loom cloth manufacturers in Govan, and James Donald, sole partner of said firm, and John S. M'Culloch, as trustees for said firm, against John M. Fraser, merchant in Glasgow, for reduction of a minute of agreement of sale and a disposition of a factory in Govan by Fraser to said firm, and for payment of £3622. In June 1894 the Court assoilzied the defender, and he was found entitled to £451 of expenses.

In July 1894 the estates of the firm of Donald & M'Culloch and of Donald, the sole partner, were sequestrated.

In May 1895 Fraser raised an action against James MacGregor Malloch, writer in Glasgow, for payment of these expenses.

The pursuer averred that the defender had made large advances to the firm, and that the former action at the instance of Donald & M'Culloch was really brought by him for his own interest, and that he had no instructions or authority of any kind given to him either by Donald or M'Culloch, that the proceedings were throughout entirely under his control, and that he provided at his own charges for the whole expenses of the litigation.

The pursuer pleaded that the defender being the true *dominus litis* in the former action, the pursuer was entitled to decree.

The defender denied the pursuer's averments.

The Lord Ordinary (Kyllachy) allowed a proof.

The import of the proof is given in the following extract from the Lord Ordinary's opinion:—"I do not think that the real facts of the case are seriously disputed. In 1891 Messrs Donald & M'Culloch

* Decided Feb. 8, 1896.

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(the pursuers of the action referred to) bought from Fraser (the present pursuer) a factory in Govan, with plant and machinery and certain business assets. The price as ultimately paid was about £3500. Messrs Donald & M'Culloch, who had been employed in the factory, had little capital—only about £250—but they obtained a loan on the property of £2000, and the balance was lent them by the present defender, Malloch, who was their banker and law-agent in the transaction. The factory was not successful, and in 1892 Messrs Donald & M'Culloch raised an action of reduction against Mr Fraser on the ground of fraudulent misrepresentation. By that time they were indebted to the defender, Mr Malloch, to the extent of about £1300, and there was another creditor for £400 more. Mr Malloch's firm, who were writers in Glasgow, conducted, through their Edinburgh correspondent, the litigation, and during its progress he continued to finance the factory business. The action was in the end unsuccessful, with the result that the factory was closed, and Donald & M'Culloch were sequestrated."

The Lord Ordinary assoilzied the defender.*

CAIRNS, M'INTOSH, & MORTON, W.S.—MARCUS J. BROWN, S.S.C.—Agents.

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* "OPINION.—The defender in this case is sued for payment of the expenses awarded to the pursuer in a recent action in which he (the pursuer) was defender, and was successful in his defence. The ground of the demand is, that the defender was, as is alleged, the true *dominus litis* in the action, and is, as such, responsible for the expenses. It is not said that he was a party to the action. So far as appears he was simply the Glasgow agent of the pursuers. But it is said that he had such an interest in the result of the suit, and had such control over its course, as to be the true *dominus litis*.—(His Lordship here stated the facts as narrated above).

"The question which must first be determined is, what in law are the elements which attach to a person not a party to a suit the character of *dominus litis*, and that in the sense and to the effect for which the pursuer contends.

"The term *dominus litis* is of course borrowed from the civil law, but with respect to the particular facts with which we have here to deal, it cannot be said that much assistance is to be derived from the definitions and doctrines of that law. The expression was used in the civil law in two senses. It was used to denote the formal pursuer as distinguished from the advocate who appeared for him. It was also used to denote the pursuer or defender proper as distinguished from the procurator or mandatory in whose name it might happen that the contract of litiscontestation was entered into. As between and among those parties there were various points which were ascertained—(Code ii. tit. x. 1; Digest iii. tit. iii. 10-17 and 30-31; Digest xlix. tit. i. 4; Digest xliv. tit. iv. 11; Code ii. tit. xiii. 22-23, and vii. tit. xlv. 1; Cujacius ix. 1065). It was held for example (1) that no judgment could issue in an action except for or against the formal parties to the action,—that is to say, the parties to the contract of litiscontestation; (2) that the procurator who had as such become a party to the contract of litiscontestation had right to be relieved by his mandant or principal of all costs and liabilities thereby incurred, and had a preference for such relief against anything which he recovered; and (3) that judgment being obtained against the procurator, an action lay upon that judgment against the mandant or principal as the true *dominus litis*. But, so far as I can discover, the civil law did not at all deal with the case of a latent third party lying behind not only the advocate and the procurator but also the pursuer or defender, for whom the advocate or procurator appeared. As to the liabilities of such a party the civil law was silent. Still less did it attempt to define

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JOHN LITTLE MOUNSEY (Thomas Dunn's Trustee), Pursuer and Real Raiser.—*Salvesen—Chree.*

MRS MARION HARDY AND OTHERS, Claimants (Reclaimers).—*Salvesen—Chree.*

JOHN DUNN AND OTHERS, Claimants (Reclaimers).—*Salvesen—Chree.*

MRS MARION SMITH OR TAIT, Claimant (Respondent).—*M'Lennan—Gray.*

Loan—Proof—Bank Cheque.—In support of a claim against the estate of a deceased person for repayment of an alleged loan, the creditor produced a cheque drawn by her payable to the deceased or bearer, and marked paid by the bank, but not indorsed by any payee. *Held* that the cheque did not of itself instruct a loan, and afforded no ground for allowing parole proof.

Haldane v. *Spiers*, March 7, 1872, 10 Macph. 537, *commented on.*

Loan—Proof—Writ—Writ of executor and trustee—Writ of beneficiaries—Res inter alios.—In an action of multiplepoinding brought by a testamentary trustee, a claim was lodged by A, who averred that "from time to time she made loans of money" to the truster amounting in all to £390. In support of her claim A referred to a minute of agreement entered into between the truster's widow, since deceased, who was at the time his execu-

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what interest in or connection with the suit should be held to bring those liabilities into play.

"Neither is much help to be had from the law of England. Putting aside its doctrine of Maintenance and Champerty (Blackstone's Com. 4, 10, 12 and 13) with which we are not concerned, the English doctrine of *dominus litis* (or what may loosely be so called) relates exclusively to the question—in what circumstances shall a party to an action who has another party behind him be bound for that reason to find caution for expenses? And all that can be said on that matter is that the English rule—so far as any settled rule exists—goes a good deal further than our Scots rule on the same subject. It certainly goes a good deal beyond any rule which could be applied to the question with which we have here to deal. It appears to be the result of the English cases that it is enough to justify a demand for caution, *e.g.* from a pursuer, that some third person has instigated the suit—has some interest in its result—and has contributed to its cost. At least that appears to be so where the third person refuses to sist himself as a party to the suit. That, however, is, as I have said, merely a rule of process which by no means settles the outsider's liability for the expenses of the suit. As to that matter all that has been held in England seems to be this, that in no case can such liability be enforced in the suit itself or incidentally to the suit. Whether it can be enforced as here by a separate action, and if so on what principle, does not appear to have been considered. In the English law, as also probably in the civil law, that question is I imagine left to depend on the ordinary law of principal and agent—(*Ball* v. *Ross*, 1840, 1 Scott (new edit.) C. P. 217; *Osborne* v. *Petchell*, 1839, 7 Scott C. P. 481; *Hayward* v. *Giffard & Grove*, 1858, 4 M. and W. 194).

"Coming next to the Scots authorities, there is no doubt that these recognise the proposition that a party outside an action may in certain circumstances become liable for the expenses awarded to the successful party, and may be sued for those expenses as here by separate action. There is also no doubt that this liability has been said to depend on the interest which the outside party has in the subject-matter of the suit, and on the control which he possesses and exercises over the course of the suit. But the practical question always is, as to the kind and degree of interest and of control which shall be sufficient for the purpose. And I am afraid that

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* Decided March 5, 1896.

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trix and sole trustee, and his eldest son, under which the son took over at a valuation the crop and stocking on certain farms of which the truster had been tenant. There was appended to the minute, which was tested, a state of the trust funds, and among the "outstanding debts" was entered "sum on debt due to" A "£390." The state was signed by the widow and eldest son, and appended to it was a docquet signed by the truster's other children who, with the widow and eldest son, were the beneficiaries under his will, approving of the minute of agreement, and also "approving of and holding as correct, and duly vouched" the state of trust funds. A, to whom the document had not been delivered or exhibited at any time, maintained that the debt of £390 was proved by it, or alternatively that it raised a *prima facie* case of loan which she was entitled to supplement by parole proof. *Held* (1) that the docquet was not a writ binding on the beneficiaries as in a question with A, but was merely an admission or discharge by them in favour of the truster's widow; (2) that the entry of the sum of £390 was ineffectual to prove a debt due by the trust-estate, in respect (*a*) that the writ in which it occurred was not delivered to A as an acknowledgment by the trustee that the debt was due, and (*b*) that such an acknowledgment, if delivered to A, would not have been binding on the trust-estate; and (3) that

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none of the decided cases formulate or ascertain the principle on which that question must be decided.

"There are some classes of cases which are not uncommonly classed under the head of *dominus litis* of which the principle is perhaps clear enough. For example, when the pursuer of an action alienates, or is otherwise divested of the subject of the action so that he is no longer interested in it, the transferee of the subject may be required to sist himself, and failing his doing so, the action may be dismissed—(*Fraser* v. *Dunbar*, June 6, 1839, 1 D. 882, 11 Scot. Jur. 500; *Fraser* v. *Duguid*, June 9, 1838, 16 Sh. 1130, 10 Scot. Jur. 485; *Waddel* v. *Hope*, Dec. 2, 1843, 6 D. 160, 16 Scot. Jur. 121). The principle here is that the defender is not bound to litigate with a person who has no longer an interest or title to sue, and against whom therefore no effectual judgment could be obtained.

"Again, where the pursuer becomes bankrupt, and is divested subject only to a contingent reversion, he has still no doubt an interest and a title to sue, but the immediate interest is in his creditors, and if the trustee declines to sist himself, the bankrupt must as a rule find caution for expenses. This again is simply an equitable rule of process which settles nothing, *e.g.*, as to the trustee's liability for expenses, if the suit proceeds and the cautioner fails.

"Similarly in popular actions, such as rights of way, where a pursuer is put forward who has a sufficiently good title and interest, but whose title and interest is shared by others who supply the funds, the Court will appoint those other persons to sist themselves, and failing their doing so, will require the pursuer to find caution—(*Jenkins, &c.*, v. *Robertson, &c.*, March 20, 1869, 7 Macph. 739). At least they will do so if it appears that the pursuer is a man of straw, and has been put forward for that reason—(*Potter* v. *Hamilton*, July 19, 1870, 8 Macph. 1064). Here also nothing is involved touching the liability of the outside parties for expenses. They may or may not be liable (if the cautioner fails) according to circumstances—that is to say, according to what may ultimately be found to be their true relation towards the suit, the parties to the suit, and its subject-matter.

"These cases therefore settle nothing really relevant to the present question. It may be right in particular cases that, if certain outside parties decline to sist themselves, the action shall be dismissed, or allowed to proceed only on caution for expenses, and yet it may by no means follow that those outside parties incur any liability for expenses if the action proceeds. That depends, as I have said, on their attitude to the action, and what that

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the writs being themselves insufficient to prove the constitution of a loan there was no room for parole proof to any effect.

Duncan's Trustees v. *Shand*, Jan. 7, 1873, 11 Macph. 254; *Briggs* v. *Swan's Executors*, Jan. 24, 1854, 16 D. 385; *M'Calman* v. *M'Arthur*, Feb. 24, 1864, 2 Macph. 678; *Williamson* v. *Allan*, May 29, 1882, 9 R. 859; *Laidlaw* v. *Shaw*, March 5, 1886, 13 R. 724, *explained and approved*, *per* Lord Kinnear.

Proof—Writ—Writ of executor.—Held that an affidavit in support of a claim for return of inventory-duty in which an executor deponed that he had actually paid debts "due and owing from the deceased at the time of his death," including a debt due to A, was not evidence of the constitution of a debt due to A.

1ST DIVISION. Ld. Moncreiff.

THOMAS DUNN died on 2d March 1865 leaving a trust-disposition and settlement whereby he conveyed his whole estates, heritable and moveable, to trustees for certain purposes, including, *inter alia*, the payment to his widow of the free income of his whole estates during her life, and on her death the division of the estate among his children in equal shares.

Mrs Dunn, the truster's widow, died in 1893, at which date she

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attitude must be to make them liable is the question which has to be solved.

"Neither, again, does the case of *Stevens* v. *Burden*, Nov. 21, 1823, 2 Sh. 447, cited by the pursuer, advance the argument. In that case, a father, as part of an agreement by which his son's means were reduced to an alimentary annuity of small amount, undertook to defend, and did defend, an action of declarator of marriage which had been raised against the son, and in which decree ultimately went out against him, with expenses. The father was found liable, at the suit of the pursuer's agent, for the expenses decerned for, and was so, as the report bears, on the ground that 'the defender undertook to defend his son in the declarator of marriage, and that he did not allow him sufficient aliment.' In other words, the father was held liable in virtue of the special contract between him and his son, which contract, in the particular circumstances, the agent for the successful party being the son's creditor for the expenses, was allowed to enforce by direct action.

"The only decision really in point is that of *Corsan* v. *M'Lauchlan*, Feb. 8, 1828, 6 Sh. 505, which is very shortly reported. In that case (M'Lauchlan) a heritable creditor had a dispute with another heritable creditor (Corsan) as to the latter's right to remove the common debtor (Rankine) from the subject of the security. Rankine was bankrupt, but he and M'Lauchlan granted a joint mandate to M'Lauchlan's agent to oppose the removing. The result was a suspension which was brought by M'Lauchlan's agent as it happened in the name of Rankine alone. The suspension was unsuccessful, and Corsan having obtained decree for expenses against Rankine sued M'Lauchlan therefor. The Lord Ordinary (Meadowbank) assoilzied M'Lauchlan, but 'the Court being satisfied that he was the true *dominus litis*, and that Rankine was merely a man of straw, altered, and decerned in terms of the libel.'

"There is no other case in the books in which decree for expenses has gone out against an alleged *dominus litis*. There are cases where such decree has been refused, but the only one of importance is that of *Mathieson* v. *Thomson*, Nov. 5, 1853, 16 D. 19, 26 Scot. Jur. 24, where there are *dicta* by Lord Rutherfurd to which both parties in this case appeal. That distinguished Judge there said,—'There may be some difficulty in defining exactly what is a *dominus litis*; but I confess that I very much agree with what has been laid down by your lordship, and with the definition quoted from the civil law by Lord Ivory, that he is a party who has an interest in

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was the sole surviving trustee, and Mr John L. Mounsey, W.S., was then appointed trustee by the Court.

Certain questions having arisen with regard to the division of the estate Mr Mounsey raised an action of multiplepoinding, the fund *in medio* being the trust-estate, the value of which was £1193, 4s.

Inter alia, a claim was lodged by Mrs Marion Brodie or Tait, formerly Mrs Smith, a sister of the truster's wife.

Mrs Tait averred;—(Cond. 2) "The claimant was on friendly terms with the truster, Thomas Dunn, during his life. She from time to time made loans of money from her separate estate to the truster, several of which were of small amount; but, in particular, on or about 1st February 1865, she advanced him on loan a sum of £200, as is instructed by her cheque of that date in his

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the subject-matter of the suit; and through that interest a proper control over the proceedings in the action. Now, it will not make a person liable in the expenses of the action that he instigated the suit or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit that while he does both of these things he shall have some ultimate consequent benefit in the issue of the suit. But when you go a step further, and find a party with a direct interest in the subject-matter of the litigation, and through that interest master of the litigation itself, having the control and direction of the suit, with power to retard it or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*, and though another name may be substituted the party behind is answerable for the expenses.'

"To complete the summary, it must be added that there are certain cases—familiar enough in practice—in which the liability in question has been always recognised. Some examples at once suggest themselves, and there may be others.

"The first is the case mentioned by Lord Rutherfurd of the assignee suing in name of his cedent. There is here probably a double remedy open to the opposite party. If the assignation is absolute, the assignee may require to sist himself, or the cedent to find caution. But it has never been doubted that in such a case the assignee is also liable, not only to keep his cedent *indemnis*, but at the suit of the opposite party to implement the judgment including any award of expenses against his cedent.

"Another case even more familiar is that of a beneficiary or creditor under a trust—voluntary or judicial—who desires to try some question which the trustee or trustees decline to try themselves, but which they agree to allow the creditor or beneficiary to try in their name and at his own expense. In that case it is always understood that the creditor or beneficiary, although not appearing in the suit, and having only an indirect interest in its subject-matter, is yet liable in case of failure for the expenses to the opposite party.

"Again, a third case is also common. A parochial board litigates in a pauper's name in order to recover for the benefit of the rates some debt or asset belonging to the pauper. It has never been doubted that in such a case the parochial board if unsuccessful must pay the expenses of both sides.

"Now, all this being so, what is the legal doctrine which underlies and explains these particular instances? In my opinion it is simply the elementary doctrine that a principal—disclosed or undisclosed—must make good the engagements and answer for the acts of his agent acting within the scope of the latter's authority. That it seems to me is the true basis of the rule which I have been considering, and supplies the test by which the pursuer's demand in this case must ultimately be judged. For after all what is the substance of the matter? A person becomes a party to a suit,

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favour, which is herewith produced.* The total amount of the advances made by the claimant to the truster due at the date of his death, including said sum of £200, but exclusive of interest, was £390." (Cond. 3) "No part of said debt of £390, and no interest thereon, has been paid to the claimant. During the lifetime of the said Mrs Agnes Brodie or Dunn and her enjoyment of the liferent of the deceased's estate, the claimant, out of regard for her sister Mrs

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and by doing so comes under an implied obligation to his adversary to perform the judgment, and, *inter alia*, to pay such expenses as may be awarded against him. That is an obligation in which his adversary is a creditor, and it is of no importance whether it arises by contract or *quasi* contract or by force of law. But an obligation so incurred may—like other obligations—be incurred on one's own behalf or on behalf of another. And if the latter be the case the position simply is that the party to the suit and the party behind him stand to each other in the relation of principal and agent, with all the liabilities towards third parties which that relation involves.

"That being so, the question in each case of the kind and in the present case is not whether the alleged *dominus litis* is interested in the action, or has advised it, or has financed it, or has exercised greater or less control over its progress. The question is whether in initiating and conducting the action the nominal pursuer (or defender as the case may be) was acting not as a principal but as an agent. And that question must, I apprehend, be determined on the same principles as are applied to other transactions, the ruling consideration always being what was the true agreement between the parties. In the proof of that agreement, their respective interests and the extent of the control possessed by each, and other like facts, may be important elements, but they are at best only elements in the proof.

"Now, applying these principles to the solution of the present case, the facts which have to be noted are shortly these.

"In the first place, there is no evidence—certainly no direct evidence—of any agreement between Malloch and Donald & M'Culloch that the action in question should be raised and prosecuted by Donald & M'Culloch on Mr Malloch's behalf, they giving their names, and being bound to act, so far as they did act, under and subject to his directions. There is, in other words, no direct evidence of a contract of agency. On the contrary, the direct evidence is the other way. Both Mr Malloch and Mr Donald deny that any such agreement existed, and there is nothing in the documents or books produced to instruct anything of the kind. A point was made that in the business account of Mr Malloch's firm, as recorded in their ledger, there is no charge against Donald & M'Culloch for taking their instructions to raise the action. But it is not disputed that meetings took place when the raising of the action was discussed and resolved upon, and I must say that it appeared to me that too much was made of an omission which would probably have been corrected when the ledger entries came in ordinary course to be revised.

"In the next place it is impossible to say that Mr Malloch had or alleged any right of property in the fund or claim which was the subject-matter of the action. He was a creditor of Donald & M'Culloch, and, as such, he had of course an indirect interest, but it was the interest of a creditor, and it is

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* The cheque, which was not indorsed by any payee, was in the following terms :—

"£200. Edinburgh, February 1st, 1865.

"The Union Bank of Scotland, Pay to Mr Dunn or bearer the sum of Two Hundred Pounds Sterling.

"M. B. SMITH,
"99 S. B. Canongate."

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Dunn, abstained from enforcing her claims to principal and interest. These claims were, however, all along well known to and acknowledged by Mrs Dunn and the family of the deceased. In particular, these claims were acknowledged by Mrs Dunn as the only acting trustee under the settlement of Thomas Dunn, the truster, and by the truster's son Robert Dunn, by the minute of agreement dated 31st March 1869,* between Mrs Dunn as trustee foresaid and the said

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not, I think, material that that interest was large or even predominant. He was not the only creditor. Donald & M'Culloch were not in any view divested. Nor is it disputed that, whatever their financial position, they had a sufficient and substantial interest in the success of the suit. Had it succeeded they would at least have been able to pay their creditors in full, or nearly in full. They would have escaped sequestration, and would probably have been able to make a new start under different circumstances.

"Lastly, it is not, I think, proved that Mr Malloch had, by agreement or otherwise, the command of the litigation. His firm conducted it as Glasgow agents, and provided the necessary outlays. And he no doubt had such oversight and control as belonged to him as agent in the cause, and as a creditor largely interested. But the pursuers Donald & M'Culloch took themselves an active interest in the action, and, so far as I see, never parted with their right to abandon or compromise, or take such other course as they might think their interest dictated. In short, according to the evidence, the litigation was in all respects conducted in the ordinary way, with this difference—not I am afraid without precedent—that the pursuers' agents trusted for recovery of their charges to the success of the action.

"I cannot, in these circumstances, affirm that the defender Mr Malloch was in the position of an undisclosed principal, conducting the suit through nominal pursuers, who were truly his agents. He was no more the true litigant in respect of his interest in and oversight of the suit than he had been all along the trader or manufacturer in respect of his interest in and oversight of the business of the factory. Everything which can be said of his position towards the action may equally be said of his position towards the business, and yet it is now well settled by a well-known class of cases that a creditor financing a business, and supervising it, and exercising over it large powers and authorities, will yet not be held to be the principal or a partner in such business when in truth and in substance he was only a creditor working out payment of his debt—(*Eaglesham* v. *Grant*, July 15, 1875, 2 R. 960; *Mollwo, March, & Co.*, 1872, 4 P. C. App. 419, and cases cited)."

* At the date of the agreement Mrs Dunn was the sole acting executrix and trustee of the truster. The minute was to the effect that Robert Dunn, the second party, having obtained a lease of certain farms which had been tenanted by the truster at the date of his death, Mrs Dunn, the sole acting trustee, had made over to the second party the crop, stock, and implements thereon at a valuation, amounting to £1491, 18s., which the second party bound himself to pay to Mrs Dunn, under deduction of certain sums payable from the trust-estate, which he undertook to pay directly. These did not include any sum payable to Mrs Tait. The agreement was duly signed and tested. There was appended to the agreement a state of the trust funds:—

"*Assets.*

. . . . . .

"*Assets not realised.*

. . . . . .

"*Outstanding Debts.*

"1. Residue duty on £438, 2s. 8d. at one per centum, payable to Government on death of Mrs Dunn, .	£4	7	7
"2. Sum on debt due to Mrs Margaret Smith, .	390	0	0

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Robert Dunn. There was annexed to the said minute of agreement, and signed as relative thereto by Mrs Dunn, as trustee foresaid, and by Robert Dunn, a state of the trust funds falling under the trust of the said Thomas Dunn, and among the outstanding debts due by the trust there is entered in said state the said capital sum of £390 as a debt due to the present claimant. Further, the said state of trust funds has appended thereto a docquet signed by five of the truster's children, namely, the defenders John Dunn, Thomas Dunn, Marion Dunn, now Mrs Hardy, Rachel Dunn, now Mrs Shaw, and Agnes Dunn, now Mrs Renton, whereby the said five children approved of the said minute of agreement, and also approved of and held as correct and duly vouched the said state of trust funds, including the debt due to the claimant. The said debt was also known to and acknowledged by the other two children of the truster, viz., William Dunn and Jean Dunn, now Mrs Glover, who did not subscribe said docquet in consequence of their being under age at the date thereof. The claimant's claim is thus instructed and proved by the writ of the deceased's trustee and legal representative, and also by the writ of six out of the eight parties beneficially interested in the estate of the deceased Thomas Dunn. No sum, either of principal or interest, has been paid to the claimant to account of the said debt by any of the said parties, and the claimant has never had any intromissions with any part of the trust-estate."

Mrs Tait also founded in argument on an affidavit in a claim for return of inventory-duty made by Mrs Dunn, but this writing was not referred to on record.*

"Legacy left to Rachel Dunn by Rachel Dods, in hands of Mr Thomas Dunn at his death, . . £40 4 6

"4. Legacy left to Peter Dunn by trust-deed, . 100 0 0

"SCHEDULE of ACCOUNTS paid or to be paid by Mr Robert Dunn.

. . . . . .

£718 8 0½

"H. Lyon, *witness.* AGNES DUNN.

"A. B. Matthews, *witness.* ROBERT DUNN.

"We, the undersigned, children of Mr Thomas Dunn, approve of the arrangement for conveyance of crop, stocking, and implements mentioned in the foregoing minute of agreement, being satisfied that the same was more to advantage than a sale of these by public roup, and we approve of, and hold as correct and duly vouched, state of the trust funds of our father as at Martinmas 1868, hereto prefixed. JOHN DUNN. THOMAS DUNN. MARION DUNN. RACHEL DUNN. AGNES DUNN."

* ". . . and depones that the deponent has actually paid debts to the full amount of £1128, 4s. 1d., due and owing from the deceased at the time of his death, and payable by law out of his personal estate, according to the schedule thereof hereunto annexed and signed by the deponent . . .

"Excerpt from Relative Schedule for Return of Inventory-Duty.

. . . . . .

"Schedule of debts due and owing by the deceased at the time of his death and actually paid.

. . . . . .

"Voucher No. 25—Mrs Margaret Smith, . . £200 0 0

. . . . . .

"Total, £1128 4 1"

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Mrs Tait pleaded;—(2) The claimant is entitled to be ranked and preferred as aforesaid, in terms of her claim, in respect that the same is proved by the writ of the trustee and legal representative of the truster, and also by the writ of the parties beneficially interested in the trust-estate. (3) Alternatively, in respect of the written adminicles founded on, the claimant is entitled to a parole proof of the validity of her claim.

Claims were also lodged by Mrs Marion Dunn or Hardy and others, the children of the truster, and their assignees. They concurred in opposing the claim for Mrs Tait, and pleaded, *inter alia*, that the claim (1) was unfounded in fact; and (2) could only be proved *scripto*.

On 19th December 1895 the Lord Ordinary (Moncreiff) allowed the claimant Mrs Tait a proof of her averments.*

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* "OPINION.— . . . As a general rule loan must be proved by the writ or oath of the debtor. Writ there must be, but if writ under the hand of the debtor is produced which, *prima facie*, bears to be an acknowledgment of the debt, but which is not in itself conclusive, or which depends for its effect upon circumstances which require to be ascertained, the rule requiring writ is held to be satisfied and parole evidence is let in to set up the writing and complete the proof.

"Mrs Tait produces a cheque for £200, dated 1st February 1865, granted by herself to the truster and indorsed by him, which she alleges instructs a loan of £200 made by her to him on that date. The cheque, taken by itself, simply instructs the fact that money passed. *Haldane* v. *Speirs*, 10 Macph. 537, has decided that it cannot be regarded as the writ of the payee to the effect of proving loan; and that parole evidence is incompetent to prove *quo animo* it was granted. I do not say that if a general proof is allowed the granting of the cheque is of absolutely no importance, but certainly by itself, apart from other writing, it does not instruct loan.

"The writing, however, which is relied on is No. 24 of process, which contains, it is maintained, an acknowledgment of an outstanding debt of £390 due to the claimant. It is dated in 1869, and is under the hand of Mrs Dunn, who was then the sole trustee and executrix of the alleged debtor. The entry is not a casual jotting; it was made in connection with a formal family transaction, and bears to have been signed before witnesses by Mrs Dunn. It appears from the minute of agreement, No. 24 of process, that in 1869 Robert Dunn, one of the truster's sons, having obtained for himself a lease of a farm of which his father was tenant at the date of his death, purchased from Mrs Dunn, as sole acting trustee, the stock, cropping, and implements upon the farm at a valuation of £1491, 18s. Of this sum it was arranged that he should pay the trustee £773, 9s. 11½d., and become responsible for and pay accounts payable from the trust-estate amounting to £718, 8s. 0½d. Appended to the agreement is a state of the trust funds as at Martinmas 1868 signed by the widow, in which, among the 'outstanding debts' is entered '2. Sum of debt due to Mrs Margaret Smith, £390.' (I understand that there is no dispute that by 'Mrs Smith' the claimant is meant.) Then follows a schedule of the accounts paid or to be paid by Mr Robert Dunn, and the whole concludes with a docquet signed by five of the truster's children in the following terms:—'We, the undersigned children of Mr Thomas Dunn, approve of the arrangement for conveyance of crop, stocking, and implements mentioned in the foregoing minute of agreement, being satisfied that the same was more to advantage than a sale of these by public roup, and we also approve of and hold as correct and duly vouched, state of the trust funds of our father as at Martinmas 1868 hereto prefixed.'

"Now, this is not an acknowledgment made direct to the alleged creditor,

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Mrs Marion Dunn or Hardy and the other children of the truster reclaimed, and argued;—If the writs founded on by Mrs Tait were not sufficient *per se* to prove the alleged loan, parole evidence of the constitution of the debt was incompetent. Parole proof was only admissible to establish facts extrinsic to the writings establishing the debt, *e.g.*, that the writ was *de facto* the writ of the borrower, or that there had been delivery of it. But these were not the facts that Mrs Tait asked a proof of. The interlocutor of the Lord Ordinary was therefore wrong. The writs were not proof *scripto* of a debt. The cheque was clearly not.[1] The affidavit, if it proved anything, proved part extinction of the alleged debt, but it was not really evidence at all in a question like the present. The minute of agreement with the state of funds was no more than an admission by the parties signing it that they were satisfied with the intromissions of the trustee, but that could have no effect as in a question with creditors. Mrs Tait was not a party to it, and it had never been delivered to her.[2] It was at most an undelivered acknowledgment made by a trustee or executor who had no authority to make it. The executor's oath or admission

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but that is not essential. An entry in the debtor's books, if sufficiently specific, is enough even if the creditor was ignorant of the existence of the entry until he recovered it under a diligence. In the case of *Briggs* v. *Swan's Executor*, in 16 D. 385, an illustration will be found of the effect attributed to a document of this kind. The question there was not one of loan, but whether a debt had been cut off by the long negative prescription. It was held that certain states prepared for and docqueted by the executors and an inventory given up to the Stamp Office, in which the debts in question were entered as due, were sufficient to preserve them from the negative prescription. In that case a proof was allowed of the circumstances connected with the preparation and signing of the states. On consideration of the proof it was held, as I have stated, that the debts were saved from prescription.

"Again, in the case of *Williamson* v. *Allan*, 9 R. 859 (for the purpose of establishing loan) a proof was allowed to set up an I O U, which was open to the objection that, although it bore the date of 22d May 1876 it was really granted in April 1880, by which time the granter was insolvent, although the document was signed more than sixty days before his bankruptcy. The sum also in the I O U was incorrect. Therefore, taken by itself, the I O U, although *ex facie* a document of debt in the creditor's possession, was utterly insufficient to instruct loan. But parole proof was allowed of the circumstances in which the I O U was granted, and the alleged lender and the granter of the I O U were both examined on oath. On a consideration of the evidence the creditor was held to have established loan to the extent of £1554, 17s. 2d. Lord Kinnear remitted to the trustee to rank him accordingly; and the First Division of the Court adhered to that interlocutor, with a slight variation.

"In the present case, I think that the writing founded on is *prima facie* a sufficient acknowledgment of debt to let in parole proof. The other claimants have given no explanation as to how the entry which I have quoted came to be made. I therefore allow the claimant Mrs Tait a proof of her averments. The main object of that proof is to ascertain the circumstances in which the entry founded on was made; and the effect to be given to the writing may depend on the evidence adduced on the one side or the other; but I may add, to prevent misunderstanding, that I do not intend to exclude the evidence of the claimant herself."

[1] Haldane v. Speirs, March 7, 1872, 10 Macph. 537, 44 Scot. Jur. 305.

[2] Duncan's Trustees v. Shand, Jan. 7, 1873, 11 Macph. 254, 45 Scot. Jur. 188.

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did not bind beneficiaries or make their estate liable.[1] The question in the case of *Briggs*[2] was not the constitution of a debt, but merely whether the admission of a debt was sufficient to interrupt the negative prescription, and so overcome the presumption of payment of an admitted debt. An entry like that relied on by Mrs Tait, even if found in the books of the alleged debtor himself, would not support the claim.[3] The docquet was not holograph, and was not tested, and could not therefore be founded on as the writ of the parties signing it.[4]

Argued for Mrs Tait;—It was admitted that it was not competent by parole evidence alone to prove the constitution of a debt. But here, in allowing a proof of this claimant's averments, the Lord Ordinary, having in view the strong written adminicles, had applied the principle of the case of *Williamson*.[5] It was quite competent where, as here, the documents, to say the least, raised a strong *prima facie* case to allow proof in supplement. A document, if it was the sole foundation of a claim, required to be holograph or tested, but that was not so if it were used only as an adminicle,[6] and therefore the docquet was not to be disregarded. But then, in addition to the docquet, there was the more important document, the state of trust funds, signed by the trustee and executrix. She was the proper person to investigate claims against the deceased's estate, and her admission of a debt was binding.[7] It was not necessary that a document of debt should pass from debtor to creditor. Entries in the books of the debtor were sufficient writ.[8] As regarded the beneficiaries, the state of trust funds was in the position of a fitted account, and did not require to be probative.[9]

At advising,—

Lord Kinnear.—The question we have to consider is whether a proof at large should be allowed for the purpose of establishing the case alleged by the claimant Mrs Tait. The claim is for repayment of money lent to the testator, who died in March 1865, and the averment in support of it is that

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[1] Ker. 1627, M. 12, 478; Eccles, 1664, M. 16,270; Stewart v. Syme, Dec. 12, 1815, F. C.; Farquhar v. Farquhar, Feb. 23, 1886, 13 R. 596.

[2] Briggs v. Swan's Executors, Jan. 24, 1854, 16 D. 385, 26 Scot. Jur. 182.

[3] Waddel v. Waddels, Dec. 20, 1790, 3 Pat.'s App. 188; Wink v. Spiers, March 23, 1868, 6 Macph. 657, 40 Scot. Jur. 340.

[4] Alexander v. Alexander, Feb. 26, 1830, 8 S. 602; Miller v. Farquharson, May 29, 1835, 13 S. 838; Hamilton's Executors v. Struthers, Dec. 2, 1858, 21 D. 51, 31 Scot. Jur. 42; Bowe & Christie v. Hutchison, March 19, 1868, 6 Macph. 642, 40 Scot. Jur. 326; M'Adie v. M'Adie's Executrix, March 9, 1883, 10 R. 741.

[5] Williamson v. Allan, May 29, 1882, 9 R. 859; Laidlaw v. Shaw, March 5, 1886, 13 R. 724; Ross v. Fidler, Nov. 24, 1809, F. C.

[6] Bryan v. Butters Brothers & Co., Feb. 23, 1892, 19 R. 490.

[7] Briggs v. Swan's Executors, Jan. 24, 1854, 16 D. 385, 26 Scot. Jur. 182; M'Calman v. M'Arthur, Feb. 24, 1864, 2 Macph. 678, 36 Scot. Jur. 339.

[8] Ersk. Inst. iv. 2, 4; Lawrie, 1675, M. 12,622; Purveyance, 1677, M. 12,623; Gordon v. Glendonwyn, Feb. 23, 1838, 16 S. 645; Thomson v. Lindsay, Oct. 28, 1873, 1 R. 65; Fraser v. Bruce, Nov. 25, 1857, 20 D. 115, 30 Scot. Jur. 70; *cf.* Wood v. Howden, Feb. 7, 1843, 5 D. 507, 15 Scot. Jur. 260.

[9] Ersk. Inst. iii. 2, 24.

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the claimant "from time to time made loans of money to him, several of which were of small amount," and that on or about the 1st of February 1865 she advanced him on loan a sum of £200, as is instructed by her cheque of that date in his favour; and finally that the total amount of her loans at the date of his death was £390. Except as regards the sum contained in the cheque of 1st February, there is no statement of the specific amount of any particular loan, or of the dates when any of the loans were made. The claimant gives no detail in support or in explanation of her case except what I have quoted; and it is this bare averment, that she lent moneys to the deceased, that the Lord Ordinary has remitted to proof. The claimant's counsel did not dispute the general rule of law—which, indeed, is too well established to admit of discussion—that a loan of money can only be proved by the writ or by the oath on reference of the alleged borrower. But he maintains that he has produced certain writings which are sufficient to satisfy the rule, either as being in themselves evidence of the loan, or as raising a *prima facie* case which may be completed by parole testimony.

The first of these documents is the cheque of 1st February 1863, and I agree with the Lord Ordinary that this is not a writ of the testator which is sufficient either to prove a debt or to displace the general rule of law so as to let in parole proof. If the cheque had been indorsed by the alleged borrower, and so had afforded evidence under his hand that he had drawn the lender's money from the bank by her authority, the case of *Haldane* v. *Spiers*[1] would have been directly in point. But it is payable to bearer, and it is not indorsed by any payee. It bears no signature except that of the drawer; and therefore it affords no evidence whatever that the claimant's money was drawn by the testator, or that the cheque ever came into his hands. It is in no sense the borrower's writ, and it does not even raise the question on which the Court was divided in *Haldane* v. *Spiers*.[1]

The other documents are of a different description. They are not the writs of the borrower himself, but they are writings under the hand of his testamentary trustees, which are said to bind the trust-estate. The first is an affidavit in support of a claim for return of inventory-duty, in which it is deponed that the executor had actually paid debts amounting to £1128 due and owing by the deceased at the time of his death, and payable out of his personal estate; and one of the debts so paid is said to be a sum of £200 due to the claimant. If the loan had been otherwise established this would not have been evidence to prove payment, but just as little is it evidence of the debt. So far as it goes it is against the claim.

The second document on which the claimant's counsel mainly relied is a note of the debts of the trust-estate outstanding at Martinmas 1868, which includes a "sum on debt due to Mrs Margaret Smith, £390." This list of debts is appended to a minute of agreement between Robert Dunn, one of the sons of the testator, and his widow, who was one of his trustees, whereby the son, who had obtained a lease of certain farms of which his father had been tenant until his death, agrees to take over the crop, stock, and implements upon the farms, and to pay to the trustee the sum of £1491, 18s., as fixed by certain referees, under deduction of certain "sums payable from

[1] 10 Macph. 537.

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the trust-estate, out of proceeds from the farms for crop 1868 paid or to be paid by him, and amounting in all to £718" odds. This agreement is a probative writ, being executed by the parties before witnesses and duly attested; and there is appended to it a state of the trust funds, shewing the assets and outstanding debts, and a schedule of accounts, shewing the sums paid or to be paid by Robert Dunn in terms of the agreement. The alleged debt to Mrs Smith is not one of these sums, and therefore it forms no part of the subject-matter of the agreement. But it is entered in the list of outstanding debts, and that as well as the other lists I have mentioned is signed by the two parties and by the witnesses to the agreement. There follows a docquet signed by five of the testator's children, who are said to have been of age at the time, by which they "approve of the arrangement for the conveyance to Robert of the stock, crop, and implements mentioned in the agreement, being satisfied that the same was more to advantage than a sale by public roup," and also "approve of and hold as correct and duly vouched" the prefixed state of the trust funds of their father as at Martinmas 1868."

It is obvious on the face of it that the main purpose of this document was to embody the agreement for the sale of the crops and farm stock and implements to the testator's son, and to preserve evidence that it had been made with the assent of such of the beneficiaries as had attained majority But incidentally it contains a state of trust funds signed by the widow and certain of the children in which the existence of a debt of £390 to the claimant is said to be acknowledged. The claimant, however, was no party to the transaction. It is not alleged that the document was delivered or exhibited to her, or that she knew anything about it. So far as the children are concerned it is not a probative writ, because their signatures to the docquet are not attested. But assuming it to be sufficiently proved, it is nothing more than a discharge to the mother, by which as in a question with her they agree to treat certain claims as duly vouched. The signature of such a docquet may be effectual to preclude the beneficiaries who have signed it from challenging payments which may have been made by the executrix. But it did not oblige her to admit claims which were not vouched, nor did it relieve her or her co-trustees of their duty to see that debts were well constituted before paying them out of the trust-funds. Accordingly, the claimant's counsel said that the strength of his case did not depend upon the docquet signed by the beneficiaries, but upon the admission of the acting trustee and executrix. But the supposed admission of the executrix is just as ineffectual to prove a debt against the estate as that of the beneficiaries, and for the same reasons. The list of debts is not a writ in which the claimant had any right or interest. Even if it had purported to be an admission of debt by the widow, addressed to the claimant, and put into her hands as an acknowledgment to be held by her as her document, it does not follow that it would have been binding on the present trustee. The cases which were cited to shew that an executor's acknowledgment is sufficient to bind the trust-estate are really authorities to the contrary. In *Briggs* v. *Swan's Executors*[1] it was held that, although executors are entitled, as an ordinary act of administration, to grant acknowledgments which

[1] 16 D. 385.

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will prevent prescription running against a debt that is truly due, they can go no farther, and therefore that, as the writ of the executor is not the writ of the debtor, it will not prove the debt, so that, if they go on to pay without sufficient evidence, the payment may be disallowed on an accounting with the parties really interested in the executry estate. In *M'Calman* v. *M'Arthur*[1] an improbative writing by the deceased was found to have been homologated by his executor, but the executor was the principal beneficiary and trustee for his own behoof; and the Lord President pointed out that he might be liable to other beneficiaries if the debt was not truly due. But it is unnecessary to consider what might have been the effect of an acknowledgment delivered to the claimant, for the list of debts in question is not an obligatory document, nor was it delivered, so as to enable the claimant to found upon it against the trust-estate. For whatever purpose it was drawn up, it remained the private document of the trustee and beneficiaries. The observations of Lord Neaves in *Duncan* v. *Shand*[2] seem to me to be in point when he says that a written acknowledgment of the receipt of money will not infer a loan or a debt unless the writing has been delivered to the creditor. His Lordship says—"The doctrine as repeatedly laid down is that he who gives another a document acknowledging the receipt of money, without qualification or explanation, as a chirographum to be preserved against him, infers an obligation to repay, and this obligation arises not so much from the document itself as from its possession by the other party. That is the case of *Ross* v. *Fidler*,[3] and a whole series of decisions."

If the documents are insufficient to prove the alleged loan, I am unable to see upon what grounds they should be held sufficient to let in parole evidence. The rule is that loans cannot be proved except by the writ of the borrower. It is quite consistent with the rule to admit parole evidence of facts extrinsic to the writing, in order to prove that it is in truth and in law the borrower's writ. It may be necessary, and it is perfectly competent, to prove handwriting, or to prove delivery, or, it may be, to prove the authority of an agent. There may be other purposes which might be figured similar to these. But parole evidence is not admissible except for the purpose of enabling the creditor to prove the loan, not by the parole evidence itself, but by his debtor's writ. It cannot be admitted to prove the essential facts which go to constitute loan without violating the rule of law.

Now, what are the facts which it is proposed to prove by parole? There is no averment whatever except that the claimant from time to time made loans to the deceased. If that is to be remitted to proof, the case must turn not upon the purport and effect of writings, but entirely upon the parole evidence. It would be contrary to the rule of law to allow a loan to be proved partly by the writing and partly by the acts and words of the alleged borrower. But in the present case there is no writing of the testator which could be treated as an item of evidence if a parole proof were allowable.

I do not think it necessary to examine in detail the cases which were cited to justify a departure from the rule. In some of these cases it may have been doubtful whether the writing founded on was sufficient or whether it was the writ of the borrower. But in all the result depended upon its being

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[1] 2 Macph. 678. [2] 11 Macph. 254. [3] Nov. 24, 1809, F. C.

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held that the loan was proved *scripto*. The case of *Laidlaw* v. *Shaw*[1] is an apparent exception. But that was a case of intromission to which the rule is inapplicable, and not of the direct loan of money. The money contained in a deposit-receipt belonging to one sister was uplifted by her agent and applied in payment of debts due by another. It was not thought doubtful that this could be proved by the testimony of the agent. The case of *Williamson* v. *Allan*,[2] on the other hand, is no exception to the rule. A loan was proved by an I O U. But that is an obligatory document which requires no evidence to support it. Parole evidence was led not to set up the document or to supplement its deficiencies, but because it was alleged to have been granted by a bankrupt in fraud of creditors. It was found to be an honest document, and that being established, the debt was held to be proved by the writ of the borrower and not by the parole evidence.

For these reasons I am of opinion that the claimant's case can only be proved by the writ of the deceased, and that as no such writ has been produced the claim must be repelled.

The LORD PRESIDENT and LORD ADAM concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was not present at the advising, concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and repelled the claim for Mrs Tait.

KEITH R. MAITLAND, W.S.—THOMAS LIDDLE, S.S.C.—DONALDSON & NISBET, Solicitors —HUGH MARTIN, S.S.C.—Agents.

No. 120.
Mar. 13, 1896.
Luke v. Wallace.

JOHN LUKE, Pursuer (Appellant).—*John Wilson.*
JOHN BRYSON WALLACE AND ANOTHER, Defenders (Respondents).—*W. Campbell.*

Right in Security—Poinding of the ground—Lease—Registered bond and assignation in security of long lease—Registration of Leases (Scotland) Act, 1857 (20 *and* 21 *Vict. cap.* 26), *sec.* 4.—The Registration of Leases (Scotland) Act, 1857, authorises the recording of leases of thirty-one years or upwards in the Register of Sasines, and empowers the person in right of such recorded lease to assign the same in security of money borrowed, it being enacted by section 4 of the Act that the recording of such assignation in the Register of Sasines shall complete the right under it, "and such assignation in security so recorded shall constitute a real security over such lease to the extent assigned."

Held that the creditor under a bond and assignation of a ninety-nine years' lease duly recorded in terms of the Act was not entitled to warrant for poinding of the ground.

2D DIVISION. Sheriff of Stirling, Dumbarton, and Clackmannan.

IN January 1896 John Luke, Headswood House, Denny, brought an action of poinding of the ground in the Sheriff Court at Stirling against John Bryson Wallace and Archibald Cruickshanks, as sole partners of the firm of Wallace, Cruickshanks, & Company, iron-founders, Denny, and as individuals. The action proceeded upon a bond and assignation in security of a lease of certain subjects in the parish of Denny for ninety-nine years, and craved warrant to poind the subjects on the ground let in payment of the principal interest, and penalties due under the bond. The bond and assignation in security was in the form of schedule (B) annexed to the Registra-

[1] 13 R. 724. [2] 9 R. 859.

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tion of Leases (Scotland) Act, 1857, and both the lease and the bond and assignation in security had been duly recorded in the Register of Sasines in terms of that Act.*

The defenders pleaded, *inter alia ;*—(5) In any event, the pursuer's loan is not a *debitum fundi*, and poinding of the ground is therefore incompetent and illegal.

On 30th January 1896 the Sheriff-substitute (Buntine) sustained the 5th plea in law for the defenders, and dismissed the action.

The pursuer appealed, and argued ;—This was a debt secured upon land, and therefore the action was competent.[1] By the Registration of Leases Act, 1857, such assignations in security were competent, and under section 4 of the Act constituted a real security over the lease to the extent assigned. A personal contract which gave a real right to the lands was equivalent to a *debitum fundi*.[2] The effect of the Registration of Leases Act, 1857, sec. 20, and the Heritable Securities Act, 1894,[3] was to give to bonds and assignations of leases all the statutory qualities of bonds and dispositions in security.

Argued for the respondents ;—This was a personal debt, and the fact of its being secured by an assignation of a lease gave the creditor no real right.[4] The Registration of Leases Act, 1857, sec. 16, made registration equivalent to possession, but not to infeftment, and gave no real right in the lands assigned.

LORD JUSTICE-CLERK.—I do not see any reason to disturb the judgment of the Sheriff-substitute. I think Mr Wilson's clients had no interest to raise the question. It is a question which has never been raised before. I suspect the reason why it has never been raised is because no one has ever been advised to raise it before. Looking at the Act of Parliament, I think the words of the fourth clause are quite ineffectual to give to the creditor under an assignation in security of a registered long lease a right to poind the ground. All the clause says is that "such an assignation in

* The Registration of Leases (Scotland) Act, 1857, authorised the recording of leases of thirty-one years' duration and upwards, and of assignations of such leases, in the Register of Sasines, and by sec. 4 enacted,—"It shall be lawful for the party in right of any such lease recorded as aforesaid, and whose right thereto is recorded in terms of this Act, but in accordance always with the conditions and stipulations of such lease, and not otherwise, to assign the same, in whole or in part, in security for the payment of borrowed money, or of annuities, or of provisions to wives or children, or in security of cash credits or other legal debt or obligation, in the form as near as may be of the schedule (B) to this Act annexed; and the recording of such assignation in security shall complete the right thereunder; and such assignation in security so recorded shall constitute a real security over such lease to the extent assigned."

Sec. 16 enacted,—"The registration of all such leases, assignations, assignations in security, translations, adjudications, writs of acknowledgment, and notarial instruments as aforesaid, in manner herein provided, shall complete the right under the same respectively, to the effect of establishing a preference in virtue thereof, as effectually as if the grantee, or party in his right, had entered into the actual possession of the subjects leased under such writs respectively at the date of registration thereof."

[1] Erak. iv. 1, 11.

[2] Scottish Heritages Co., Limited, v. North British Property Investment Co., Limited, Jan. 23, 1885, 12 R. 550.

[3] Heritable Securities (Scotland) Act, 1894 (57 and 58 Vict. cap. 44), sec. 14.

[4] Stroyan v. Murray, July 17, 1890, 17 R. 1170.

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security so recorded shall constitute a real security over such lease." That is not the same thing as a real security over the lands in the lease. If it had been intended to carry the right of the creditor any further, the framers of the statute would have said so plainly, and they might easily have found words to convey their intention.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

FRASER, STODART, & BALLINGALL, W.S.—WILLIAM B. RAINNIE, S.S.C.—Agents.

No. 121.

Mar. 13, 1896. Reid's Trustee v. Watson's Trustees.

DAVID SIMPSON CARSON (Francis Robertson Reid's Trustee) AND ANOTHER, Pursuers (Respondents).—*Sym*—*Salvesen.*
DAVID RITCHIE AND ANOTHER (Watson's Trustees), Defenders (Reclaimers).—*Johnston*—*Clyde.*
JOHN ANDREW HAMILTON, Defender.

Landlord and Tenant—Lease—Lease by bona fide possessor without title—Assignation.—The title of a *bona fide* possessor of land, who had granted a lease of minerals for twelve years, was reduced when 3½ years of the lease had still to run. He then granted an assignation of the lease in favour of the true owner, who undertook to implement the granter's obligations. In an action by the lessee against the granter and the assignee for declarator that the pursuer was not bound by the lease, *held* (*aff.* the judgment of Lord Kyllachy, Ordinary) that the lease was not binding on the true owner when he established his right to the lands, and therefore that it was not binding on the tenant, and that the assignation had no effect, as the granter had nothing to assign, *dies.* Lord Young, who was of opinion (1) that as the lease had been granted by a *bona fide* possessor in the course of ordinary administration, it was binding upon the true owner, and (2) that if the lease was not binding upon him originally he was entitled to validate it by homologation, and had done so.

Weir v. *Dunlop*, July 17, 1861, 23 D. 1293, *followed.*

2D DIVISION. Ld. Kyllachy.

(SEE *Watson's Trustees* v. *Hamilton*, 21 R. 451 and H. L. 35.)

The late Walter Whyte, of Bankhead, died in 1880, leaving a will, which contained the following clause:—"I also leave to my nephew James Francis Watson, . . . my estate of Bankhead, . . . but I wish it expressly understood that in the event of my said nephew James Francis Watson dying without leaving any lawful male heir of his body, then, and in that event, my said lands of Bankhead are to revert back to my nephew John Hamilton." James Francis Watson never made up any title under this disposition. On 6th November 1882, John Andrew Hamilton made up a title by notarial instrument, which proceeded upon—(1) the infeftment of Walter Whyte, and (2) his settlement.

The notarial instrument was registered on 3d November 1882. The warrant of registration bore,—"Register on behalf of Mrs Margaret Pollock or Whyte . . . in liferent and J. A. Hamilton . . . in eventual fee as within mentioned."

James Francis Watson died on 3d April 1883, leaving a settlement, and on 6th September 1883 J. A. Hamilton expede before the Sheriff of Chancery a general service as nearest and lawful heir of provision in general to James Francis Watson under Mr Whyte's settlement.

In January 1884 Hamilton entered into an agreement with Francis

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Robertson Reid, by which the former agreed to lease to the latter certain minerals in Bankhead for twelve years from Whitsunday 1884. Reid worked the minerals until 1888, during which period he paid lordships. From Martinmas 1888 till Martinmas 1892 he did not work the minerals, but he paid the fixed rent of £75 under the agreement.

In July 1893 David Ritchie and William Lochore Brown, the trustees of the late James Francis Watson obtained decree declaring that Bankhead had vested in Watson, and that his conveyance to them had evacuated the destination to Hamilton in Whyte's settlement. This judgment was adhered to by the Second Division on 31st January 1894, and affirmed by the House of Lords on 4th June 1894 —21 R. 451 and H. L. 35. Decree of reduction of Hamilton's title was granted on 21st June 1894.

Watson's trustees made up an independent title to Bankhead, and on 24th October 1894 obtained from J. A. Hamilton an assignation of his right and interest in the lease which contained this clause:— "Provided always, as it is hereby expressly provided and declared, that the said David Ritchie and William Lochore Brown, as trustees foresaid, shall by acceptance hereof be bound and obliged to perform, implement, and fulfil the whole obligations and prestations incumbent upon me by the said lease, agreement, and letter of lease, so far as still subsisting and not already performed."

On 18th November 1890 Reid, the mineral tenant, granted a trust-deed for behoof of creditors, and on the death of the trustee the Court of Session, on 2d June 1893, appointed David Simpson Carson to the office.

Following upon the decree of declarator and reduction, Watson's trustees intimated to Reid and his trustee that they were in right of J. A. Hamilton in the lease of Bankhead, and demanded payment of the fixed rent from Martinmas 1892. Carson and Reid declined to do so on the ground that the lease was ineffectual on Hamilton's part, as he never had any right to the minerals.

In February 1895 Carson, as Reid's trustee, and Reid raised this action against Watson's trustees and J. A. Hamilton for declarator that the agreement to lease of January 1884 was *ultra vires* of Hamilton, and was then and is now ineffectual, "and that the same is not binding on the pursuers, or either of them, and that they from and since the date thereof, or otherwise from and since Martinmas 1892," were freed and relieved of all obligations purporting to be imposed on Reid, thereby, and for declarator that the agreement could not be assigned, and had not been assigned, to Watson's trustees, and for reduction of the agreement and assignation.

The pursuers pleaded;—(1) The defender John Andrew Hamilton never having had any right to the said lands of Bankhead or the minerals therein, the alleged agreement between him and the said Francis Robertson Reid for a lease of the coal and other minerals mentioned therein was on his part *ultra vires* and wholly ineffectual. (2) The title, or alleged title, of the defender the said John Andrew Hamilton to the said lands and estate of Bankhead having been reduced, the pursuers are entitled to decree as concluded for. (3) The defender the said John Andrew Hamilton had no power to assign to the defenders the trustees of the said James Francis Watson the said agreement, or any right or title to demand from the pursuers implement of the obligations undertaken by the said Francis Robertson Reid under the said agreement, and the said last mentioned

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defenders are accordingly not entitled to enforce implement thereof. (4) There never having been any valid or binding contract between the pursuers, or either of them, and the defenders the trustees of the said James Francis Watson, the pursuers are entitled to decree as concluded for. (6) The agreement of lease is not enforceable against the pursuers, in respect that the said John Andrew Hamilton had no right to the subjects let, and that his pretended title to the same *ex facie* of the Register of Sasines, being without warrant and inherently null, did not enable him to bind the defenders, the true owners, to implement its provisions.

The defenders Watson's trustees pleaded;—(2) It being *jus tertii* to the pursuers to found any plea upon the said decree of declarator and reduction and the said assignation, or upon the settlement of Mr Whyte, and title made up by John Andrew Hamilton thereon, and the defenders the trustees of the late James Francis Watson being able and willing to implement the conditions of the said agreement of lease, the defenders are entitled to be assoilzied from the conclusions of the summons. (3) The pursuer Francis Robertson Reid having been personally bound and obliged by the agreement of lease, and the same having been validly assigned, the pursuers are bound to implement the obligations thereof.

Hamilton did not lodge defences.

On 7th November 1895 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds, decerns, and declares, in terms of the declaratory conclusion of the summons, declaring the term of Martinmas 1892 to be the date at which the pursuers were, and are now, and in all time coming, freed and relieved of and from all the obligations purporting to be imposed on the pursuer Francis Robertson Reid by the agreement mentioned in second conclusion, and reduces, decerns, and declares in terms of the reductive conclusions of the summons," &c.*

* "OPINION.—This is an action of declarator and reduction brought by the tenants under a mineral lease, and it is directed against the lessor and certain other parties, who are (as it now appears) the true proprietors of the mineral field, and are also assignees to the lease under an assignation of the lessor's part of the lease granted by the lessor. The object of the action is to have it declared as against both defenders that the lease is no longer binding, and it seeks, as against both defenders, to reduce both the lease and the assignation. I do not know that I need refer to the exact terms of the summons. The proposition which it involves shortly is, that neither together nor separately can the defenders to any effect enforce the obligations of the lease as against the pursuers. [His Lordship stated the facts.]

"The pursuers maintain that John Andrew Hamilton's title having been reduced, the lease in question entered into between them and him is at an end; and in reply to the argument that the personal contract under the lease still subsists, and that the lessor, through his assignees, is still able and willing to perform the lessor's part of the contract, they contend (1) that they cannot be called upon to perform at the instance of John Andrew Hamilton, because being no longer proprietor of the subject he can no longer maintain them in possession; (2) that the other defenders, although proprietors of the subject, have no title to enforce a lease to which they were not parties; and (3) that they (the other defenders) acquired no such title by the assignation under reduction, because (*a*) the contract of lease had, as they say, fallen before the assignation was granted, and (*b*) because the lessor's interest in a lease is not, as they say, assignable, except as incident to a conveyance of the subjects let.

"Considered in point of principle, the questions thus raised appear to

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Watson's trustees reclaimed, and argued;—The Lord Ordinary's judgment was founded on *Weir* v. *Dunlop*,[1] but that case was special, and was distinct, as the lessor was not infeft. Here the lessor was infeft on an *ex facie* regular title, on the assumption that the destination to Watson was evacuated by his death without a lawful male heir. Therefore a real right granted by the lessor was valid even although his title was afterwards reduced.[2] To maintain the reverse [3] was to misunderstand the case of *Macniven*,[4] which turned on a reservation that the lessees' right should stand or fall with the lessor's. A lease was in a stronger position than a disposition, because a lessee was entitled to rely on apparent ownership, and need not be judaical in criticising his granter's right. Besides, the lease was valid as a *bona fide* act of administration of Watson's property.[5] In leases there was no *delectus personæ* on the part of the lessee. Even assuming defect in the title, the contract between the lessor and lessee was confirmed by the assignation. The lease was assignable if the assignee

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me to be difficult. I am not, I confess, prepared to accept the proposition that the reduction of a lessor's title *per se* puts an end to the contract of lease, so that although the lessor were still able by arrangement with the new owner to secure the tenant in continued possession, the tenant would nevertheless be at liberty to refuse implement of his part of the contract. On the contrary, I should think, *prima facie*, that both parties would in that case still be bound—bound, that is to say, by their personal contract. If either was liberated, it could only be by the other party being disabled from performance. And, at least in other contracts than that of lease of land, such disablement would not necessarily follow from loss or absence of title. There may, I apprehend, be a quite valid sale or hire of what is or turns out to be a *res aliena*; nor is there, so far as I know, any legal impossibility in the seller or hirer duly performing such a contract. He may be able to do so, and may do so quite duly, by arrangement with the true owner. The peculiarity, however, of the contract of lease of land is this—that it is part of the lessor's obligation to give the lessee a title which shall be good against singular successors. And if, under the lease, the rent is or becomes payable to a person other than the proprietor of the lands, the lease cannot, I apprehend, be good against singular successors. That is to say, it cannot comply with the conditions of the Act 1449, c. 18. To secure therefore the lessee, and so perform his (the lessor's) part of the contract, it is necessary for a lessor whose title has been set aside either to reacquire the subjects under a valid title, or effectually to transfer his contract rights to the true proprietor. And that being so, the question in the present case seems really to come to this, whether the pursuers are right in their contention that the assignation which the lessor has here made in favour of the other defenders is incompetent and inept. If such an assignation is incompetent—that is to say, legally impossible—there is of course an end of the matter. If, again, it is competent and effectual, there seems no reason why the lessee should be liberated.

"Now, can it be affirmed that the assignation by Hamilton to the other defenders of his contract rights under the various leases which he had granted during his possession was incompetent and inept? *Ex hypothesi* at the date of the assignation the contracts of lease as personal contracts

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[1] July 17, 1861, 23 D. 1293, 33 Scot. Jur. 652.
[2] Heron v. Stewart, May 30, 1749, Hume, 440, 3 Ross's Leading Cases, 243; Calder v. Stewart, Nov. 18, 1806, 3 Ross's Leading Cases, 248.
[3] Rankine on Leases, p. 48.
[4] Macniven v. Murray, May 25, 1847, 9 D. 1138, 19 Scot. Jur. 482.
[5] Mackenzie v. York Buildings Co., May 16, 1769, 3 Pat. App. 378.

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could implement the conditions of the lease. Further, a lease by one without title was confirmed by subsequent acquisition of title. Thus, if Watson's trustees, after reducing Hamilton's title, had conveyed the land to him and obtained a reconveyance from him, his lease to Reid would have been set up, and the assignation would have transferred to them an undoubted contract. The law should favour the direct course rather than the circuitous route.

Argued for the respondents;—The Lord Ordinary was right in following the case of *Weir*.[1] Hamilton's title was not *ex facie* valid. *Ex facie* it was null, for the notarial instrument proceeded on Whyte's settlement, which shewed that Watson was fiar. By the Act 1449, c. 17, a lease was not good against singular successors unless the granter was infeft, and had an *ex facie* regular title.[2] Here the title of the granter was not *ex facie* regular, and neither tenant nor owner could enforce it. It was erroneous to view the lease as an act of administration. The case of *Mackenzie*[3] was explained by Lord Young

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held good. There had, as yet, been no default—no failure on the lessor's part to perform his obligations. Why, the defenders ask, should there in these circumstances be any legal impediment to an assignation by the lessor to an assignee who is willing and able to give performance? There is of course no *delectus personæ* with respect to the lessor under a lease; and, as regards the suggestion that the lessor's interest cannot be assigned except as incident to a disposition of the subjects—that, the defenders urge, is a proposition unsupported by principle, unless in the sense (which is conceded) that such an assignation can only be effectual if made to the proprietor of the subjects—so as to vest in the same person the right both to the rents and property of the subject.

"The defenders also urge, and I think with force, that the object of the defenders could have been obtained circuitously by a conveyance of the estate to Hamilton by the other defenders (which would have validated the lease by accretion), and a reconveyance by Hamilton to them, which would have carried the lease as an accessory of the estate. That they say would have been clearly competent, and being so they deny the right of the pursuer to compel such circuity of procedure. They also point out (although this is perhaps a different matter) that upon the theory of the pursuers Hamilton remains liable to them, the pursuers, in damages for breach of contract, and is yet disabled from relieving himself by securing them in all their rights.

"I am bound to say that I feel the force of these considerations, and if the point at issue had been still open I should have had great difficulty. But the pursuers found on a judgment of the Court in the case of *Weir* v. *Dunlop & Company*, 23 D. 1293, which they say is conclusive, to the effect that such an assignation as was here granted is incompetent. And the defenders do not profess, or at least have not been able to my satisfaction, to distinguish that case from the present. That being so, I consider that I am bound by that decision, and do not feel at liberty to canvass its grounds. The only distinction which I can find—apart from the very unfavourable circumstances in which the question was there raised—is this, that in that case there was perhaps ground for holding that before the assignation there in question was made the lessor had failed to keep the lessees in possession—they having, before the date of the assignation, been, as I gather, practically evicted by the true owner. I do not, however, find sufficient evidence that the judgment proceeded on that ground; and, on the whole, I think my proper course is to follow the decision, which I need hardly say, looking to the Judges who took part in it, is one of high authority.

"I propose, therefore, following that judgment, to give the pursuers decree in terms of the summons."

[1] 23 D. 1293. [2] Bell's Pr. sec. 1181. [3] 3 Pat. App. 378.

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in a recent case.[1] The assignation did not effect a cure, because a personal contract cannot be assigned. A person could not validly assign a lease unless along therewith he granted a conveyance of the land. Hamilton's assignation carried nothing, because he himself had no right. The Act 1449, c. 17, raised a lease from the position of a mere personal contract into a real right in a question with singular successors. But Watson's trustees were not singular successors, and did not represent Hamilton.

At advising—

LORD JUSTICE-CLERK.—(After narrating the facts)—Upon these facts, the following considerations seem to me to arise. At the time the defender John Andrew Hamilton granted this lease, he was not in a position to do so effectively. He was not infeft, he had no title, and no right to the use and enjoyment of the estate, and therefore he could not as proprietor grant any effectual right of lease. The case was not one in which the personal obligation under a lease and the right to the subject of the lease were in one person, and there could be no effectual lease. By the decree of reduction in the former action, John Andrew Hamilton was found to have no title to the estate, and therefore in a question between him and the pursuers of this action there was and could be no effectual lease. But if he was in no position to fulfil his part of the obligation of lease, can he enforce the other part against the other party, or transfer to anyone else the right to do so? At the time when it was found that he had no right, and for months afterwards, the other party to the contract could have no answer to a demand by the proprietor infeft that they should cede possession, on the ground that the person who had professed to give them rights had himself none. And if they were in this position, then, as they had no one bound by their contract who could effectually keep them in possession, the question is, could they themselves be held bound? And if not bound, then a subsequent assignation by John Andrew Hamilton could not make binding on the pursuers obligations the correlative obligations to which the pursuers could not have enforced as binding on the true proprietor. But if the latter was not bound, no one was bound. And if the pursuers were not bound at the time immediately following the reduction of John Andrew Hamilton's title, they have done nothing since which can bind them in obligation to the new proprietors, with whom they had no contract.

These considerations have appeared to me to be of great weight. I have given attention again and again to the views suggested by the Lord Ordinary tending in an opposite direction, but without being able to see that they are sufficiently weighty to overcome them.

The case of *Weir*,[2] quoted by the pursuers, seems to me to be in point upon the general principle, and I observe that the Lord Ordinary states that the defenders were unable to distinguish the present case from it, and he states that he has also been unable to do so. I must say that when I first read that case that was my very distinct impression, and I endeavoured when listening to senior counsel for the defender to discover in the argument any sound ground for holding that the case did not apply, but I, like

[1] Liquidator of West Lothian Oil Co. v. Mair, Nov. 18, 1892, 20 R. 64.
[2] 23 D. 1293.

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the Lord Ordinary, have been unable to do so. I think therefore that there is precedent for the judgment which the Lord Ordinary has pronounced. I confess I should have had diffidence rather than confidence in expressing my own view in such a case as this had the question been an entirely new one, not already considered and dealt with in this Court, knowing that there is a difference of opinion on the bench in regard to it. And I have not come to the opinion that the Lord Ordinary's interlocutor should be adhered to without much and repeated consideration of the arguments pro and con, both on the general principle and on the case of *Weir*.[1] But having done so, the conclusion at which I have arrived is that the interlocutor of the Lord Ordinary is right, and ought to be adhered to.

Lord Young.—The Lord Ordinary, if I rightly understand his note, is of opinion that the agreement of 24th January 1884 was at its date valid, and therefore binding on both parties to it, and further, that it remained so down to the term of Martinmas 1892, that is, for eight years and a-half of the twelve years of endurance specified in it. As to the residue (3½ years) I gather from his Lordship's observations that but for the decision in the case of *Weir* v. *Dunlop & Co.*,[1] he would have been disposed to hold that as between the parties to the agreement it was as binding after as it was before Martinmas 1892; that the agreement of August 1894 between the competitors for the property of Bankhead, made on the determination of the litigation between them, including the assignation by the defeated to the successful competitor of the outstanding leases on the lands of which his success had made him owner, was in all respects proper, and is not impeachable by the present pursuers, and that the pursuers, the lessees under the agreement of 1884, having got full and undisturbed possession of the subject thereby let, and complete implement of the obligations in their favour, not only during the eight and a half years till March 1892, but thereafter during the subsistence of the litigation between the competitors for the property, and the continuance of their possession till the expiry of the term of twelve years at Whitsunday next being guaranteed to them by the owner of the land in an onerous contract with the party (John Andrew Hamilton) who was bound to give it or procure it, they must fulfil their part of the agreement, which has hitherto been, and must, under the obligation validly imposed on the owners of Bankhead, continue to be, fulfilled to them.

The Lord Ordinary, although he indicates pretty distinctly that he has been influenced by the case of *Weir* v. *Dunlop*[1] to go against what would otherwise have been at least the strong inclination of his own judgment, does not seem to me, if I may presume to say so, to be quite satisfied that it is in point. I think it is not in point, and that we must consider the case before us irrespective of it. I think it is a peculiar and special case, and that it determines no general principle.

1. And first with respect to the agreement of 1884, the only ground for the declarator and reduction concluded for respecting it is that Mr Hamilton not being proprietor of Bankhead, it was for him *ultra vires* to enter into

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it. There is no other. Now, it is true, no doubt, that as in a question with an objecting owner it is *ultra vires* of a stranger to grant a lease of the owner's property. Here Mr Hamilton thought himself owner, and acted accordingly for fourteen years, during twelve of which his title was not questioned by those—viz., Watson's trustees—who turned out to be the true owners. Of course no one other than the true owner could challenge Mr Hamilton's possession, or the possession of tenants under him during these years. His tenants who took leases from him and entered on possession *could not* challenge his title to the property. I may say that I think it a universally true proposition that a tenant accepting a lease from anyone *cannot* challenge the title of his landlord. The trustees of James Francis Watson, who instituted proceedings in 1892, were the only parties who could *disturb his* possession, or that of any tenant of his.

It is certainly unusual for the claimant to an estate during his litigation *with the* party in possession to do anything whatever to disturb tenants in *bona fide* possession, and indeed such disturbance would, speaking generally, be impossible. But it is sufficient here to say that the successful claimants (Watson's trustees) did nothing whatever to disturb the possession or the *rights* under agreement with Hamilton of the pursuer or any other tenants, during the dependence of the title litigation,—that is, between 1892 and 1894,—and it does not occur to me that they could have done anything. After success, it was for their consideration whether it was possible, or, if possible, desirable, to interfere with possession on current leases from Mr Hamilton. I doubt if it was possible, and strongly incline to think it was not. As to the prudence and good feeling of simply homologating, as they did, the leases he had granted during the period of his possession, and relieving *him* of the obligations he had thereby undertaken by taking these obligations on themselves, I am unable to entertain a doubt.

The tenant the pursuer (I use the singular for clearness) says that he did not work the coal after 1888. I assume this to be the fact, although there is no admission, but think it clearly immaterial. He entered into possession in 1884, paid rent down to Martinmas 1892, and his possession, as the defender truly avers, "was not and never has been disturbed." Why did he not pay after Martinmas 1892? His only answer is (cond. 2) "in consequence of the litigation after mentioned,"—that is, the litigation as to the property title which commenced on 1st March 1893 (cond. 3). I cannot accept this as a good reason, not being prepared to affirm it as a sound general proposition that a litigation challenging the title of the party in possession of an estate entitles the tenants thereon on leases from him to throw up their leases. I should even go the length of saying that the proposition is extravagant on the statement of it. If the litigants cannot agree to leave matters undisturbed till the issue of the suit, they may apply to the Court to protect the interests of the party who may succeed, which may be done by appointing a factor to receive the rents and pay expenses meanwhile. But, as I have already observed, the familiar and usual course is to leave things alone and undisturbed, exactly as was done here. As to disturbing pending such litigation the possession of a tenant, I repeat that, in my opinion, the law would not, unless on some very special and exceptional ground, permit it, and would, on the contrary, protect such possession.

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It follows that the tenants being thus secured in their rights must fulfil their obligations.

This brings me down to the termination of the litigation on 4th June 1894, when the defenders Watson's trustees were ascertained and declared to be the owners of Bankhead. Was the tenant the pursuer (I still use the singular) then and thereby "freed and relieved" of the obligations imposed on him by the lease, and theretofore, I assume, incumbent on him as the counterpart of his rights? The pursuer's case here, if I understand it, is this, that his obligations by the lease, being to John Andrew Hamilton as proprietor of Bankhead, ceased when it was judicially ascertained that he was not proprietor. I cannot assent to this proposition. The pursuer's obligations could not cease while his rights subsisted, and it is too clear to require argument that his rights were not terminated by the judgment of 1894. John Andrew Hamilton could not after June 1894 satisfy these rights specifically without the aid of Watson's trustees, and it may be a question whether or not they were bound to give it. If they were bound, or, whether bound or not, did give it, I am of opinion that Hamilton was bound to satisfy the pursuer's rights specifically. The pursuer's argument here was that Watson's trustees did not enable Hamilton to satisfy the tenant's right to be continued in the possession and enjoyment of the subject let, but only undertook themselves to satisfy it on Hamilton's behalf. There is, of course, no doubt of their ability to satisfy it or of the validity and obligatory character of their undertaking to do so. What, then, is the distinction, or what can it signify to the pursuer whether his right is satisfied by Hamilton directly, or by Watson's trustees, upon an onerous obligation which Hamilton procured from them? Suppose that on the judgment being pronounced Hamilton had bought the property from Watson's trustees, is it doubtful that the lease in question would have been good and enforceable *hinc inde* till its expiry? But the case supposed is really not distinguishable from the present as regards the satisfaction of the pursuer's rights, the only subject which I am now considering, and the point which I desire to make clear being that if his rights exist, and he is sufficiently assured that they will be satisfied in the future as they have been in the past, his obligations also exist and must be fulfilled.

It was not till 24th October 1894 that Watson's trustees executed the deed, whereby they bound and obliged themselves "to perform, implement, and fulfil the whole obligations and prestations incumbent on me (J. A. Hamilton) by the leases," &c. referred to, including that to the pursuer. This was four months after the judgment in their favour, and in the view that they were during these four months free of any obligation by the lease or otherwise to the pursuer, it is urged that he on his part was also free, and was not put under obligation to them by their subsequent adoption and ratification of the lease.

Now, in the first place, I cannot assent to the assumption on which this argument rests, viz., that by the judgment in their favour they took the property free of the leases upon it granted by Mr Hamilton during his possession, and were at liberty, if they pleased, to eject tenants possessing under such leases. On the contrary, I am of opinion that when the title of a party in the *bona fide* possession of an estate is successfully assailed, as Mr

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Hamilton's title was here, the owner is on the one hand entitled to have it, and on the other must be content to take it as it exists, that is to say, in so far as its existing state and condition has been produced by ordinarily prudent management. There must, of course, be management during the period, long or short, that the possessor and the owner are both ignorant of their respective positions, and if it was ordinarily prudent I am of opinion that the owner cannot assail it or the rights acquired by third parties in the course of it, and by reason of it. Innumerable cases might be put illustrative of this view, but it is sufficient to take the illustration of leases such as ordinarily prudent management required, or even warranted. I should hold, I must say without doubt, that the owner will, as the result of his success, take the estate with the advantage of these leases upon it, and that as regards the tenants he must take the place of the possessor who granted them, and whose title he defeated. This is the manifest justice of the matter as regards both the possessor who *bona fide* granted the leases, and the tenants who *bona fide* took them and possessed upon them.

But, in the second place, on the assumption, contrary to my opinion, that Watson's trustees were not bound to recognise the pursuer's lease, and take him as their tenant under it, I am unable to appreciate the only reason which has been suggested, why, in October 1894, they were not at liberty to homologate that lease, or why their homologation then should be inoperative. The only reason suggested is that there was a delay of four months. This delay obviously enough does not render the homologation inoperative in favour of the pursuer and against Watson's trustees, and it cannot be suggested that it (the delay) was, or conceivably could be, prejudicial to the pursuer. Watson's trustees were owners of Bankhead when the lease was granted, and had Hamilton possessed their mandate his act would have been *intra vires*, and needed no homologation. But subsequent assent by the party whose prior mandate would have validated the act from the beginning is homologation and equivalent to prior mandate. It was intended that the lease should be by the proprietor of Bankhead, or one having authority—his authority, express or implied—for none other could grant it, and error on the subject seems to present a typical case for homologation. Who was the proprietor, there being no *delectus*, was immaterial, provided he (whoever he was) authorised the lease, and equally so whether the error consisted in the granter thinking that he was himself the proprietor when he was not, or that he had the proprietor's authority when he had not. I am unable to perceive any distinction in this matter between a mineral lease, or indeed any other lease, and a sale, or hire, or loan, of a specific subject. The seller, hirer, or lender is absolutely bound by his contract, and may undoubtedly fulfil it by procuring homologation. I do not mean to say that a purchaser or lessee might not declare off if, when matters were entire, he discovered that the contract required homologation, which had not been granted. But the pursuer's case is as far removed from one of that kind as would be that of a buyer who had got delivery of the goods he bought and resold, or consumed four-fifths of them. The pursuer has under the lease in question been in exclusive possession of the property of Watson's trustees since 1884, and removed, and, I suppose, sold some considerable portion of its mineral substance.

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I have already said that I assume (though we have neither admission nor evidence on the subject) that the lease, after four and a half years' working under it, proved unprofitable to the tenant, but that I think is a circumstance immaterial to the question we have to decide. It may, however, be useful to point out more distinctly, that had the lease proved profitable to the tenant the legal rights and obligations of the parties before us would have been the same, and the decision upon them dependent on the same considerations. The purpose of doing so is to test the reason and justice of the pursuer's pleas by the consequences to which they lead.

Suppose that the lease had proved profitable to the tenant and disadvantageous to the proprietor, and that the defenders (Watson's trustees), prompted by a consideration of interest similar to that which actuates the present pursuer, had repudiated the lease as a nullity, or at any rate invalid to affect them, and therefore desired the pursuer to remove from their ground and make reparation to them for having, without authority, sunk and worked pits upon it, and removed a quantity of coal, their property. Such contention and demand by Watson's trustees would, indisputably, be in accord with the pursuer's pleas on record and his argument to us, and could not, consistently with them, be resisted. The continuous working and extraction of coal having endured for only a few years (4½) and the fixed rent being only £75 (we do not know what the lordship amounted to) the case is not so gross as may (legitimately for illustration) be figured. Suppose the working and extraction had continued for—say—ten or twenty years, and that the rent (fixed rent or lordship) regularly paid to the honestly supposed owner during that period had amounted to £20,000, and further suppose that the tenants' prospects for the residue of the lease had been undoubtedly good,—the legal rights of the parties would, I repeat, have stood exactly as they do here, and depended on the same legal considerations, for I know of no rule of law to enable me to distinguish between possession for five years and possession for ten or twenty years during which there was honest error as to the ownership of the ground, or between £100 and £1000 a year of value.

I can see no answer consistent with the pursuer's argument to the claim of the true owner for reparation. There might be a right of relief or to damages from the party who granted the lease, and thereby put the tenant in a false position, but this might be worthless, and probably would be in most cases where a large property is taken from the possessor, and all the tenantry thereon evicted with such claims upon him. I do not believe that it has hitherto occurred to any lawyer that our law was such as to admit of such results.

I venture in conclusion, and in the interest of both parties, to point out that on the assumption that the pursuer's case is well founded, viz., that this lease must be regarded as of no avail between him and Watson's trustees, and reduced accordingly, it follows clearly, in my opinion, that Watson's trustees have an unanswerable claim of damages against him for sinking pits in their land, and extracting and removing coal therefrom, nor do I think that he, on his part, could have any corresponding claim of relief against J. A. Hamilton, who offers him full implement, in spirit and to the letter, of his contract, and is admittedly in a position to give it.

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LORD TRAYNER.—The Lord Ordinary has pronounced the interlocutor now under review chiefly, if not altogether, out of deference to the decision in *Weir* v. *Dunlop*,[1] a case which, in his Lordship's opinion, cannot be distinguished in any material respect from the present. There is obviously a similarity between the two cases; and although each presents certain specialties in fact and circumstance, I agree with the Lord Ordinary in thinking that in all essential respects they are the same, to be decided on the same grounds, and therefore with the same result. I shall not examine the case of *Weir*[1] further than to say that in it, as in the present case, there was a lease (or missives of lease) granted by one who had no title to the subjects let, that possession followed in respect thereof on the part of the lessee, that there was an assignation subsequently granted by the lessor of all his rights under the lease (or missive of lease) in favour of the person vested with the property of the subject let, and that the person so vested with the property (and assignee of the lessor) was willing to continue the rights to the lessees which the lease conferred. The cases differ in respect that the possession had by the lessee in the former case was shorter and of a different character from that enjoyed by the lessee in the present case. This difference does not strike me as having any material bearing on the question before us; while, as I have said, the points of agreement seem to me to make the decision in the one case a precedent for the decision of the other.

Apart from precedent I should have arrived at the same conclusion. In the first place, I think there never was a valid lease at all—that is, a lease which the lessee could not have challenged during any period of its currency. The granter of a lease of heritable subjects "must be either the proprietor of the subject let, or one entitled to the full use and possession of the subject, or one in the administration of it. The proper title, therefore, of the granter of a lease as heritable proprietor is an infeftment."—Bell's Prin. sec. 1181. Now, Mr Hamilton does not pretend that he was in the administration of this estate on behalf of some other; nor was he entitled to the full use and enjoyment of it as liferenter or otherwise. The lease, or more correctly the agreement to lease, entered into between Mr Hamilton and the pursuer bears to be "of coal and other minerals as after mentioned in part of his (that is, Mr Hamilton's) lands of Bankhead." It was therefore as proprietor, and in no other character, that Mr Hamilton agreed to lease the minerals. But he had no infeftment. The title on which Mr Hamilton proceeded, and the only title he had, was not an infeftment in the lands. A reference to the case of *Watson's Trustees* v. *Hamilton*[2] decided in this Division of the Court will shew exactly how the matter of title stood. Shortly stated, it was this. The late Mr Whyte of Bankhead by his last settlement left his estate of Bankhead to his widow in liferent, and to his nephew James Francis Watson in fee, with this addition, "that in the event of my said nephew James Francis Watson dying without leaving any lawful heir-male of his body, then and in that event my said lands of Bankhead are to revert back to my said nephew, John Hamilton." It was decided that under that destination there was a

[1] 23 D. 1293.

[2] 21 R. 451, H. L. 35.

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direct conveyance of the estate to Mr Watson vesting him with the estate as at Mr Whyte's death, and a simple substitution of Mr Hamilton which could be evacuated by Watson; that Watson did evacuate it by his general disposition; and that no right of fee ever descended to Hamilton. Upon Mr Whyte's settlement, however, Mr Hamilton had expede a notarial instrument, which was recorded on behalf of Mrs Whyte in liferent and himself in "eventual fee." It goes without saying that there was no warrant for recording any notarial instrument in favour of Mr Hamilton as fiar of Bankhead. He was not the fiar; the deed upon which the notarial instrument proceeds gave him no fee. The phrase "eventual fee" is novel, and expresses rather Mr Hamilton's expectation than his right. But certainly the recording of that notarial instrument did not give Mr Hamilton any infeftment as fiar or proprietor of Bankhead. That being so, Mr Hamilton lacked the qualification necessary to enable him to grant a valid and binding lease of Bankhead or the minerals therein. Now, I think the pursuer could at any time during the currency of the pretended lease have thrown it up on the ground that the lessor had no title to the minerals let, and could not consequently protect him, the tenant, in his possession under it. He was not bound to wait until the real owner came forward to eject him.

If it is said that I am here disregarding the principle that a lessee cannot challenge his lessor's title, my answer is that that principle has no application to the case I am considering. That principle only applies where the lessee in a question with the lessor, or one in right of the lessor, is maintaining some right or claiming some benefit under or in respect of the lease, not where he is renouncing or repudiating the lease.

In the second place, if the lease was not valid and binding on the pursuer, then the subsequent assignation of it to the defender was of no avail. Mr Hamilton by his assignation could give no higher or better right to his assignee than he had himself. If he had no enforceable right under the lease his assignee could have none by virtue of the assignation. But further, when the assignation was granted, the lease as a contract had come to an end. The lessor's title, such as it was, had been reduced, and the reduction of a lessor's title extinguishes the lease. It was therefore an assignation to a lease which the supposed lessor had no title whatever to enforce; it was a lease which he was never in a position effectually to grant. But what he had never power to grant, and could certainly not now enforce, he could not with any effect assign. Without a valid assignation in their favour the defenders cannot enforce the lease. It is a contract to which they are not parties.

It is said, however, on behalf of the defenders, that the pursuer should be held bound by the lease, because he was not, in point of fact, disturbed in his possession while he held under Mr Hamilton, and that they do not wish or propose to disturb him now; that he has got all he bargained for either from Mr Hamilton or them. This argument was thought to be illustrated or enforced by reference to the case of a sale of a *res aliena*. I confess I do not see how the illustration aids the argument. Suppose a case. Suppose that A sells to B a subject belonging to C, and that whether B knows or does not know that the thing belongs to C. When the time

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for delivery of the thing sold arrives, if A can deliver it, it is of no consequence to whom it had previously belonged. It is in the lawful possession of A at the time for delivery, he can fulfil his contract by delivery, and it is not in B's mouth to say, "When you sold this to me it was not yours." But if A said to B "I cannot deliver the subject sold because it belongs to C, but he is willing to sell it to you on the very same terms as those on which I sold," would that be fulfilment of his contract, or would B be bound to transact with C? Certainly not. Yet here, according to the defenders' argument, B is bound to contract with C, and must take from C what he had bought from A. But it may perhaps be said that the case I have used in illustration is different from the case here, inasmuch as in the case supposed there was no delivery at all under the contract, while here there was at least partial delivery. Well, I will suppose another case. A contracts with B to supply him with 500 tons of a special brand of pig-iron in each month for a year. He fulfils his contract for the first nine months and then informs B that he is not in a condition to fulfil the contract farther, and that C, a third party, will take up the contract and fulfil it on the same terms as had originally been bargained for. That case is very like the present. Three-fourths of the contract time had passed; three-fourths of the contracted quantity had been delivered and disposed of; would B be bound to contract with C for the remaining fourth? I answer again in the negative. B may contract with C if he pleases, but he cannot be compelled to contract with him. No more can the pursuer be compelled to take the defender as his lessor—as his co-contractor—in the partial fulfilment of a contract made with Mr Hamilton and him only. In the case just supposed I spoke of C as a third party, and did so of set purpose, in order to note that I am not touching upon the question of how far one who is really a principal may insist on a contract partially fulfilled originally entered into by his agent in his own (that is, the agent's) name, or how far a contract partially fulfilled may be insisted in by one who is the successor or representative of the person who originally contracted. This question does not arise here, for Mr Hamilton never was the agent for Watson's trustees, and Watson's trustees are in no sense the successors or representatives of Mr Hamilton in the lands of Bankhead. Further, let me observe that the willingness of the defenders to continue the pursuer in possession under the lease cannot make such continuance an obligation on the pursuer. Their willingness rather points to there being no such obligation. If the pursuer is bound to remain as tenant, the defenders are bound—willing or unwilling—to keep him. If the pursuer remained tenant only because of the defenders' willingness or consent that he should do so, then he remains tenant not by obligation but by consent on his part. And this leads me to notice, in the third place, another ground on which I think the pursuer entitled to our judgment. At the date when Mr Hamilton's pretended title was reduced, and the estate of Bankhead declared to be vested in Mr Watson's trustees by virtue of Mr Watson's settlement, Watson's trustees were not bound by the lease either under the provisions of the Act 1449 or otherwise. They were absolutely entitled to say to the pursuer,—You are occupying our subjects without title, and you must leave. To that there was no answer. There was not even the answer that Mr Hamilton at the

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time of granting the lease had a title on record which was *ex facie* valid. In my opinion, the record, if examined, would have shewn that he had no title whatever to Bankhead. "Eventual fee" (which was all that the record shewed in Mr Hamilton), if it means anything, does not mean present fee, but a fee which may eventually descend—but equally may not. It was not an infeftment as of fee. Accordingly, I repeat that Mr Watson's trustees were not bound by the lease in question when they vindicated their right to Bankhead. But if they were not bound, neither was the pursuer—it was a bilateral contract by which both parties must be bound or neither. And if the pursuer was not then bound by the lease, he has done nothing since which could have the effect of making the lease binding upon him.

The Lord Ordinary says that the parties could by means of a conveyancing device have made the lease binding. Perhaps they could (I offer no opinion as to that), although as the Lord Justice-Clerk said in *Weir's*[1] case in reference to the same suggestion,—"It would not have been fair and honest." But the device was not resorted to, and we have to deal now with things as they are, and not as they might have been.

It was also suggested in the course of the argument that if the pursuer succeeded in this action he would lay himself open to a claim at the instance of Watson's trustees for the value of their minerals which he had worked without a title. If that is the consequence of success in the present action the pursuer of course must face it. It is not in the least the question now before us, and cannot affect that question. With regard to that matter I would only say that the suggestion does not seem to me to be one calculated to cause the pursuer any serious alarm.

I am of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

H. B. & F. J. DEWAR, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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Mar. 13, 1896. Bell's Trustees v. Copeland & Co.

WILLIAM BELL AND OTHERS (James Bell's Trustees), Pursuers (Respondents).—*Rankine—Guy.*

J. COPELAND & COMPANY AND OTHERS, Defenders (Appellants).—*Clyde.*

Bankruptcy — Sequestration — Preference — Poinding of the ground—Ground-annual—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 118.—The Bankruptcy (Scotland) Act, 1856, cuts down poindings of the ground which have not been carried into execution by the sale of the effects sixty days before the date of the sequestration, but provides that "no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a poinding of the ground . . . after the sequestration, but such poinding . . . shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term."

Held that the creditor under a contract of ground-annual is entitled to

[1] 23 D. 1293.

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2D DIVISION.

Sheriff of Lanarkshire.

the benefit of this proviso, the annual payments under the contract being truly the interest on a debt of which the principal is the capitalised value of the annual payments.

ON 27th June 1895 the estates of J. Copeland & Company, engineers, Glasgow, and the individual partners of that firm were sequestrated.

In October 1895 the trustees of the late James Bell, letterpress printer, Dublin, raised an action of poinding of the ground in the Sheriff Court at Glasgow, against Copeland & Company, and the individual partners of the firm, and also against John Gourlay, C.A., Glasgow, the trustee on their sequestrated estates.

The pursuers set forth two contracts of ground-annual, dated respectively March 1865 and May 1873, each consisting of a disposition of the lands therein described, granted by the original creditors in the ground-annual to the original debtors, under the real burdens, declarations, and conditions specified, and, *inter alia*, under the real lien and burden of payment of a yearly ground-annual in the one case of £248, 16s. 2d., and in the other of £68, 7s., payable half-yearly, and under the declaration that the debtors should have power, at any time within a period specified, to redeem the ground-annual on payment of a capital sum equal to twenty-one years' purchase thereof; and the debtors further bound themselves personally to pay the ground-annuals stipulated, and in security disponed the ground-annuals and the lands themselves.

The summons concluded for warrant to poind the moveables on the lands disponed under the contracts of ground-annual, and to pay the pursuers out of the proceeds in satisfaction of, or to account of, the sums of £124, 8s. 1d., and £34, 3s. 6d., being the half-yearly payments due under the contracts of ground-annual at the term of Whitsunday 1895 for the half year preceding, with interest from the term of payment till paid; and of the like sums of £124, 8s. 1d., and £34, 3s. 6d. payable half-yearly and termly at each term of Martinmas and Whitsunday thereafter, with interest, the terms of payment being first come and bye-gone.

The pursuers pleaded that the ground-annuals and interest being unpaid and due to the pursuers by the defenders, and being *debita fundi* on the subjects described, the pursuers were entitled to warrant as craved.

The defenders admitted that the ground-annuals in question were due and had not been paid, and explained "that the defender John Gourlay, as trustee foresaid, is and has been ready, and offers to pay any interest on the pursuers' debt (*i.e.* upon his ground-annuals) up to Martinmas 1895, in terms of section 3 of the Conveyancing (Scotland) Act, 1874, Amendment Act, 1879, and section 2 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887."*

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* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 118, provides,—"No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration . . . shall (except to the extent hereinafter provided) be available in any question with the trustee; provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a poinding of the ground . . . after the sequestration, but such poinding . . . shall, in competition with the trustee, be available only for the interest for the current half-yearly term,

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The defenders pleaded;—(1) Decree of absolvitor ought to be pronounced, in respect the Bankruptcy (Scotland) Act, 1856, section 102, confers a preferable right to the moveables upon the defender John Gourlay, as trustee upon the sequestrated estates, subject only to the payment of the interest which has been tendered, and for which alone the pursuers could poind the ground.

On 9th December 1895 the Sheriff-substitute (Balfour) pronounced this interlocutor:—"Having considered the cause, under reference to annexed note, repels the defences, and decerns in the poinding of the ground as craved," &c.*

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and for the arrears of interest for one year immediately before the commencement of such term."

This enactment was repealed by the Conveyancing and Land Transfer (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 55, but it was re-enacted by the Conveyancing (Scotland) Act, 1874, Amendment Act, 1879 (42 and 43 Vict. cap. 69), sec. 3; and an addition was made to it by the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887 (50 and 51 Vict. cap. 69), which provided by sec. 2,—"Notwithstanding anything contained in the Bankruptcy (Scotland) Act, 1856, the provisions of sec. 3 of the Conveyancing (Scotland) Act (1874) Amendment Act, 1879, shall be applicable to all poindings of the ground by which moveables forming part of or belonging to a bankrupt estate, whether administered in Scotland or furth thereof, are sought to be attached or affected, and that whether the debts or securities in respect of which such poindings of the ground shall be brought shall have been constituted or granted by the bankrupt, or by any ancestor or predecessor of the bankrupt, or by any other person."

* "NOTE.— . . . The present poinding is alleged to be for the interest on a debt for the current half-yearly term, but the defenders say that a ground-annual is not interest on a debt at all, but that it is a perpetual annuity having no reference to any principal sum or debt. This, however, seems to me to be a very narrow reading of the clause of the statute. The result of this reading would be that a superior would have a preference over the trustee for his feu-duties, because the superior's rights are reserved by the Bankruptcy Acts, and a bondholder could have the statutory preference over the trustee for his interest, but the holder of a ground-annual (who is preferable to a bondholder) would have no preference at all. It is contended that a ground-annual is not interest on a debt in the same way as interest on the principal sum contained in an heritable bond. But I hold that it is an annual payment which has been fixed by taking a certain rate of interest on a principal sum, viz., the price of the lands, and there is no principle whatever in holding that the statutory preference applies to a bond and not to a ground-annual. The argument appears to me to be founded upon a constrained reading of the expression 'interest on debt.' All the other elements which go to confer the preference exist in the person of the pursuers, inasmuch as (1) they hold a security over the bankrupt's heritable estate; (2) this security is preferable to the right of the trustee; and (3) they are entitled to execute a poinding of the ground after the sequestration.

"This is not a case which, in my opinion, falls to be determined by nice inquiries as to what the meaning of ground-annual is, and as to whether it is not tantamount to interest and annual rent. It falls to be dealt with on a broader basis, viz., whether, in the sense of the statute, a ground-annual is not really an annuity determined by the price of the lands, and whether it may not from that point of view be fairly described as interest on debt. There is no reason whatever, that I can see, for a holder of a ground-annual being deprived of the preference under the statute, and for

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The defenders appealed, and argued;—The sum termly due under a contract of ground-annual was not interest on a debt. There was no capital sum of which such termly payments were the interest. A contract of ground-annual was a security for the termly payments, and for nothing more. The utmost preference, therefore, to which the pursuers were entitled under the statutes, was for interest on the unpaid half-yearly payments down to Martinmas 1895, and this the defenders had tendered.

Argued for the pursuers;—A contract of ground-annual was truly a contract for the payment of interest on a debt heritably secured in perpetuity, the capital of the debt being the capitalised value of the annual payments. Ground-annual was just annual rent, and annual rent was another name for interest.[1] It was not to be assumed that the Legislature intended creditors under a contract of ground-annual to be in a worse position than ordinary heritable creditors.

LORD YOUNG.—The creditor in a ground-annual is a creditor in perpetuity for payment of a certain sum annually. Now, that payment is secured on land. That is why it is called a ground-annual; it is an annual payment secured on land. I have already said that payment is due in perpetuity, and in order to ascertain the amount of the debt we must capitalise the annual payment in the ordinary way. The capitalised value is the amount of the debt. Now, the annual payment is just the return or rent to him on this debt. It appears to me such an annual payment is indistinguishable from interest. I think he is entitled to poind the ground for that to the extent allowed by the statute, that is, for the amount due for the current half-year and one year before. Now, the Sheriff-substitute has sustained that contention. I think, even on the literal meaning of the clause, that his view is correct. But according to the true meaning and intent of the statute it is impossible to doubt it. I cannot distinguish between the position of the respondent and the position of a creditor under a bond. I am therefore of opinion that the Sheriff-substitute's interlocutor is right, and ought to be affirmed.

LORD TRAYNER.—I agree. I think the argument for the appellants is ingenious, but it is based on a too strict construction of section 118 of the Bankruptcy Act, and if sustained would have the effect of placing a certain class of heritable creditors in a very anomalous position. The question comes to be whether the holder of a ground-annual is to be put in a worse position than a heritable creditor under a bond. I should be averse to so holding. The annual payment under the contract of ground-annual is not the amount of the debt; the debt is the annual payment capitalised. Accordingly the interest on that debt is just the amount which the creditor here is trying to recover.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

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the holder of an heritable debt (which is an inferior burden) being preferred to him.

"I am therefore of opinion that the holder of a ground-annual is entitled to the statutory preference, and that this poinding is competent."

[1] Ersk. Inst. iv. 1, 2.

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THE COURT recalled the interlocutor of the Sheriff-substitute; found that the poinding for which warrant was craved was available only for the ground-annuals for the half-yearly term current at the date of sequestration and for the preceding half-year, and remitted the cause to the Sheriff to proceed as accords."

W. FINLAY, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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Mar. 17, 1896. Brown v. Magistrates of Leith.

ROBERT AINSLIE BROWN AND ANOTHER, Appellants.—*Jameson—Craigie.*

MAGISTRATES OF LEITH, Respondents.—*Salvesen.*

Police—Process—Private Improvement Expenses—Assessment—Police Commissioners—Finality Clause—Review—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. c.* 55), *secs.* 339 *and* 368.—The Burgh Police (Scotland) Act, 1892, enacts, sec. 339,—"Any person liable to pay or contribute towards the expense of any work ordered or required by the Commissioners . . . or who thinks himself aggrieved by any order, or resolution, or deliverance, or act of the Commissioners . . . may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session. . . ." Sec. 368 provides that private improvement expenses may be imposed and levied at such periods as the Commissioners may think fit, and that at the meeting imposing the same the Commissioners shall appoint a day upon which they shall be payable, and other days before which appeals by parties complaining that they have been improperly charged shall be lodged and heard by the Commissioners, "and the decision of the Commissioners upon all such appeals shall be final." The owner of property abutting on a private street appealed to the Commissioners under sec. 368 against an assessment imposed upon him for private improvement expenses. The Commissioners dismissed the appeal. He then appealed to the Court of Session under sec. 339. *Held* that the appellant having submitted the question of his liability to pay the assessment to the Commissioners their decision was under sec. 368 final, and that the appeal was *incompetent.*

Delegation—Police—Power of Police Commissioners to delegate to a committee—Imposition of Assessment—Burgh Police Act, 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 54.—Sec. 54 of the Burgh Police Act, 1892, enacts,—"The Commissioners shall have power to form committees of their number . . . and to delegate to such committees the powers competent to the Commissioners under this Act. . . ." *Held* that under the foregoing section Commissioners are entitled to delegate to a committee the power of hearing and deciding appeals under section 368 against assessments.

Elgin v. *Thomas*, July 4, 1856, 18 D. 1204, *distinguished.*

1ST DIVISION. THIS was an appeal under section 339 of the Burgh Police Act, 1892 * by Robert Ainslie Brown and Miss J. A. Brown, proprietors of certain subjects in Mayville Gardens, Leith, against an assessment imposed upon them for private improvement expenses.

The appeal was presented in the following circumstances:—

The appellants received a notice under the Burgh Police (Scotland)

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 339, enacts,—"Any person liable to pay or contribute towards the expense of any work ordered or required by the Commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved by any order, or resolution, or deliverance, or act of the Commissioners, made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session."

Act, dated 28th February 1895, in the following terms:—"Although the statute does not require such notice, notice is hereby given to you, as an owner liable in costs therefor, that the Magistrates and Council, as in room of the Commissioners of Police, have resolved to cause" Mayville Gardens "(being a 'private street' as defined by the said Act, in which houses or permanent buildings have been erected on one-fourth of the ground fronting the same), and the footways, to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged and channelled,—the carriageway to be of *Macadam, and the footways of* and the same to be otherwise completed in terms of said Act." The words "*and the footways of*" were deleted.

They subsequently received a second notice dated 24th July 1895, bearing to supersede the first, and being in precisely the same terms except that the words "*cement concrete*" were substituted for the word "*Macadam.*" To both notices was appended a note in the following terms:—"The whole of the costs, charges, and expenses incurred by the Magistrates and Council (who are to execute the work) in respect of said works, are recoverable from the owners of premises liable therefor, in terms more especially of clauses 137, 138, and 139 of said Act; and, for any appeals as regards said works, reference is made to clauses 143 and 339 of said Act."

The appellants took no exception to the notices, and the work was thereafter taken in hand and completed by the Magistrates in October 1895.

On 24th October the Treasurer's Committee of the Town-Council by minute approved of the allocations of private expenses in connection with the work, and "agreed to recommend the Council to impose the sums therein set forth upon the parties therein named, respectively; and, further, to recommend them to appoint the 30th day of December next as the day upon which the said sums shall be payable; the 19th day of December next as the day upon which appeals, by any parties complaining that they have been improperly charged, may be lodged with the collector; and the 26th day of December next as the day on which appeals, in reference to such expenses, shall be heard by the committee, for which purpose the committee crave a remit, with powers to act for the whole Council in hearing and disposing of appeals."

At a meeting on the 8th November 1895 the Magistrates and Town-Council by minute "approved of the foregoing minute of the Treasurer's Committee, and resolved accordingly . . . approved of the allocation of private improvement expenses therein mentioned; and imposed, and hereby impose, the sums set forth in the said allocation upon the parties therein named respectively; and appointed, and hereby appoint, the days specified . . . for the payment of the said expenses and the lodging and the hearing of appeals, and further, remitted to the committee, with powers, as craved, to act for the Council in the hearing and disposing of appeals."

Thereafter the appellants received a notice, dated 20th November 1895, from the collector of the burgh bearing that "the Magistrates and Council, on 24th October 1895, imposed and charged you, in respect of premises of which you are owner . . . with 'private improvement expenses,' amounting as per allocation to £74 for levelling and paving of carriageway, relaying channel and kerb, and repairing footway, and that the council have appointed Monday, 30th December 1895 as the day upon which the same shall be payable;

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the 19th day of December 1895 as the day upon which appeals by any parties complaining that they have been improperly charged may be lodged with me; and the 26th day of December 1895, at half-past two o'clock afternoon (within the Council Chamber, here), as the day on which appeals in reference to such expenses shall be heard."

Mr Brown and Miss Brown gave notice of appeal on 18th December 1895, and on 26th December Mr Brown was heard for both parties by the Treasurer's Committee, and the appeals dismissed.* This decision was confirmed at a full meeting of the Magistrates and Town-Council on 7th January 1896.

Mr Brown and Miss Brown then appealed to the Court of Session.

It was admitted at the bar that the Treasurer's Committee of the Council consisted of the whole Council sitting in private, with the treasurer instead of the provost in the chair. The undernoted sections of the Burgh Police (Scotland) Act, 1892, were, *inter alia*, referred to by the parties.†

Argued for the appellants;—(1) The appeal was competent under section 339, and should be sustained, the proceedings in connection

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* It was stated by the respondents in this appeal that the grounds of Mr Brown's appeal to the Commissioners were (1) want of proper notice before the work was begun; (2) that concrete was used, not Macadam; and (3) that part of the charge was excessive.

† Sec. 54.—"The Commissioners shall have power to form committees of their number, either with directions to report to the Commissioners, or for carrying the various purposes of this Act into execution, and to delegate to such committees the powers competent to the Commissioners under this Act in whole or in part, with regard to the subject which may be remitted . . ."

Sec. 133.—"Where any private street in which houses or permanent buildings have been erected, or one-fourth of the ground fronting the same or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the Commissioners, it shall be lawful for the Commissioners to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled. . . ."

Sec. 134.—"If any private street shall at any time be made, paved, . . . and put in good order and condition, to the satisfaction of the Commissioners, then it shall be lawful for the Commissioners to declare, and if such street has been paved and put in order on their requisition as hereinbefore provided they shall declare, the same to be vested in the Commissioners."

Sec. 137.—"The whole of the costs, charges, and expenses incurred by the Commissioners in respect of private streets . . . shall be recoverable as private improvement expenses."

Sec. 365 enacts that "private improvement expenses" may be recovered in the same manner as any assessment under the Act.

Sec. 368.—"The said . . . private improvement expenses may be imposed and levied yearly . . . or at such other periods as the Commissioners may think fit, and shall be payable at such times as they appoint, and at the meeting imposing the same the Commissioners shall appoint a day upon which such rates and expenses shall be payable, and another day upon which appeals by any parties complaining that they have been improperly rated or charged may be lodged with the clerk or collector, and another day or days on which appeals in reference to such rates or expenses shall be heard by the Commissioners . . . and the decision of the Commissioners upon all such appeals shall be final. . . ."

with the assessment having been wholly invalid. (2) The magistrates should have served a formal requisition on the appellants, calling upon them to do the required work. It was only on failure or default of an owner to do the work himself that the magistrates were entitled to do it at their own hand. That was clearly implied in the statute, and especially in sections 134, 141, 327, and 365. No such notice, however, had been given. The intimation of 24th July could not be held to be such a notice, for it did not sufficiently specify the nature of the work required to be done.[1] Besides, all reference to footpaths was deleted from it, whereas the notice of assessment expressly included them.[2] (3) Further, the assessment had been imposed, not by the Commissioners, as required by section 368, but by the Treasurer's Committee, and in the same way the appeal had been heard and decided by the committee, and not by the Commissioners. There was no warrant for that in the Act, for section 54 conferred no right on the Commissioners to delegate the power to impose or confirm assessments.[3] (4) Again, assuming that the assessment was validly imposed, it was imposed on the 8th November, but the intimation to the appellants bore that the assessment was imposed on the 24th October. Such an error was fatal.

Argued for the respondents;—(1) The appeal was incompetent. Section 339 did not apply when an assessment had actually been laid on, but even if the appellants might have come to the Court of Session direct, they had elected to go before the Commissioners, and section 368 made the decision of the Commissioners final. (2) Section 133 regulated the matter in hand, and imposed no duty on the magistrates of first calling upon the owners to execute the necessary work themselves. If there was such a duty, then the intimation of 24th July was amply sufficient. (3) The assessment was not in fact imposed by the Treasurer's Committee. It was recommended by them, and approved by the Commissioners. But if it were held that the committee had imposed it, then still there was no objection to it, for the Commissioners were entitled to delegate any of their powers under the Act to a committee. The error in date was immaterial. It was not an essential of the notice, and no date need have been given at all. No hardship had resulted.

At advising,—

LORD PRESIDENT.—The provisions, upon the construction of which this appeal depends, occur in an Act of Parliament. Accordingly, I shall most decorously express my first remark upon them by saying that, doubtless for good reasons, their coherence and relation has not been made too plainly manifest.

The practical conclusion which I have come to is that this is an incompetent appeal. The present appellants, as I think, by their own act, submitted the question whether they had got to pay for this street to the Commissioners, and the Commissioners have decided that question against them. That decision, as I can best make out, is final. These propositions may seem simple; they are very far from simple on the statute.

In order to judge of the matter it is best to begin with the position in

[1] Campbell v. Magistrates of Edinburgh, Nov. 24, 1891, 19 R. 159.
[2] Magistrates of Edinburgh v. Paterson, Dec. 3, 1880, 8 R. 197.
[3] Thomas v. Elgin, July 4, 1856, 18 D. 1204, 28 Scot. Jur. 590.

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which the appellants stood when they appealed to the Commissioners. They had been formally notified that they had got to pay £74 for making a road, about which they had been previously informed that it was going to be made. Well, now, to take the first of the objections to this liability, which they now state, they were perfectly aware that they had not first been asked to do the work themselves. They say that the Commissioners had no right to make the road at their expense without first giving them the opportunity of doing the work themselves. Of the merits of this objection more need not be said than that, in this instance, the statute, not having done something, talks afterwards as if it had, and the suggestion is, that it is to be taken at its word. Such as it is, however, this objection is legal in its quality, and I think that it might have grounded an unsuccessful appeal to the Court of Session or the Sheriff, under the 339th section. The appellants, however, did not avail themselves of this remedy.

The other objection to the notice of 20th November, now stated by the appellants, is that a wrong date was named as that on which the assessment was laid on. By the time the notice was given the assessment had been imposed by the Commissioners, but the date mentioned in the notice was that of a committee recommending the rate, and not that on which the recommendation was acted on by the Commissioners. Now, I can quite understand that here, again, there was a question which might have been tried, although a somewhat technical one. But, instead of looking round and seeing whether there were any such points capable of being tried in a Court of law, the appellants appealed to the Commissioners themselves under section 368.

That section is a very curious one. It is now founded on, and I think rightly, as conferring a right of appeal against the rate or expense now in question. In most statutes a right of appeal would be conferred by substantive enactment. In this Act it is conferred by telling the Commissioners that, among other things which they are to notify, they shall notify the day on which appeals will be heard.

The way in which the case of the appellants comes within, or at least may be held to come within, the section at all, is also singular enough. The money which they are rated for is the cost of making up a private street. By way of simplifying matters, the statute says that this cost is to be recoverable as a private improvement expense. When the reader searches for this presumably special method of recovery he finds that the manner in which private improvement expense is to be recovered is defined (in section 365) as being the same manner as that in which any other rate is recoverable.

Now, the 368th section purports expressly to apply to private improvement expense, and I suppose that, at least in this Act, it may be held to treat of the process of recovery. Under this section, then, the appellants appealed to the Commissioners, and their appeal was refused. I shall, in the meantime, assume that the committee had power to dispose of the appeal, and I ask what was the statutory result? The section says that the decision of the Commissioners is final. I cannot get over this. The 339th section gives an appeal wherever it is not otherwise specially provided. I think that this 368th section is such a special provision. As already indicated, I consider that the appellants, being persons who were liable to

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pay or contribute towards the expense of work required by the Commissioners, had right to come to the Court by appeal under section 339, but if they chose to go to the Commissioners they submitted to a final decision.

The only remaining question is,—Did the Commissioners decide? Now, I take this question upon the footing that the body which heard and decided it was a committee, and certainly the attempts of the Commissioners to validate the proceedings by deciding a case which (*ex hypothesi*) the Commissioners themselves had not heard, cannot be regarded as successful. Nor do I feel sure that it would be safe to say that a committee of the whole Council would be equivalent to the whole Council in matters in which the Commissioners alone had jurisdiction, especially when we know that the committee had appointed to it a different chairman from the statutory chairman of the Commissioners, and that it sat with closed doors. But, then, section 54 satisfies me that it was competent to the Commissioners to delegate this matter to a committee. The terms of that section are quite general. I see and highly appreciate the reasons why the Act might well have distinguished between what are, constitutionally speaking, such comparatively high matters as assessment on the one hand and the execution of details on the other. This, however, is for legislators and not for Courts of law; and while I do not wish to say anything against the case of *Thomas*,[1] which was a decision on another statute, I cannot read into the statute now before us a distinction which the Legislature might have drawn and has not drawn, and which is not implied as far as I am aware, in any established principle of statutory construction.

Had this last objection been good, I should have held the appeal competent, as the import of the objection is that the Commissioners did not exercise their jurisdiction under section 368. As it is bad, I am for refusing the appeal as incompetent.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT refused the appeal as incompetent.

R. AINSLIE BROWN, S.S.C.—IRONS, ROBERTS, & CO., S.S.C.—Agents.

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MRS MARGARET HENDERSON, Claimant (Appellant).—*W. Campbell—Graham Stewart.*

DANIEL S. GRANT (Laing's Trustee), Respondent.—*Hunter.*

Process—Cessio—Appeal—Competency—Value of cause—Affidavit and claim—Sheriff Court Act, 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 22—*Sheriff Courts Act*, 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 26 (4).—A creditor who had poinded some of his debtor's effects, thereafter lodged an affidavit and claim in the latter's cessio in which he stated the amount of the debt due to him to be £42, and claimed a preferable ranking to the effect of receiving full payment of his debt out of the poinded effects. The trustee admitted his claim to an ordinary ranking only, and his deliverance was sustained by the Sheriff. The value of the poinded effects was £18. The creditor appealed to the Court of Session. The trustee objected to the competency of the appeal on the ground that the only question was the creditor's right to a preferable ranking, and that the actual sum in dispute was therefore below £25. *Held* that the appeal was competent, the value

[1] 18 D. 1204.

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of the cause falling to be ascertained as in an ordinary Sheriff Court action, viz., by the amount of the claim made in the conclusions of the summons, or other initial writ, which here was the affidavit and claim.

Observations by Lord M'Laren on the right of appeal in cessios by reclaiming note under 6 and 7 Will. IV. c. 56.

Poinding—Delay in selling pointed effects—Supervening cessio of debtor—Right of poinding creditor to a preference.—A creditor executed a poinding of his debtor's effects on 25th July 1893, but took no further steps in the poinding, the debtor having from time to time made payments to account. Sixteen months thereafter the debtor took out cessio, and the poinding creditor lodged a claim to a preferable ranking in the cessio. *Held* that there had been undue delay on the creditor's part in following out his diligence by a sale of the pointed effects, and that the poinding was in consequence inept to found a preference.

Opinion on the question whether there is a complete transference to the creditor of the property in the pointed effects before their sale has been carried through *reserved* by Lord Kinnear.

Observations on *Tullis* v. *White*, referred to in Bell's Com. 7th ed. ii. 61, note 4.

1st Division. Sheriff of Perthshire.

THIS was an appeal at the instance of Mrs Margaret Stewart or Henderson against a judgment of the Sheriff of Perthshire, by which he sustained a deliverance of Daniel S. Grant, the trustee in the cessio of Robert Laing, refusing a preferable ranking to the appellant.

The claim by the appellant was made in the following circumstances:—On 11th March 1892 Mrs Henderson obtained a decree against Robert Laing for the inlying expenses attendant on the birth, and for the aliment of an illegitimate child, with expenses of process, and on 13th July 1893 Laing was duly charged to make payment.

Thereafter, on 25th July 1893, Mrs Henderson pointed certain goods belonging to Laing, the execution of poinding being reported by the sheriff-officer on the 29th July 1893.

The value of the pointed goods was stated in the report to be £18.

On 8th August 1893 Mrs Henderson obtained a warrant to sell the pointed goods, but the warrant, which bore to be in terms of the Statute 1 and 2 Vict. c. 114,* did not specify the time at which the sale was to take place, and was therefore inept.

No further proceedings took place under the poinding, the warrant to sell not being put in force, as the appellant alleged, in consequence of Laing making payments to account. The last of these payments was made on 19th June 1894.

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* The Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), enacts, section 25,—"That the officer shall within eight days after the day on which the poinding was effected . . . report the execution thereof to the Sheriff. . . ."

Section 26.—"That on the execution being reported, the Sheriff . . . if no lawful cause be shewn to the contrary . . . shall, if required, grant warrant to sell (the pointed effects) by public roup at such time and at such place, with such public notice of the sale as may appear to the Sheriff most expedient for all concerned . . . provided that the sale shall not take place sooner than eight days, nor at a longer period than twenty days after the date of the publication of the said notice of sale, and the Sheriff shall order a copy of the warrant of sale to be served on the debtor . . . at least six days before the date of the sale. . . ."

Section 28.—"That on the moveables being sold . . . the judge of the roup shall within eight days after the date of the sale make a report to the Sheriff. . . ."

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Laing having in December 1894 obtained the benefit of cessio, and the respondent in this appeal, Daniel S. Grant, having been appointed trustee, Mrs Henderson, on 15th December 1894, lodged an affidavit and claim setting out:—"That Robert Laing . . . is justly indebted and resting owing to the deponent the sum of £42, 11s. 4d., conform to state of debt annexed hereto, and extract decree therein referred to, as also execution of charge and report of poinding and warrant of sale following thereon, all herewith produced . . . Depones that a preference is claimed to the effect of receiving full payment of the debt out of the effects poinded by the deponent on 25th July 1893."

Thereafter the trustee issued a deliverance by which he rejected "this claim to a preferable ranking, but admits the same to an ordinary ranking."

The poinded goods were by agreement sold by the trustee under reservation of the rights and pleas of parties.

Mrs Henderson objected to the deliverance of the trustee, but on 17th May 1895 the Sheriff-substitute (Grahame) sustained the trustee's deliverance, and found the claimant entitled only to an ordinary ranking.

The claimant having appealed, the Sheriff (Jameson), on 14th December 1895, adhered.*

The claimant then appealed to the Court of Session.

The respondent objected to the competency of the appeal, and argued;—An appeal in a process of cessio is subject to the same provisions and conditions as an appeal in an ordinary action in the Sheriff Court.[1] That being so, the present appeal was incompetent, for the subject-matter of the appeal was under £25 in value. The only question between the parties was the right of the appellant to a preferable ranking, or, in other words, to the poinded effects, and their value was £18. It was plain from the first that that was the *de quo*, although the forms of claims in a cessio necessitated the statement of the whole debt due to the appellant. What had come to be the actual money worth of the claim was the true test of the value of an action.[2]

Argued for the appellant;—The appellant did not dispute that an appeal in a cessio, when not taken by way of reclaiming note under 6 and 7 Will. IV. c. 56, was subject to the same conditions as an appeal in an ordinary action. But applying these, the appeal was quite competent, for the value of the cause was £42, the amount of the claim of debt made by the appellant. The respondent's test was un-

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* "NOTE.—Notwithstanding the very high authority of Professor Bell (Com. 7th ed. pp. 61 and 62; 5th ed. ii. 64), I feel bound by decided cases to hold that a poinding is not completed so as to operate as a transference of the property of the poinded effects, until a sale has taken place under the poinding, although, when such sale has taken place, the effect of the poinding goes back to the date of execution. In my opinion this doctrine is established by the cases of *Tullis* v. *White*, 18th June 1817, F. C.; *Samson* v. *M'Cubbin*, 1 S. 407; *Lyle* v. *Greig*, 5 S. 845; and *Scoullar* v. *Campbell*, 3 S. 77. I may also refer to Lord Ivory's note to Erskine on this subject. As no sale took place under the poinding founded on by the appellant, her objection to the trustee's deliverance must be disallowed."

[1] Sheriff Court Act, 1853 (16 and 17 Vict. c. 80), sec. 22; Sheriff Courts Act, 1876 (39 and 40 Vict. c. 70), sec. 26 (4).

[2] Dobbie v. Thomson, June 22, 1880, 7 R. 983.

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precedented, viz., the value or reported value of the securities. The value of the cause was the invariable test, as that was set out in the conclusions of the summons or other initial writ. The case of *Dobbie*[1] was really an illustration of that rule.

LORD ADAM.—This is an appeal from a judgment in the Sheriff Court at Perth on the deliverance of a trustee in a process of cessio.

I have no doubt that appeals in a cessio presented under the 1876 Act are entirely similar to, and are treated precisely as if they were ordinary Sheriff Court actions. That is not the course which we might have expected to be followed in cessio appeals, because they are more analogous to appeals under the Bankruptcy Acts than to ordinary actions, but it is the case.

Now, the objection made to the competency of this appeal is that the cause is under the value of £25, and that accordingly it is not subject to appeal. The question, therefore, is whether or no the value of the action is £25. I have always understood that the value of a cause is to be determined from the conclusions of the summons or petition, and that we do not go outside of them to ascertain the value, and although the claim is not before us in the shape of a summons or petition, but in an affidavit, I think that this must be treated precisely as if it were a summons or petition, and that the value of the cause must be determined by the amount claimed therein. Now, as Mr Stewart has pointed out, the amount of the claim is £42. It may be that it may ultimately turn out that there is no discussion or dispute between the parties except as to whether or no the creditor has a preferential right over the poinded goods, but none the less the fact is that the claim is for £42, and is so treated by the parties, for the trustee in his deliverance "rejects this claim to a preferential ranking, but admits it to an ordinary ranking," *i.e.*, admits the whole claim of £42. It may be, from all that appears, that there will be ample funds to meet the claim, but however that may be, the claim made was for £42, and therefore the appeal is competent.

LORD M'LAREN.—The question of appeal to the Court of Session from judgments in cessio proceedings is left by the Legislature in an unsatisfactory position. We must keep in view that the process of *cessio bonorum* was an extraordinary remedy for poor debtors, and was originally competent only in the Court of Session. There was a right of review at that time by way of reclaiming petition, the form being afterwards altered to reclaiming note. When the Act of King William (6 and 7 Will. IV. c. 56) was passed it was thought proper, because of the smallness of the bankrupt's estate, to give jurisdiction to the Sheriff, but without depriving the parties of the right of proceeding in the first instance in the Court of Session. The mode of appealing from the Sheriff was by reclaiming note to the Inner-House. The reason of this is evident; if the appeal had been in the form of advocation, which at that time was the ordinary mode of bringing a case to the Court of Session from the inferior judicatory, the case would have had to go through the Bill-Chamber and then to a Lord Ordinary before coming to the Inner-House, and so the summary process of coming at once to the

[1] Dobbie v. Thomson, June 22, 1880, 7 R. 983.

Inner-House by reclaiming note was established to facilitate the disposal of this class of small bankruptcies. I am by no means satisfied that this right of coming to the Inner-House by reclaiming note has ever been taken away. I do not find any reference to it in the later statutes, and it is not in accordance with principle to hold that a right of review is taken away by implication arising from the silence of subsequent legislation. I should have hesitated to hold that the Act of 1876 was meant to substitute a new appeal for the old reclaiming note to the Inner-House, because the words of the section can be read as meaning an appeal within the Sheriff Court. But then I think that the provision in the Act of 1880 (the Debtors (Scotland) Act, 1880, 43 and 44 Vict. c. 34) means that cases of cessio originating in the Sheriff Court might be brought here by appeal according to the same rules as an ordinary Sheriff Court action.

I concur in the opinion which has been expressed, that the test of value is the sum claimed in the initial writ by which the creditor brings his case into Court. That has always been the test, and the initial writ here is the affidavit and claim. I agree that it would be more in accordance with bankruptcy practice to give an unqualified right of appeal as under the Bankruptcy Act of 1856, but there may be reasons for limiting it in the case of small estates, and at all events the statute is clear, and appeal is limited to cases in which the value is not less than £25.

LORD KINNEAR.—I have no doubt that this appeal is subject to the condition which applies to appeals from the Sheriff Court in ordinary Sheriff Court actions,—that is to say, that we cannot hold it to be competent if the value of the cause is below £25.

I agree that it is settled by a series of decisions, which cannot be questioned, that for this purpose the value of the cause must be measured by the amount of the claim contained in the conclusions of the summons or other initial writ, and not by the value determined as a result of the judgment brought under review. In applying this rule to the present appeal we must look for some writ which may be considered to take the place of a summons, since otherwise the provisions of the statute would be inoperative, and I have no doubt your Lordships are right in holding that the initial writ is to be found in the affidavit and claim in which the creditor sets out her alleged rights against the debtor. Now, the creditor makes a claim for £42, 11s. 4d. There can be no question that if the trustee had rejected it *in toto* the creditor would have been entitled to appeal. In point of fact he has not rejected it *in toto*, but only in part, by refusing to allow her a preference, but I agree that this in no way affects the value of the cause, as fixed by the creditor's demand, and that accordingly the appeal is competent.

The LORD PRESIDENT was absent.

THE COURT repelled the objection to the competency of the appeal.

The case was then heard on the merits.

Argued for the appellant;—It was not maintained, as the Sheriff seemed to think, that the mere execution of the poinding operated a complete transference of the property of the pointed effects, but only that as soon as the poinding was executed a *nexus* was imposed on

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the goods which the creditor could at any time render effectual by going on to sell. The debtor's sequestration within sixty days would have cut down that right, but a cessio had no such effect at any time, not being equal to a universal diligence like a sequestration.[1] Here the cessio was sixteen months after the poinding, and being a voluntary assignation by the debtor of his estate, the trustee had no higher right than the debtor, and could not defeat, any more than the debtor could have defeated, the appellant's diligence. Even arrestment on the dependence of an action was not interrupted by the bankruptcy of the debtor.[2] Then, again, mere delay in carrying out the diligence did not affect the creditor's right, although delay which could be construed into presumed relinquishment might be fatal to it. But relinquishment of diligence was not easily to be presumed, and all that the appellant had done was, by agreement with the debtor, and in consideration of his making payments from time to time, and for his convenience, to postpone further execution. Such conduct could not be said "to reasonably infer abandonment."[3] There being no intention to abandon, therefore, the mere delay had not rendered the diligence inept. In the case of *Scoullar*[4] there had been a delay of three years, and there were analogous cases in other branches of diligence which confirmed the appellant's contention.[5] The fact that the original warrant to sell was defective was not material, for the appellant might have at any time obtained a correct warrant, there being no limit of time fixed within which the Sheriff had to issue the warrant. That was in accordance with practice.[6]

Argued for the respondent;—It was admitted that a cessio did not necessarily operate a stay of diligence like a sequestration, but the trustee in a cessio was vested in the debtor's moveable estate to the same effect as a trustee in a sequestration under the act and warrant.[7] The strong presumption therefore was against the view that estate in the debtor's hands belonged to or could be carried off by a particular creditor. Creditors who had come into existence subsequently to the poinding, and who knew nothing about it, had given credit on the faith of the pointed effects belonging to the debtor. It was not necessary in the circumstances to maintain the ground of judgment on which the Sheriff proceeded, although it was perfectly sound and entirely warranted by the cases cited by him, and especially by the case of *Tullis* v. *White*,[8] because poinding was a diligence which in any view had to be promptly and timeously followed out,[9] and if it were not, then it ceased to be effectual to create a preference. Here there had undoubtedly been undue delay.[10]

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[1] Simpson v. Jack, Nov. 23, 1888, 16 R. 131.

[2] Mitchell v. Scott, June 29, 1881, 8 R. 875; Nicolson v. Johnston & Wright, Dec. 6, 1872, 11 Macph. 179, 45 Scot. Jur. 110.

[3] Erskine Inst. iii. 6, 18.

[4] Scoullar v. Campbell & Co., May 27, 1824, 3 S. 77.

[5] Macleod, 1805, Hume's Dec. 226; Nairn v. Brown, 1724, M. 820; Lister v. Ramsay, 1787, M. 824; Kerr v. Barbour, May 30, 1837, 15 S. 1041.

[6] M'Vicar v. Kerr, July 2, 1857, 19 D. 948, 29 Scot. Jur. 437.

[7] Gray v. Gray's Trustee, Jan. 29, 1895, 22 R. 326.

[8] Tullis v. White, June 18, 1817, F. C.

[9] Bell's Com. 7th ed. ii. 61; 5th ed. ii. 64.

[10] Samson v. M'Cubbin, May 15, 1822, 1 S. 407; Lyle v. Grieg, June 27, 1827, 5 S. 845.

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Besides, in executing a diligence like poinding, strict compliance with the statutory rules was essential, but here the warrant to sell was certainly incompetent. It was too late, more than a year afterwards, to have that corrected by obtaining a new warrant. The Act clearly intended that the Sheriff should fix the date of sale on receiving the report of the execution of poinding, and that it should not be left to the creditor at any time to obtain a warrant.

At advising,—

LORD ADAM.—(After narrating the circumstances)—The question is whether the appellant, in respect of these proceedings, has a right to a preferable ranking in the cessio to the extent of the value of the goods poinded.

It appears to have been maintained in the Sheriff Court that the effect of the execution of poinding was *per se* to transfer the property of the poinded goods to the poinding creditor, and that a sale was not necessary to complete the diligence, but that plea was not insisted in before us. It was admitted that a sale was necessary for that purpose, but it was maintained that the execution of poinding created a *nexus* on the poinded goods, which the poinding creditor was entitled to make effectual at any time thereafter, so long as it could not be shewn that he had abandoned the poinding. I do not know any authority for such a proposition, the effect of which would be to place poinded goods *extra commercium*, so to speak, for an indefinite period.

I do not see how this question could have arisen prior to the Act 54 Geo. III. c. 137, because prior to that statute the officer at the time of executing the poinding, failing payment of the debt, handed over the *ipsa corpora* of the goods poinded to the poinding creditor at the appraised value. It was by that statute that the goods were for the first time directed to be left in the hands of the debtor, and provision made for the sale of the goods and completion of the poinding. The matter is now regulated by the Act 1 and 2 Vict. c. 114. It appears to me that the provisions of both statutes clearly indicate that the poinding shall be completed without undue delay. Thus by section 25 of the last named statute, the officer is directed to report the poinding to the Sheriff within eight days of its execution. Then by the next section, on the execution being reported to the Sheriff, he is directed, if required, to grant warrant to sell the goods by public roup, at such time and place, with such public notice of the sale as may appear to him most expedient for all concerned, at the sight of a judge of the roup to be named by him, and by the 28th section the judge of the roup must make a report of the sale to the Sheriff, and lodge in the hands of the Sheriff-clerk the roup rolls, also within eight days of the sale.

Thus, it will be observed, that short and definite periods are appointed for the various steps of procedure necessary to complete the poinding. Then, again, it is not left in the discretion of the poinding creditor to determine when the goods poinded shall be sold; that is to be done by the Sheriff, who is to fix the time most expedient for all concerned, and it is to be done on the execution being reported to him. That does not appear to me to mean that he may do so at any time, no matter how long, after the execution has been reported to him. If it were so, it would put it largely

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in the power of the creditor to determine when the sale should take place, and at a time most expedient for himself, which is not what I think the Act intended. I am therefore of opinion that if the appellant were now to apply, or had applied at any time after lodging her affidavit and claim in the cessio, for a warrant to sell the poinded goods, the Sheriff could not competently have granted it. Her inchoate diligence, it appears to me, cannot now be completed, and therefore can afford no ground for a preferable ranking.

If undue delay in carrying through the sale of the poinded goods be a relevant consideration at all in such cases, there can be no doubt of its application in this case.

I therefore think the appeal should be dismissed.

LORD M'LAREN.—I agree. I think the principle that regulates cases of this kind is that, while an executed poinding does in a certain sense give a preference, it is only to this extent, that the creditor, notwithstanding bankruptcy, is entitled to follow out his inchoate diligence, and thus make his preference secure. But it is a condition that he follows it out in accordance with the provisions of the statutes regulating personal diligence, and without any undue delay. In the present case the delay has been such as to make it altogether inequitable that any such preference should be recognised.

LORD KINNEAR.—I am of the same opinion. I do not think it necessary to determine whether Mr Bell's criticism of the case of *Tullis* v. *White*,[1] which was referred to in the course of the argument, is correct or not, both because that decision proceeded upon the construction of regulations which are not identical with those of the statute now in force, although they are very similar to them, and also because in either view of the question discussed by Professor Bell the appellant's diligence is inept. The decision was that the property of poinded goods was not transferred until the sale was completed, and a note of sale thereafter lodged with the Sheriff-clerk. Mr Bell thought that the messenger's execution was an adjudication of the property, and therefore that it was the completion of the diligence, the subsequent sale not being so much the point of completion as a necessary adjunct, without which everything that had gone before became useless. But in either view it was indispensable for the efficacy of the diligence that the goods should be sold or judicially delivered within the appointed time. There may be cases in which the distinction may be material, but in the present case it appears to me to be of no importance whether the transference of property in the poinded goods was still incomplete when the officer's execution was reported, or whether being provisionally complete, it was defeated by the invalidity of the subsequent steps of the diligence, or by his delay to obtain a valid warrant of sale. There can be no question at all that the warrant of sale which he did obtain was inept, because it did not satisfy the provisions of the statute.

I think with the Sheriff-substitute that it is unnecessary to decide whether that defect might have been remedied if it had been discovered within a reasonable time. The question would have been whether the

[1] 2 Bell's Com. 7th ed. 61.

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application for a new and valid warrant, in place of the inept warrant that had been granted, was or was not made in such circumstances as to be fairly within the condition of the statute that the warrant must be granted upon the report of the execution. But however that may be, I entirely agree with your Lordships, for the reasons stated by Lord Adam, that the application for a new warrant more than a year afterwards is too late; and that to grant a warrant at the time when the arrangement was made by the appellant and the trustee, with the holder of the goods, would have been altogether beyond the powers conferred upon the Sheriff by the statute.

It appears to me therefore that at that time the property of the poinded goods had not been transferred to the creditor, but still remained with the debtor, and that it was too late for him to convert his inchoate diligence into a complete adjudication by obtaining a new warrant.

The appellant's counsel argued that it was not necessary that there should be an adjudication and transference of the property in order to a valid poinding, but that the poinded goods were affected by what he described as a *nexus*, by virtue of which they must be detained in the hands of the owner, subject to the creditor's right to sell whenever he might think fit to apply to the Sheriff for a warrant. Now, I agree with what Lord Adam has said, that there is no authority for that proposition, and I think it altogether inconsistent with the nature and operation of the diligence of poinding, because it is elementary that poinding operates as an adjudication or transference of the debtor's goods to the creditor, and if the creditor does not succeed in obtaining an effectual transference, he takes nothing by his proceedings.

The notion that the goods can be subject for an indefinite period to an attachment which is ineffectual to give them to the creditor, but effectual to prevent the debtor dealing with them, or to prevent other creditors obtaining right to them, appears to me to be entirely inconsistent with all authority. It is quite true that the Personal Diligence Act, like the previous statute of George III., prohibits the owner of the goods, the debtor, from disposing of them during the period for which they are left in his possession between the execution of the poinding and judicial delivery of the goods or the execution of the warrant for sale, and during that time it makes all unlawful intromitters liable to imprisonment, and to pay double the appraised value of the goods, if they are not made furthcoming.

But then that is a statutory provision for the purpose of preventing the goods from being carried away from the poinding creditor during the prosecution of the various steps of procedure which the statute introduced for the purpose of making his right effectual with greater safety to other interests.

But that provision necessarily falls if the provisions of the statute for the execution of the diligence itself are not rigidly complied with. The efficacy of the prohibition depends entirely upon the efficacy of the procedure for adjudging the goods, and if the creditor has failed to carry out that procedure so as to obtain a good adjudication, the incidental provision against interference in the meantime with the poinded goods can have no effect whatever in giving him any other right which could come in place of the right which a complete adjudication would have given him. I have no

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doubt at all, for these reasons, that the poinding in this case was inept, and that the Sheriff's judgment was right.

The LORD PRESIDENT was absent.

THE COURT dismissed the appeal.

CARMICHAEL & MILLER, W.S.—DALGLEISH, GRAY, & DOBBIE, W.S.—Agents.

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Mackie v. Presbytery of Edinburgh.

REVEREND JAMES MACKIE, Pursuer (Reclaimer).—*Mackenzie—J. R. Christie.*

THE PRESBYTERY OF EDINBURGH AND OTHERS, Defenders (Respondents).—*Cheyne—C. N. Johnston.*

Process—Declarator—Relevancy—Trust—Powers—Object of power—Church.—A church in Manchester was held by trustees under a trust-deed which entitled them to sell the church, it being declared that in the event of a sale the proceeds should be held by the trustees for such purposes as the majority of the Presbytery of Edinburgh should direct.

The church was sold, and in consequence the congregation was dissolved.

The minister raised an action against the Presbytery of Edinburgh and the trustees for declarator that a majority of the Presbytery might competently direct the trustees to make payment to the pursuer of such sums as the majority of the Presbytery might appoint by way of compensation to the pursuer for loss of stipend or otherwise. The pursuer averred that a majority of the members of the Presbytery were willing to direct an allowance to be made to him if they were satisfied of the competency of doing so.

Held (*aff.* judgment of Lord Kincairney) that the action was not relevant, as the pursuer's statement did not shew that he was an object of the power given to the majority of the Presbytery of Edinburgh.

1ST DIVISION. Lord Kincairney.

THE "SCOTTISH NATIONAL CHURCH" in Manchester was vested in trustees under an indenture dated 16th March 1863.

The following summary of the provisions of the indenture is taken from the opinion of the Lord Ordinary (Kincairney) in the action after mentioned:—

"It provides that worship in this church, called in the indenture Scotch Church, should be conducted in accordance with the forms of the Established Church of Scotland by a minister in full communion with the Church of Scotland, and that any minister who might be elected to the church should sign the indenture and should thereby acknowledge his liability to the jurisdiction of the Church of Scotland, and that if he should incur 'such sentence, decision, or enactment of or by any ecclesiastical Court which would have had jurisdiction in that behalf if he had been resident in Scotland as is equivalent to deposition or deprivation according to the usages of the said Church of Scotland, such minister shall cease to be the minister of the said Scotch Church, and shall thenceforward be deprived of all power and right to officiate therein or receive any future benefit or emolument therefor.' It is provided that on a vacancy the right of electing a minister should belong to the communicants, above eighteen years old, being seatholders. It is further provided that the managers for the time should collect the seat-rents, collections, and subscriptions, and apply them in the repair, maintenance, management, and endowment of the church, as the managers, with consent of the trustees, might direct, and that any surplus should be paid to the minister.

"It is further provided that at any time the trustees, with consent

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of the majority of the Presbytery of Edinburgh, might sell the premises, and it was declared that the trustees should 'hold the moneys to arise from such sale . . . for such purposes as the majority of the members, for the time being, of the said Presbytery, at a meeting of the said Presbytery, may in writing direct.'"

The Reverend James Mackie, the pursuer of the present action, was appointed minister of the church in 1881.

On 29th February 1892 the church was sold by the trustees, who retained the proceeds in their hands, and did not appropriate them to any particular purpose.

On 12th June 1895 Mr Mackie raised this action against the Presbytery of Edinburgh, and the trustees acting under the indenture.

The conclusions of the summons were for declarator that the defenders the trustees were bound to "hold certain sums of money, being the proceeds arising from the sale of the 'Scottish National Church,' upon trust for such purposes as the majority of the members for the time being of the said Presbytery of Edinburgh at a meeting of the said Presbytery may in writing direct: That a majority of the defenders" the Presbytery of Edinburgh "for the time being, present at a meeting of the said Presbytery, may, under and in virtue of the powers conferred on them by said indenture, lawfully and competently in writing direct the defenders" the trustees under the indenture "for the time being, as trustees under said indenture, to apply any part of the money held by them under the indenture arising from the sale of the said 'Scottish National Church,' or of the income accruing therefrom, in making payment to the pursuer of such sum or sums as such majority may appoint, and that by way of compensation to the pursuer in respect of the interruption of his pastorate by the sale of said church, or in lieu of stipend, or by way of retiring allowance or otherwise, and that at such time or times, and under such stipulations or conditions as such majority may so direct; and that in the event of such majority of the said defenders" the Presbytery of Edinburgh "for the time being, present at a meeting of said Presbytery, so directing them in writing, it shall be lawful to, and incumbent upon, the defenders" the trustees under the indenture, "and their successors in office, as trustees under said indenture, to make payment to the pursuer out of the money held by them as aforesaid of such sum or sums, at such time or times, and under such stipulations or conditions, as such majority shall have in writing so directed."

The pursuer averred that he was duly elected in 1881, and inducted as minister of the church by the Presbytery of Liverpool. "At the time of pursuer's appointment, it was proposed by the elders and managers of said church that his stipend should be at the rate of not less than £300 per annum, and arrangements were made for guaranteeing this amount for two years. For that period pursuer's stipend was duly paid at the said rate."

After reciting the indenture the pursuer further averred that after September 1883 the payments of his stipend became irregular, and after some time ceased altogether. Consequent upon the sale of the church "the congregation of the said Scottish National Church has been irretrievably dissolved, and the pursuer, although appointed to be its minister *ad vitam aut culpam*, conformably to the constitution of the Church of Scotland, has been deprived of the means of earning his stipend. No part thereof has been paid to him for several years, and he has now no means of effectually enforcing payment thereof. The pur-

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suer has thereby been left without any regular or permanent means of support, and he and his family have been involved in much destitution." "In October 1894 the pursuer presented a petition to the said Presbytery craving it *inter alia* to direct the defenders the said trustees to pay to the pursuer out of the moneys in their hands as the proceeds of the sale of the said trust property such a sum as should, in the opinion of the Presbytery, be a fair and equitable allowance to him in respect of the period during which he has been deprived of his income, and further to direct them to pay him in future such an annual allowance out of the said trust funds, or the income thereof, as should be reasonably sufficient to enable him to support himself and his family in proper comfort. This petition came before the said Presbytery for consideration at its meeting on 31st October 1894, when a motion was carried by a large majority of the votes of the members present expressing sympathy with the pursuer in his necessitous circumstances and remitting it to the Law and Ordinances Committee of the Presbytery to consider whether it was competent for the Presbytery to direct the trustees in terms of the petition. For this motion thirty-one members voted as against thirteen for dismissing the petition. At a subsequent meeting held on 26th December 1894 a report was submitted by said committee negativing the competency of directing the trustees in terms of the petition, and the adoption of this report *simpliciter* was carried by a narrow majority of the members present, only eleven votes being recorded in its favour. This petition of the pursuer was thus dismissed entirely in consequence of the report of the said committee against the competency of making to him any payment out of the money arising from the sale of the said church held by said trustees under the indenture. The pursuer, however, believes and avers that a large majority of the defenders the members of the Presbytery of Edinburgh would be quite prepared to direct the trustees to apply part of the trust funds in making a payment or allowance of some sort to the pursuer were they only satisfied of the competency of doing so, and the pursuer has thus a substantial interest in having the declaratory conclusions affirmed. In consequence of the circumstances already set forth he has been under the necessity of bringing this action to have the powers of the Presbytery over the trust-estate judicially determined."

The pursuer pleaded;—(1) The defenders the Presbytery of Edinburgh having upon a sound construction of said indenture power through a majority of the defenders its members for the time being, present at a meeting of Presbytery, to direct in writing the defenders the said trustees to the effect set forth in the summons, the declaratory conclusions ought to be affirmed. (2) The pursuer, having a substantial interest in the affirmation of the declaratory conclusions of the summons, has a good and sufficient title to pursue this action.

The defenders *inter alia* denied that the pursuer was appointed to be minister of the church *ad vitam aut culpam*.

They pleaded;—(1) No title to sue. (2) The action as laid is incompetent. (3) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons. (4) Under the indenture of 16th March 1863, the defenders the Presbytery are not entitled to apply the funds in question in making payment of any sums by way of compensation to the pursuer in respect of interruption of his pastorate, or in lieu of stipend, or by way of retiring allowance.

On 19th December 1895 the Lord Ordinary (Kincairney) sustained

the first, second, and third pleas in law for the defenders, and dismissed the action.* No. 125.

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* "OPINION.—This action of declarator is, so far as I am aware, unprecedented; at least, no example of such an action was referred to. The pursuer began his argument by quoting a well-known passage in Stair's Institutes, iv. 3, 47, where he says that 'declarators may be pursued for instructing and declaring any kind of right relating to liberty, dominion, or obligation. . . . Parties may call whom they please, the conclusion being to hear and see it found and declared that the party had such a right.' But the unique peculiarity of this action is that it does not seek to have any right of the pursuer or any obligation of the principal defenders the Presbytery of Edinburgh declared or enforced. It is an action without relation to civil right or civil obligation. No such action has as yet, so far as I am aware, been entertained in our Courts.

"The defenders plead that the pursuer has no title to sue, that the action is incompetent, and the averments irrelevant. In considering these pleas, the averments of the pursuer must be accepted so far as consistent with the document on which they are based.

"The case has relation to the price of a church in Manchester, which had been built for divine worship in connection with the Church of Scotland, and had been vested in certain trustees, and was thereafter sold. The conditions under which this church was held by the trustees, and the power in virtue of which it was sold, are expressed in an indenture dated 16th March 1863, on which the pursuer founds."

(After the summary of the indenture before mentioned and a narrative of the summons and condescendence his Lordship proceeded)—"The pursuer states that the condition of this church and congregation had from time to time been under the consideration of the Church courts in Scotland; that sympathy had on various occasions been expressed for him in his position; that a petition by him for an allowance out of the fund had come before the Presbytery of Edinburgh, and that a motion was carried by a large majority 'expressing sympathy with the pursuer in his necessitous circumstances, and remitting it to the Law and Ordinances Committee of the Presbytery to consider whether it was competent for the Presbytery to direct the trustees in terms of the petition'; that at a subsequent meeting a report by the committee was submitted which negatived the competency of granting the petition, and that the report was adopted by a narrow majority; and he brings his averment up to this,—that a large majority of the members of the Presbytery 'would be quite prepared to direct the trustees to apply part of the trust funds in making a payment or allowance of some sort to the pursuer were they only satisfied of the competency of doing so.'

"As the defenders are the Presbytery it is known to them whether this statement is accurate or not, yet they neither admit nor deny it. Still, it seems impossible to hold their answer as an admission, seeing that they altogether resist the conclusions of the action.

"From this narrative it appears that the only obligation which the Presbytery of Edinburgh undertook towards the pursuer was to allow him to conduct worship in the Scotch Church. He was not appointed by the Presbytery, but by the communicants. He was not admitted by the Presbytery of Edinburgh, but by the Presbytery of Liverpool. The defenders came under no engagement to provide him with a stipend.

"There was some discussion as to the tenure on which the pursuer held his office, and as to his present position in regard to it. He maintained that his position was strictly analogous to that of the minister of a parish in Scotland, and that he held his office, like such a minister, *ad vitam aut culpam*; and he referred to various provisions in the indenture in support of that position; and, in particular, to the clause which has been quoted as

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The pursuer reclaimed, and argued;—The pursuer had a direct interest in the right of the trustees to apply the funds in the way proposed being established. He was entitled to a declarator of that right on the principle laid down by Stair in the passage cited by the Lord Ordinary.[1] He was a party to the indenture. He still held the status of minister of the church or congregation. That was his until death, and he was willing to perform the duties belonging to the office. The proceeds of the sale were just a *surrogatum* for the church, and the pursuer had not ceased to be an object of, and to have a direct interest in, the purposes for which the trustees stood vested in the fund. Declarators in cognate circumstances had been held competent.[2]

The defenders argued that the action was incompetent and irrelevant for the reasons stated by the Lord Ordinary.[3]

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to his 'deposition or deprivation according to the usages of the said Church of Scotland.' The defenders denied that he was still minister of the congregation, or that he held his office *ad vitam aut culpam*, maintaining that no office was so held unless that were so expressed or necessarily implied, or unless the office was, as this was not, a *munus publicum*, as laid down by the Lord President (Inglis) in *Hastie* v. *M'Murtrie*, 4th June 1889, 16 R. 715. I think this contention is not material to the case stated on record. I think it impossible to contend that the pursuer held his office *ad vitam aut culpam*, for the reasons stated by the defenders, and also for the plain reason that the defenders had full power at any time to sell the church. But the pursuer avers that he is the minister of the congregation, and I find no averment that he was dismissed from that position; and I am inclined to take the argument on the footing that the pursuer holds that position or would hold it if a congregation existed. But the pursuer takes nothing by that concession, for he does not say that any obligation by the defenders results from that state of the facts; and this is not an action to enforce such an obligation. If this had been an action concluding that the Presbytery were bound to furnish the pursuer with some other building in which to conduct his ministrations to his congregation, the consideration that he was still the minister of the congregation might be relevant, although I do not suggest that that position would be maintainable. Under this record the allegation that he is still the minister of the congregation can be little more than the statement of a ground for an appeal to the bounty and favourable consideration of the Presbytery.

"The pursuer referred to various cases, as shewing that the Court will entertain an action of a declarator of a right before it has become exigible, and even while it is contingent. That has no doubt been done in one or two exceptional cases, such as *Fleming* v. *M'Lagan*, 28th January 1879, 6 R. 588, and *Chaplin's Trustees* v. *Hoile*, 30th October 1898, 18 R. 27. The case of *Falconar Stewart* v. *Wilkie*, 15th May 1892, 19 R. 630, quoted by the pursuer, was not a case of that kind, for the Court found that the right there declared was immediately exigible. But although the Court may have pronounced a decree of declarator in regard to a right which was contingent, they have never done so where the pursuer had no right at all whether present, future, or contingent.

"The pursuer must contend either that the Presbytery hold this fund in

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[1] Stair, iv. 3, 47.

[2] Mackenzie's Trustees v. Mackenzie's Tutors, July 1, 1846, 8 D. 964; Earl of Mansfield v. Stewart, July 3, 1846, 5 Bell's Ap. 139, at p. 160; Fleming v. M'Lagan, Jan. 28, 1879, 6 R. 588; Chaplin's Trustees v. Hoile, Oct. 30, 1890, 18 R. 27.

[3] Haldane's Trustees v. Haldane, Dec. 12, 1895, *supra*, 276; Skerret v. Oliver, Jan. 30, 1896, *supra*, 468.

At advising,— No. 125.

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LORD M'LAREN.—The pursuer has instituted this action in the character of minister of the Scottish National Church, Manchester, against the Presbytery of Edinburgh, with which his congregation was connected, concluding that the Presbytery may lawfully direct that a part of the money arising from the sale of the church at Rusholme Road, Manchester, should be paid to him, or applied for his benefit.

The church in Manchester,—I mean the place of worship,—was held by trustees under an indenture, in which it is provided that the managers for the time shall collect the seat-rents, collections, and subscriptions, and apply the money in the repair, maintenance, management, and endowment of the church, and that the surplus shall be paid to the minister.

It is further provided that at any time the trustees, with the consent of the majority of the Presbytery of Edinburgh, may sell the property, and it is declared that the trustees shall hold the moneys to arise from such sale "for such purposes as the majority of the members for the time being of the said Presbytery at a meeting of the said Presbytery may in writing direct."

The pursuer in 1881 was appointed minister of the congregation in accordance with its constitution, and it is stated that under the arrangement between the congregation and himself he was paid a stipend at the rate of

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their absolute discretion, or that they hold it under the limitations of a trust. The pursuer's pleas in law do not shew which of these views he maintains. If the former, then the pursuer is a mere stranger, and an applicant for charity; and I am of opinion that an action cannot be maintained to the effect that the defenders hold a fund at their pleasure, and are free, if they choose, to bestow it on the pursuer. If the pursuer's case be that the fund is held under the limitations of a trust, then I think that the pursuer must bring himself within the trust, and shew himself to be an object of the trust, as in the well-known case of *Ross* v. *Heriot's Hospital*, 14th February 1843, 5 D. 589, rev. 5 Bell's App. 37. But in my opinion the pursuer cannot invoke the interference of the Court in an action like this. It is impossible to say that the pursuer is a direct object of the trust, if trust there be. The immediate object of this trust has apparently failed, at least for the present. I do not say whether it would be possible or not to bring the pursuer's claim within a scheme authorised by the Court for the administration of this fund on the *cy près* principle. But such a scheme, if settled by the Court at all, would be settled in the Inner-House, and probably the views of the Liverpool Presbytery would be considered. But I do not think that I can pronounce any judgment in the present condition of the case, affirming the competency of paying this fund, or any part of it, to one who is not a primary object of the supposed trust, and I do not see that I am bound to pronounce any decision to the contrary.

"I think the action should be thrown out, because, as I said at the beginning, it raises no question either of civil rights or of civil obligation.

"Further, the pursuer's allegations as to the favourable views of the defenders are far too vague to form the ground of any judgment. He says that a large majority of the Presbytery are in his favour, but the extent to which they favoured him does not appear. But if this be really the case, and if the majority of the defenders are, as well as the pursuer, desirous to ascertain the extent of their powers in order to enable them to afford relief to the pursuer, it might not be impossible so to shape the case as to raise a proper *lis* on which the Court might be able to adjudicate."

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£300 for two years, and thereafter at a lower rate. But in January 1892, in the exercise of the powers which I have narrated, the property of the congregation, including the church, was sold, and the price remains unappropriated in the hands of the trustees. By the sale of the church property, without any arrangement having been made for the acquisition of another place of worship, the congregation has in effect been dissolved, and the theory of the pursuer's case is that he is entitled to be compensated out of the proceeds of the sale of the church property for the loss of his living. As I read the summons this claim is not put forward as a matter of absolute right. The pursuer only proposes that the payment of compensation to himself should be declared to be a proper application of the trust-fund, consistent with the provisions of the trust-deed and the power of sale, leaving it to the trustees to act upon the power or not, as they may see fit.

Now, the Lord Ordinary has discussed very fully the legal bearings of this claim, and I agree with his Lordship that the pursuer's claim is unsupported either by principle or authority. In order that the pursuer should obtain the declaratory judgment which he desires, it is necessary that he should shew that he is an object of the power given by the deed of foundation to the Presbytery of Edinburgh. But this is, of course, impossible, because the power of the Presbytery to direct the application of the fund is unlimited, and the pursuer is unable to shew that he has an interest in its disposal distinguishable from that of any other member of the public.

I wish, however, to be understood as referring only to the particular conclusion which is before us, under which the pursuer claims a personal interest in the fund. While the power given to the Presbytery is unlimited in form, it may very well be that the nature of the trust imposes a limitation which might, if necessary, be enforced by a decree of this Court. The subscribers, on whose credit the church at Manchester was purchased, doubtless left the disposal of the proceeds of the sale of the church to the Presbytery of Edinburgh, because they had confidence in the Presbytery, and believed that under its direction the money would be applied to purposes cognate to those for which it was subscribed.

But if it was proposed to misapply the money, and I am very far from suggesting that this is at all probable, I think we should hold that the minister, or a committee of members of the dissolved congregation, would have a title to enforce the trust, that is, to restrain the misapplication of the funds. Again, I do not say that the Presbytery would not have a title to have it declared by decree of this Court that the mode in which they may hereafter propose to exercise the power is a good execution of their trust. But the Presbytery has not proposed to make an award of compensation to the pursuer out of this fund, because I cannot accept the statement that individual members of that body are favourably disposed to the pursuer's claim as having any relevancy in a question of this nature, and we are invited to affirm the proposition, not that the pursuer has a right to a share of the money as a beneficiary under the trust, but that an application of the money which the Presbytery are not proposing to make is lawful. I am very clearly of opinion that the pursuer has no right to such a declaration, and therefore that the action is bad on the ground of want of relevancy.

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I propose that we should only sustain the third plea in law, which is sufficient for the disposal of the case, and that with this reservation we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

THE COURT recalled the Lord Ordinary's interlocutor in so far as it sustained the first and second pleas in law for the defenders, and *quoad ultra* adhered.

SIMPSON & MARWICK, W.S.—MENZIES, BLACK, & MENZIES, W.S.—Agents.

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Mar. 18, 1896.
Hood v. Gordon.

JAMES HOOD AND ANOTHER, Petitioners.—*Ure—Dewar.*
JOHN EDWARD GORDON, Respondent.—*J. Wilson.*

Election Law — Expenses — Election Petition — Taxation — Agent and Client—Fees to third counsel—Corrupt and Illegal Practices Prevention Act, 1883 (46 *and* 47 *Vict. cap.* 51), *sec.* 68, *subsec.* 17.—Section 68, subsection 17 of the Corrupt and Illegal Practices Prevention Act, 1883, enacts that the expenses in an election petition should be taxed as between agent and client.

Held that in taxing the expenses in an election petition, the Auditor had rightly refused to allow the successful party the fees of a third counsel.

Walker v. *Waterlow*, March 20, 1869, 7 Macph. 751, *followed.*

(SEE previous report, *supra*, p. 178.)

ELECTION JUDGES. Lord M'Laren. Ld. Kyllachy.

On 28th February 1896 the Auditor in taxing the respondent's account of expenses disallowed the fees paid to a third counsel employed during the preliminary procedure and at the trial of the election petition.*

The respondent lodged a note of objections to the report, and argued;—The case was one of considerable magnitude, and three counsel had been employed on each side. Fees to third counsel should therefore be allowed.[1] In *Walker* v. *Waterlow*,[2] the petitioner had withdrawn the petition a few days before the trial.

Argued for the petitioners;—*Walker* v. *Waterlow* laid down the general rule that the principle of taxation as between agent and client was not the same when the unsuccessful party had to pay as when the client had to pay, and the fees of only two counsel were allowed. This rule had been followed in the unreported Wigtown Burghs case of *Lockyer*, and it was the rule in England.[3] It had been decided[4] that the expenses of three counsel would not be allowed in a case like this, which was not of great magnitude, although the losing party himself employed three counsel.

* The Corrupt and Illegal Practices Prevention Act, 1883 (46 and 47 Vict. cap. 51), enacted, section 68, subsection 17,—"The costs of petitions and other proceedings under the Parliamentary Elections Act, 1868, and under this Act, shall, subject to any regulations which the Court of Session may make by Act of Sederunt, be taxed as nearly as possible according to the same principle as costs between agent and client are taxed in a cause in that Court, and the Auditor shall not allow any costs, charges, or expenses on a higher scale."

[1] Tannett, Walker, & Co. v. Hannay & Sons, Jan. 31, 1874, 1 R. 440.
[2] Walker v. Waterlow, March 20, 1869, 7 Macph. 751.
[3] Tillet v. Stracy, 1870, L. R., 5 C. P. 185.
[4] Cargill v. Forrest, Feb. 27, 1856, 18 D. 662.

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LORD KYLLACHY.—I see no reason to doubt that the principle which we must follow in this case is that established in the case of *Walker* v. *Waterlow*,[1] and also in the case of the *Wigtown Burghs*.[2] That principle is that while the taxation must, as prescribed by the statute, be as between agent and client, yet as the expenses in a case like this have to be paid, not by the client, but by a third party, the principle of taxation, though not indeed identical with that between party and party, must yet be different from that applied in the ordinary case of agent and client. That being the principle, I think it can hardly be disputed that, except as between agent and client in the ordinary sense, fees to three counsel are not as a rule allowed. There may indeed be cases in which three counsel are allowed—cases in which it would be reasonable for an agent, without any authority from his client, to employ three counsel. But except in such exceptional cases, the rule, both in England and Scotland, is that two counsel only should be allowed.

Now, I do not consider that the present case was so exceptional as to justify a departure from the general rule, and I am therefore of opinion that the report of the Auditor, with the deductions he has made, should be approved.

LORD M'LAREN.—I agree with your Lordship that we ought to follow the practice established by the Courts in England, especially when it is considered that there has necessarily been a much larger experience of the working of this statute in England than in Scotland. On the merits of the question my view is that when a statute authorises the taxation of expenses as between agent and client, what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed. Now, I do not think that a prudent man of business, dealing with a case which presents no special features of difficulty or importance, but which is very like the ordinary run of cases that are sent to proof in the ordinary jurisdiction of the Court, would take on himself the responsibility of employing three counsel, especially as he can always protect himself by employing two of the most eminent counsel who may be willing to undertake the duty. I therefore agree with your Lordship that the Auditor's report should be approved.

THE COURT approved the Auditor's report.

JAMES FALCONER, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

No. 127.
Mar. 19, 1896.
Kincaid v. Quarrier.

ALEXANDER KINCAID AND ANOTHER, Petitioners.—*Comrie Thomson—W. Campbell.*
WILLIAM QUARRIER, Respondent.—*Johnston—Salvesen.*

Minor and Pupil—Custody and religious education of pupil orphans—Guardian—Mora—Guardianship of Infants Act, 1886 (49 *and* 50 *Vict. cap.* 27), *secs.* 2 *and* 3.—In April 1893, the mother of three pupil children, a year after her husband's death, and a month before her own, sent them to the manager of a Protestant Home in this country, with a view to their being sent to Canada, or kept in this country, as the manager should consider best. Two of the children were sent to a similar Home in Canada in March 1894, and all were well cared for and brought

[1] 7 Macph. 751. [2] Unreported.

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up as Protestants. In October 1895 the grandfather and an uncle of the children, who were their nearest male agnates, presented a petition craving the Court to deliver the children to them, or otherwise to ordain the manager of the Homes to bring up and educate the children as Roman Catholics. They averred that the parents of the children were Roman Catholics, and that they had both expressed the desire that their children should be brought up in that religion. The Court *refused* the petition in respect that the children had been sent to the Homes by their mother, who was their legal guardian, and that it would not be for the benefit of the children to disturb the arrangements made for their upbringing and religion, seeing that these had endured for three years.

1ST DIVISION.

HUGH KINCAID, bleachfield worker at Neilston, died on 24th May 1892, survived by his wife, Mrs Mary Kincaid, who died on 26th May 1893. They were survived by four children, the eldest of whom resided with his grandfather Alexander Kincaid, labourer, Neilston.

On 24th April 1893, about a month before their mother's death, the three younger children, who were born respectively in 1883, 1884, and 1886, were received into one of the Orphan Homes of Scotland, a charitable institution under the management of Mr William Quarrier, where they were well cared for and brought up as Protestants.

On 15th October 1895 Alexander Kincaid, the grandfather, and Alexander Kincaid, an uncle of the children, and their nearest male agnates, presented a petition craving the Court to "ordain the said William Quarrier to deliver the three children, viz., Alexander Kincaid, John Kincaid, and Hugh Kincaid, to the petitioners, or to any person having their authority; or otherwise, and alternatively, to find and declare that the said three children ought to be brought up in the Roman Catholic religion, and to approve of a scheme for that purpose; and to decern and ordain the said William Quarrier to educate and bring up the said children in terms of the said scheme."

The petitioners made averments to the following effect:—Hugh Kincaid, the father of the children, lived and died a Roman Catholic. Mrs Kincaid was originally a Protestant, but before her marriage had been received into the Roman Catholic Church. The children were brought up as Roman Catholics while both their parents were alive, and their father, before his death, expressed his wish that the children should continue to be so brought up. After his death the children continued to attend a Roman Catholic school "until 24th April 1893, when the three youngest children were illegally removed to one of Mr Quarrier's Homes in Glasgow." Shortly before 24th April 1893 Mrs Kincaid, who was dying of consumption, expressed herself as most anxious that the children should be brought up as Catholics, and arrangements were accordingly being made to send the children to Smyllum Orphanage, Lanark, when they were removed to Mr Quarrier's Homes, where they were being brought up as Protestants.

The petitioners further averred;—"The petitioners repeatedly applied to Mr Quarrier for delivery of the said children, but without success. They were not in a position to take legal proceedings at that time, but they subsequently, in March 1895, instructed an agent to write to Mr Quarrier, calling upon him to deliver up the said children. Mr Quarrier, in reply, sent copies of two documents to the following effect:—

"'To Mr Wm. Quarrier. Barrhead, 24th April 1893.

"'Dear Sir,—I hereby request you to take my children under your

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care and guidance, and wish them to be brought up in the Protestant religion. Their names are Alex., John, and Hugh Kincaid, and they were left with you to-day by Robert M'Lean and Jeannie Connley. I also enclose the form of agreement signed by me.—Yours respectfully, MARY CL. or KINCADE.

"'Witness, William Jack.

"'Witness, James Baird.'

"'Orphan Homes of Scotland and Destitute Children's

"'Emigration Home.

"'Form of Agreement.

"'I, Mary Kincaid, make application to have my boys, Alexander, Jno., and Hugh Kincaid, aged 11, 9, and 7 years, received into the above named Homes, with the view of being emigrated to Canada, under the care of William Quarrier, or his agents, or to be kept at home, or otherwise disposed of as Mr Quarrier thinks best, in proof whereof I affix my signature. MARY CL. KINCADE.

"'Witness, William Jack.

"'Witness, James Baird.

"'Barrhead, 24th April 1893.'

"Jeannie Connley, referred to in the first of the foregoing writings, was the sister of Mr Kincaid, and is now dead. She was a Protestant. Robert M'Lean, mentioned in the said writing, is a working man, a religious enthusiast, and a street preacher. He was in the habit of calling upon Mrs Kincaid, and, as the petitioners believe and aver, it was he who conceived the idea of sending the children to Mr Quarrier's Homes. He made all the arrangements with Mr Quarrier for this purpose, and removed the children from Barrhead to Mr Quarrier's Homes in Glasgow.

"The petitioners believe and aver that the said documents, if signed by Mrs Kincaid, do not express her real wishes in regard to the said children. She was dying at the time she is alleged to have signed them, and was weak and facile in mind. The witnesses to the said documents did not see Mrs Kincaid sign, nor did they hear her acknowledge her signature. Their signatures were obtained by the said Robert M'Lean. The purport of the said documents is directly at variance with Mrs Kincaid's previous life and conduct. In any case, the petitioners submit that she had no right to alter her children's religion in violation of the wishes of her deceased husband, and in disregard of the religious training which they had received during the whole of their lives. The eldest brother of the said children is a Roman Catholic."

Mr Quarrier lodged answers, and *inter alia*, made the following statements:—"On 24th April 1893 the children were brought to the respondent's City Orphan Home in Glasgow by their aunt, Jane Connelly. She was accompanied by Mr Robert M'Lean. It was explained to the respondent that the children's father was dead; that their mother was ill of consumption, and not likely to live many weeks; that the father had been a Roman Catholic, but that the mother was a Protestant, and wished, in prospect of her decease, to make arrangements for the maintenance of the children; that she was in receipt of parochial relief on behalf of the children; and that she wished them removed from the control of the parochial authorities and brought up as Protestants. In support of the statements so made to the respondent, there were handed to him the two documents" referred to by the petitioners. "The respondent had no previous knowledge of

the children. The form of agreement was that usually employed with reference to the admission of children to the respondent's Homes. The children were visited at the Orphans' Home, Bridge of Weir, by their eldest brother, James Kincaid, in or about June 1893, and by the petitioner Alexander Kincaid junior, and his wife, along with the said James Kincaid in February 1894, and on this occasion they were informed by the boys Alexander and John of their wish to go to Canada the following month. The two elder children, Alexander Kincaid and John Kincaid, were accordingly sent to Canada on 29th March 1894. Notice of the respondent's intention to send them there was as usual sent to the persons by whom the respondent had been entrusted with the children. The petitioner Alexander Kincaid senior refused to do anything for the support of the children during their father's lifetime, or after his death while their mother survived. During all her married life the said Mrs Mary Kincaid, the mother of the children, was obliged to work for her own living and for their support. She was a bleachfield worker. Owing to her not being able to earn sufficient for the support of herself and her whole family, she was obliged to apply for parochial relief, and she obtained an allowance from the parish even during the life of her husband, the said Hugh Kincaid. During the period that she was in receipt of parochial relief the children attended Roman Catholic schools as a matter of course, because their father was entered in the parochial books as a Roman Catholic. The signature of Mrs Kincaid was appended to the documents before mentioned in presence of the said Robert M'Lean, William Jack, one of the attesting witnesses, and Mrs Baird, the wife of James Baird, the other attesting witness, and was subsequently acknowledged in his presence. So far as the respondent has been able to gather, the subscription of said documents was the voluntary act of Mrs Kincaid, and the same expressed her real intentions and desires in reference to her children."

The respondent further averred;—"In these circumstances the respondent considers that the documents signed by the mother are a sufficient nomination of a guardian under the Guardianship of Infants Act; and that in face of these documents, he ought not to part with the children without judicial sanction on the application of persons who have hitherto taken little or no interest in the children, and have done nothing for their support, but have allowed them to become chargeable to the parish."

On 16th November 1895 the Court allowed the respondent a proof that the letter, No. 10 of process, being the first of the two documents above set forth, was subscribed by Mrs Kincaid, and by the witnesses by whom the writing bore to be attested, and to the petitioner a conjunct probation.

A proof was led, which shewed that the letter, No. 10 of process, had been signed by Mrs Kincaid, but that it had not been duly tested. It was also proved that the other document referred to in the letter had been signed by Mrs Kincaid at the same time.

Argued for the petitioners;—The writing which was said to appoint the respondent guardian was improbative and of no avail. The respondent had accordingly no title from the children's mother, and he was not a relative. The averments of the petitioners as to the father's religion, and as to the father's wish that the children should be brought up as Roman Catholics, were not disputed by anyone with a

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title, and the case was the same as *Reilly*.[1] A father had an absolute right during his life to determine the religion of his children, and after his death, their guardian was bound to carry out his wishes. The mother, as guardian under the Guardianship of Infants Act, was in no different position from an ordinary guardian.[2] Besides, at the time when she sent the children to the Home, she was in a dying condition, and did not fully understand what she was doing. The Court should at least ordain that the children be brought up as Roman Catholics. They could do that under section 4 of the Custody of Children Act, 1891, 54 Vict. c. 3.

Argued for the respondent;—While admitting that the document was improbative, it was proved that Mrs Kincaid had signed it, and there was complete evidence, therefore, of her distinct desire that the children should be taken care of by the respondent, and brought up by him as Protestants. As their guardian she had a right to arrange for their education. But the paramount consideration was the welfare of the children,[3] and it would be most injurious to them to once more change their religious training. Besides, out in Canada they had a better chance of a fair start in life than at home. The children had practically been abandoned by their grandfather, who had never done anything to support them, and had allowed them to come on the rates. In any view, therefore, it should be made a condition of the children being given up to the petitioners that they should repay the respondent the costs he had incurred in bringing up the children. That was provided by the Custody of Children Act, 1891, sec. 2.

At advising,—

Lord Kyllachy.—The petitioners in this case are respectively the grandfather and uncle of three pupil children, who have since April 1893 been inmates of the respondent's Homes, and two of whom have since February 1894 been brought up and educated in one of those Homes situated in Canada. The children are aged respectively thirteen, eleven, and ten. Their parents are both dead, the father having died in May 1892, and the mother in May 1893. The object of the petition is to obtain an order for delivery of the children, with a view, as it appears, to their being placed in a Roman Catholic seminary. There is an alternative prayer that the respondent shall be ordained to bring up and educate the children in the Roman Catholic religion.

In this case it does not appear to me that the circumstances are favourable to the demand of the petitioners. Their individual merits are not perhaps in question. But it has to be noted that while undoubtedly the nearest agnates, they have not taken up the office of tutory, nor do they propose themselves to undertake the maintenance and upbringing of the pupils. Their object, they admit, is to hand them over to a Catholic institution. For themselves, they have not probably been in a position to act otherwise, but it is the fact that since prior to the father's death in 1892 they have not shared in the burden of the pupils' maintenance. It has also to be noted that the mother of the children, who, on their father's

[1] Reilly v. Quarrier, July 10, 1895, 22 R. 879, Lord M'Laren, p. 882.
[2] *In re* Scanlon, 1888, L. R., 40 Ch. D. 200.
[3] Morrison v. Quarrier, July 19, 1894, 21 R. 1071.

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death, became their legal guardian, was the person by whom, or at whose instance, they were handed over to Mr Quarrier. She was at the time on her deathbed—within a month of her death—and it is impossible to doubt that what was done was done with her cognisance, and that the motive must have been a strong one which induced her while still in life, to part, and to part finally, with her young children. No doubt the proof led has failed to establish the probativeness of the writings by which she placed them in the respondent's charge; and these writings therefore cannot be held as constituting a nomination of guardian under the Act of 1886. Still, the fact remains that the respondent derived his custody of the children from a lawful source. It is not admitted that the mother died a Protestant, although it is admitted that she had been so up to her marriage. But that question is not material. It is material that she deliberately placed the children in the respondent's charge.

What is, however, to my mind the conclusive consideration in the case is this, that the children have now been for nearly three years in the respondent's hands, educated no doubt as Protestants; but well educated and well cared for, and with the prospect, if left where they are, of obtaining a fair start in life. In these circumstances, I cannot hold that it would be for their benefit that we should disturb arrangements which have now lasted for so considerable a period. It may be—I express no opinion to the contrary—that *prima facie* the father's religion is the religion in which a child should be brought up. But if the guardian of the child, or those who are left to act as such, arrange otherwise, and the interference of the Court is invoked to control their action, it is not, I think, an unsafe rule that that interference must be invoked timeously, and not (unless in exceptional circumstances) after such lapse of time as occurred here. Extreme cases may, of course, occur, and they must be dealt with when they arise, but the question of creed is never the only question to be considered.

On the whole matter, and laying down no general rule, but having regard to the whole circumstances, and to the welfare of the pupils in the particular case, I am of opinion that the petition should be refused.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM and LORD M'LAREN were absent.

THE COURT refused the petition.

WILLIAM B. GLEN, S.S.C.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

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Mar. 20, 1896.*
St Cuthbert's Co-operative Association v. Assessor for Edinburgh.

ST. CUTHBERT'S CO-OPERATIVE ASSOCIATION, Appellants.—*Cullen.* ASSESSOR FOR EDINBURGH, Respondent.—*Boyd.*

Valuation Acts—Value—Subjects in occupation of owners—Co-operative store—Separate industries in same range of buildings—Whether to be taken as unum quid—Valuation by percentage upon cost of erection.—Premises belonging to a Co-operative Association consisting of a range of buildings which included a bakery, workshops, stables, and a refrigerator, were valued by the assessor as a *unum quid*, by taking a percentage on the

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cost of erection. There was no other building within the burgh of a similar construction and applied to similar purposes. The proprietors maintained that the several portions of the premises fell to be valued as separate subjects by comparison with the value of similar subjects in the burgh.

Held that the Assessor was right in valuing the premises as a *unum quid* by taking a percentage of their cost.

ON 11th September 1895, the St. Cuthbert's Co-operative Association, Limited, appealed to the Magistrates and Council of Edinburgh against the Assessor having entered premises belonging to them described as "bakery, workshops, stables, &c.," and situated at High Riggs, as of the yearly rent or value of £1625, and craved that the valuation should be reduced to £748.

The premises in question which were in the occupation of the proprietors, formed one range of buildings including a bakery, workshops, stables, a refrigerator, and all other requirements necessary for carrying on the varied business of the Association. There was no building of analogous construction in existence in Edinburgh.

The Assessor had arrived at his valuation by taking 4 per cent on the cost of the site, 7 per cent on the cost of the buildings, and 7 per cent on the cost of the fixed machinery.

The Co-operative Association led evidence to shew the yearly value of similar bakeries, workshops, stables, and refrigerators in Edinburgh as separate subjects. They contended that as the structure was adapted for four main branches of industry "the proper method of ascertaining the value of the whole structure was to determine the value of each of these four parts separately, by ascertaining the value of an existing structure of similar nature and accommodation in another part of the town, and adding together the four values so obtained."

The Magistrates preferred the principle adopted by the Assessor, but considering that in the circumstances of the case the valuation fixed by him was too high, they reduced it to £1200.

The Co-operative Association obtained a case. The foregoing facts appeared from the case.

Argued for the appellants;—The fact that the separate industries were combined in the same premises was a mere coincidence. They were each independent of one another, and fell to be valued as separate subjects by comparison with similar subjects in the burgh. Valuation by percentage on their cost was inadmissible.[1]

The respondent was not called upon.

At advising,—

LORD KYLLACHY.—I see no reason to doubt that the decision of the Magistrates in this case was right. I cannot affirm that they were wrong in declining to break up this building into sections, and to value each of these sections separately. Nor can I say that in the circumstances they were wrong in valuing the subject by taking a percentage upon the cost. It does not appear that any other or better means of arriving at the value existed. There is no hard and fast rule that the element of cost shall be discarded as an element in valuation. On the contrary, when there is no

[1] Kinross and Milnathort Gas-Light Co., Limited, v. Assessor of Kinrossshire, March 12, 1890, 17 R. 850; Annandale & Son, March 14, 1867, 11 Macph. 977.

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other measure of value available, such as rent paid for the subjects, or rent paid for or values attached to similar subjects, it may be a quite proper method to take a percentage upon the cost. The Magistrates have not, therefore, erred in any matter of principle, and I see no reason to interfere with their decision upon the facts.

LORD MONCREIFF.—I agree with your Lordship that this appeal should be dismissed. I think the decisions on valuation by the cost of erection go no further than this, that if there are other materials for estimating the annual value, they should, as a rule, be adopted in preference, or at least be considered in conjunction with cost of erection. But we have never decided that the cost of erection should not be taken into account in cases where there is no other way of arriving at the annual value.

In the present case there is no similar building with which the subject of this appeal can be compared. I think it would have been a mistake to split up the building into several sections, and value each of these sections separately. The Assessor was entitled to treat the whole subject as a *unum quid*. He did so, and, having no other means of arriving at a valuation on that basis, he has taken a certain percentage on the cost. The Magistrates did not adopt the Assessor's percentage, but they approved of the principle upon which the Assessor proceeded. I think they were right in doing so, and that there is no reason for our altering their valuation. I therefore agree that the appeal should be dismissed.

THE COURT were of opinion that the determination of the Magistrates was right.

COUTTS & PALFREY, S.S.C.—THOMAS HUNTER, W.S.—Agents.

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Mar. 20,1896.*
Burntisland Oil Co., Limited, v. Assessor for Fife.

THE BURNTISLAND OIL COMPANY, LIMITED, Appellants.—*Constable.*
ASSESSOR FOR FIFE, Respondent.—*Party.*

Valuation Acts — Value — Subjects in occupation of owners — Disused factory—Vacant workmen's houses.—An Oil Company having ceased to do business, a range of houses which had been erected for the use of the employees became with a few exceptions unoccupied, and from their position it was improbable that they would be again fully let.

Held that they fell to be valued by taking the actual rent received for the houses which were let, and adding a nominal sum of £1 per house for those which were unlet.

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THE BURNTISLAND OIL COMPANY erected a large number of workmen's houses about a mile from the town of Burntisland, for the use of the employees in the factory. Some of the houses were in the parish of Burntisland and some in the adjoining parish of Kinghorn. The business having proved unprofitable, the company closed their works, which were dismantled. As a result most of the houses became vacant. There were 143 houses in all, whereof 121 were occupied in 1892-3, 72 in 1893-4, 48 in 1894-5, and 14 in 1895-6—13 of the last mentioned number being in Burntisland, and one in Kinghorn.

At a meeting of the Valuation Committee on 16th September 1895

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the Burntisland Oil Company appealed against the following entries in the Valuation Roll:—

No.	Description and Situation of Subject.	Proprietor.	Tenant.	Occupier.	Yearly rent or value.
		Parish of Burntisland.			
49	Workmen's Houses and Reading Room, Binnend.	The Burntisland Oil Company (Limited).		Proprietors (Empty £420 17s. 10d.)	£481 7 10
		Parish of Kinghorn.			
201	Workmen's Houses at Common.	The Burntisland Oil Company (Limited).		Proprietors (Empty £42, 18s.)	45 10 0

They craved that the above entries should be reduced to £60, 10s. for the Burntisland entry, and £2, 12s. for the Kinghorn entry, being the amount of the actual rents received from houses which were let.

The Committee refused the appeal, and confirmed the Assessor's valuation. The Oil Company obtained a case. The foregoing facts appeared from the case.

Argued for the appellants;—As it was very unlikely that the houses would ever again be occupied, they should either be deleted altogether from the roll or valued at a nominal sum.[1]

The Assessor in supporting his valuation, stated that though there was no immediate prospect of the houses being let, yet if new dock accommodation should be resolved upon, the houses might become very valuable.

At advising,—

Lord Moncreiff.—The question in this case relates to the valuation of a block of workmen's houses, some of which are in the parish of Burntisland and some in the parish of Kinghorn, which were built in connection with an oil manufactory carried on by the Burntisland Oil Company. The Oil Company have now ceased to carry on business, and the result of the stoppage is that there is great difficulty in letting these houses, which were intended solely for the accommodation of the workmen while the business was being carried on. It appears that at present only fourteen of the houses are let; and, owing to the fact that they are situated fully a mile from the town of Burntisland, it seems unlikely that they will be fully let again for some time. I think we are entitled to take into account the probability or improbability of the houses being again let soon, and that it is unfair to take the rent paid for the houses which are let as a criterion of the yearly value of those which are unlet. I think we should allow a nominal rent for the houses which are unlet, and arrive at a proper valuation of the whole by adding that nominal rent to the actual rent received for the houses which are let. Therefore, in regard to No. 49 of the valuation roll for the parish of Burntisland, and No. 201 of the roll of the parish of Kinghorn, I propose to add to the actual rent received for the houses which are let, a sum of £1 per house for those which are unlet. I take the £1 per house not as repre-

[1] Earl of Home v. Assessor for Dundee, February 17, 1891, 18 R. 934: Barbour, March 7, 1878, 9 R. 1236.

senting the actual rent which would be received for any one house if let, but in order to reach a rough calculation of the present yearly value of the whole on the footing that some may be let and some not. No. 129. Mar. 20, 1896. Burntisland Oil Co., Limited, v. Assessor for Fife.

LORD KYLLACHY.—I concur. Looking to the situation of these houses, £1 a house is, I think, as much as would be at all likely to be got for them in existing circumstances.

THE COURT pronounced this interlocutor:—"We are of opinion that, as regards the subjects No. 49 of Burntisland Parish, and the subjects No. 201 of Kinghorn Parish, the actual rent received for the houses let should be entered, and a sum of £1 for each of the houses unlet.

CONSTABLE & JOHNSTONE, W.S.—ASSESSOR FOR FIFE—Agents.

JOHN CRAWFORD AND ANOTHER, Appellants.—*Dewar.*
ASSESSOR FOR HADDINGTONSHIRE, Respondent.—*Cullen.*

No. 130. Mar. 20, 1896. Crawford v. Assessor for Haddington.

Valuation Acts—Value—Consideration other than the rent—Goodwill—Public-House—Value of similar premises in same district.—A public-house was let for ten years at a rent of £24 per annum, and upon payment to the proprietor and previous occupant of £550 in name of goodwill. The Assessor, in fixing the valuation, took one-half of the £550 paid in name of goodwill as representing the goodwill attaching to the house as a heritable subject and spread it over the period of the lease at the rate of £27, 10s. a-year, making with the rent stipulated in the lease £51, 10s. as the annual value entered in the roll.

In an appeal by the proprietor, *held* that, in fixing the valuation, there ought to be taken into consideration, not merely the amount paid for goodwill, but also the rents or valuations of similar licensed premises in the neighbourhood.

AT a meeting of the Valuation Committee of the Haddingtonshire County Council held at Haddington on 12th September 1895, an appeal was made by John Crawford, spirit-dealer, and John C. Chisholm, solicitor, against the entry of their names in the Valuation-roll as tenant and proprietor respectively of a public-house in the burgh of Tranent, at the yearly rent or value of £51, 10s. They craved that the valuation should be reduced to £24.

Lands Valuation Appeal Court. Ld. Moncreiff. Ld. Kyllachy. Case 175.

From evidence led at a proof it appeared that prior to 1893 the premises in question were occupied by Mrs Port, the proprietrix, and that they were then assessed at the annual value of £19, 10s. In March 1893, Mrs Port having become insane, and John C. Chisholm having been appointed curator bonis, the premises were let to the appellant Crawford on a ten years' lease, at an annual rental of £24, a lump sum of £550 being paid to the curator bonis for the business, goodwill, &c.

The Assessor, in fixing the valuation, had taken one-half of the lump sum of £550 as representing the goodwill attaching to the house as a heritable subject (the other half being allowed as representing personal goodwill, in respect that the proprietrix had been the previous occupier), and spread it over the period of the lease (£27, 10s. a-year), making with the annual rent (£24) stipulated in the lease, the annual value as assessed, £51, 10s.

The appellants maintained that the premises had by far the smallest accommodation of licensed premises in the town, and were the least

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inviting, while with one exception they were the most highly assessed; that the Assessor had declined to apply his mind to ascertain from the facts and circumstances what was a fair rent; that £51, 10s. was a rack-rent for the subjects in question; and that the rent of £24 stipulated in the lease was the *bona fide* rent, and was ample, according to the only test that could be applied, *i.e.*, by reference to the valuation of similar premises in the same town.

The Valuation Committee were of opinion that the principle adopted and acted on by the Assessor was right. They found (1) that while according to the evidence led, and to the admission of the Assessor, the assessed rent of £51, 10s. was in excess of the assessment made on other similar public-houses in Tranent, it was only necessary for them to consider the amount paid for the goodwill of the business, and they disregarded the evidence led as to the value of other similar public-houses in Tranent; (2) that the sum of £550 paid for the goodwill of the business fell to be reduced in respect of an allowance for utensils to £500; and (3) taking the one-half as rent, they spread it over the full period of the lease, making with £24 per annum of rent payable to the proprietor, the annual value £49, and they reduced the assessment accordingly.

The appellants obtained a case.

The foregoing facts appeared from the case.

On 21st February the Valuation Judges pronounced this interlocutor:—"Find that the Committee were wrong in disregarding as an element to be considered the valuation of other public-houses in Tranent, and holding that they had only to consider the amount paid for goodwill: Find that the Committee are bound to consider the whole circumstances, including not only the gross sum paid for goodwill but also, *inter alia*, the rents or valuations of similar licensed premises in the neighbourhood: With these findings, remit to the Committee to reconsider their valuation, and to report."

On 6th March the Valuation Committee reported as follows:—"The Valuation Committee having, in terms of the foregoing remit, reconsidered the whole circumstances of the case, including the gross sum paid for goodwill and the rents of similar licensed premises in the burgh of Tranent, and how much of said goodwill effeired to the premises, adhere to their former decision, and fix the valuation at £49, and they beg respectfully to report accordingly."

On 20th March the Valuation Judges intimated the opinion that the determination of the Valuation Committee was right.

JAMES PURVES, S.S.C.—PARTY—Agents.

No. 131.

Mar. 20, 1896. Assessor for Portobello v. Mitchell & Sons.

ASSESSOR FOR BURGH OF PORTOBELLO, Appellant.—*A. J. Young.*
PETER MITCHELL & SONS, Respondent.—*D. Dundas.*

Valuation Acts—Subjects—Erections by lessee—Clayfield—"Minerals" Lands Valuation (Scotland) Amendment Act, 1895 (58 *and* 59 *Vict. cap.* 41), *sec.* 4, *Exemption* 2.—Section 4 of the Lands Valuation (Scotland) Act Amendment Act, 1895, requiring the value of erections or structural improvements made or acquired by a lessee to be entered in the Valuation-roll, exempted (2) "erections or structural improvements made or acquired and used exclusively for the purpose of working or cleaning minerals let under such lease or agreement as aforesaid in respect of which minerals rent or lordship is stipulated to be paid."

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Assessor for Portobello v. Mitchell & Sons.

A tenant who under his lease had right to dig and take clay to a considerable depth below the surface made certain erections upon the ground let to him, which he used exclusively for the purpose of working the clay.

Held that "clay" was a "mineral" within the meaning of exemption 2 of section 4 of the statute.

Lands Valuation Appeal Court.

Ld. Moncreiff.

Ld. Kyllachy.

Case 177.

On 10th September 1895 Messrs Mitchell & Sons, brick and tile manufacturers, Westbank Brick Works, Portobello, appealed to the Magistrates of the burgh against the Assessor's having entered them in the Valuation-roll for the burgh as proprietors and occupiers of "engines and erections" at Westbank at a yearly rent or value of £80.

They were lessees under a lease for ten years from Whitsunday 1891 granted by Wakefield Christie Miller, of Craigentinny, whereby there was let to them, *inter alia*, "the right of digging and taking clay from the triangular field lying to the west of the road leading from Edinburgh to Portobello."

The subjects the entry of which in the Valuation-roll was objected to were erected partly by the previous tenant and partly by Messrs Mitchell, and they had acquired from the previous tenant those erected by her. Being erections voluntarily made by a tenant, their yearly value could not have been entered in the Valuation-roll prior to the passing of the Lands Valuation (Scotland) Amendment Act, 1895 (58 and 59 Vict. cap. 41),* and the question raised was

* The Lands Valuation (Scotland) Amendment Act, 1895 (58 and 59 Vict. cap. 41), section 4, enacted,—"Section 6 of the Valuation Act, 1854, shall be read and construed as if the following proviso were inserted after the words 'as compared with the amount of such valuation,'—that is to say, 'Provided also, that where any lessee of any such lands and heritages, holding under a lease or agreement the stipulated duration of which is twenty-one years or under from the date of the entry under the same, and in the case of minerals thirty-one or under from the date of such entry, has made or acquired erections or structural improvements on the subjects let, and where the actual yearly value of such erections or structural improvements cannot, under the provision of section 6 of this Act, be entered in the Valuation-roll, such erections or structural improvements shall be deemed to be lands and heritages within the meaning of this Act, and such lessee shall be deemed to be proprietor thereof for the purposes of this Act; and the Assessor shall ascertain the yearly value of such erections or structural improvements, as a separate subject, by taking the amount of rent, if any, in addition to the rent stipulated to be paid under such lease or agreement at which, one year with another, the subjects let, and such erections or structural improvements might together in their actual state be reasonably expected to let from year to year, in consequence of such erections or structural improvements having been made, and shall make a separate entry thereof in the Valuation-roll, setting forth all the particulars relating thereto as hereinbefore provided with respect to other lands and heritages.

"But this proviso shall not apply

"(1) To any erections or structural improvements made or acquired for agricultural purposes by the lessee of subjects wholly or mainly agricultural; nor

"(2) To any erections or structural improvements made or acquired and used exclusively for the purpose of working or cleaning minerals let under such lease or agreement as aforesaid, in respect of which minerals rent or lordship is stipulated to be paid; nor

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whether the Assessor was now entitled to enter such value under the authority of section 4 of that Act.

The Valuation Committee by a majority held that the erections fell within the exception contained in the second subsection of section 4, and they therefore sustained the appeal, and ordered the entry to be deleted.

The Assessor obtained a case. The above facts appeared from the case.

Argued for the appellant;—Clay was not a mineral within the meaning of the subsection.[1]

Argued for the respondent;—The word "minerals" was given a wider or more restricted construction according to the terms of the statute or deed upon which its interpretation depended.[2] Here a wide construction fell to be given. The erections in question were of the character used in working any other mineral. *Farie's*[1] case was decided upon a construction merely of the Waterworks Clauses Act, 1847 (10 and 11 Vict. cap. 17), sec. 18.

At advising,—

LORD MONCREIFF.—I am of opinion that the determination of the Valuation Committee is right. The word "minerals" is an elastic term, and admits of construction. It will be held to have a wider or more restricted signification according to the circumstances of the case and the terms of the statute or deed upon which its interpretation depends.

Taken in its widest sense, "mineral" includes every substance which can be got from beneath the surface of the earth for profit by means of mining, quarrying, or excavation, including not merely coal and ironstone, but also clay and other strata. There have been many cases in which a restricted signification has been given to the words "mines" and "minerals," particularly in Scotland. But I think it will be found that these decisions proceeded on a consideration of the circumstances of each particular case, and the view that to give a wider signification to the words would be inconsistent with the contract between the parties or the true meaning of the Act of Parliament under construction. In the case of the *Magistrates of Glasgow* v. *Farie*, 14 R. 346, reversed 15 R. (H. L.) 94, which was founded on by the Assessor, there was a great difference of opinion among the Judges in both Courts. While the judgment of the First Division was reversed, it will be observed that Lord Herschell dissented, and that the majority of the Lords proceeded each upon different grounds. It is true that the Lord Chancellor held that the word "minerals" fell to be construed in accordance with the ordinary use of the word in dealing with proprietary rights in Scotland. But both Lord Watson and

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"(3) To coke ovens or other structures in which coal or other minerals are treated, where the rent or lordship stipulated in such lease or agreement as aforesaid to be paid in respect of such coal or other minerals is by the terms of such lease or agreement calculated upon the coke or other minerals as treated in such ovens or other structures."

[1] Magistrates of Glasgow v. Farie, Jan. 21, 1887, 14 R. 346, rev. Aug. 10, 1888, 15 R. (H. L.) 94.

[2] Hext v. Gill, 1872, L. R., 7 Ch. App. 699; Midland Railway Co. v. Haunchwood Brick and Tile Co., 1882, L. R., 20 Ch. Div. 552.

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Lord Macnaghten proceeded upon the special nature of the transaction to which the statutes in question applied.

Now, in the present case, I find nothing in the Valuation Acts to lead me to put a restricted meaning on the word "minerals." It is not inconsistent with the due operation of the statutes to give the word its widest signification; and when we look to the right conferred on the tenant by his lease and the terms of the proviso in the statute, I think it is plain that the right given to the tenant in the subject let is something very different from the ordinary use of the surface of the ground for agricultural or other purposes, which can be enjoyed *salva substantia*. Here the tenant is given the right and liberty of digging and taking clay to a considerable depth below the surface, thus removing the substance of the ground. Now, exception 1 to the proviso relates to leases for agricultural purposes. The second and third exceptions relate to mineral leases. The second exception, which applies to this case, runs as follows:—"But this proviso shall not apply (2) to any erections or structural improvements made or acquired and used exclusively for the purpose of working or cleaning minerals let under such lease or agreement as aforesaid, in respect of which minerals rent or lordship is stipulated to be paid."

The engine and erections in question are used exclusively for the purpose of working or cleaning the clay let under the lease.

I think that clay must be held to be a mineral in the sense of this exception, and that the determination should be affirmed.

LORD KYLLACHY.—I concur.

THE COURT were of opinion that the determination of the Valuation Committee was right.

R. P. STEVENSON, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

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Furnace Gases Co., Limited, v. Assessor for Lanarkshire.

THE FURNACE GASES COMPANY, LIMITED, Appellants.—*Deas.*
ASSESSOR FOR LANARKSHIRE, Respondent.—*D. Dundas.*

Valuation Acts — Subjects — Erections by lessee — Rent calculated by minerals treated in erections — Lands Valuation (Scotland) Amendment Act, 1895 (58 *and* 59 *Vict. c.* 41), *sec.* 4, *Exception* 3.—Section 4 of the Lands Valuation (Scotland) Amendment Act, 1895, providing for the valuation of erections or structural improvements made or acquired by a lessee, excepts "coke ovens or other structures in which coal or other minerals are treated, where the rent or lordship stipulated in such lease or agreement as aforesaid to be paid in respect of such coal or other minerals is by the terms of such lease or agreement calculated upon the coke or other minerals as treated in such ovens or other structures."

A chemical company under agreement acquired right to recover the tar and ammonia from the gases of the adjoining blast-furnaces of an iron company at a royalty of one shilling per ton on the coal consumed in the furnaces of the latter. They erected buildings for the purpose of working the gas on a piece of ground adjoining the ironworks, which had been leased to them under the agreement.

Held that as the lease was not a lease of minerals the exception did not apply.

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Lands Valuation Appeal Court.
Ld. Moncreiff.
Ld. Kyllachy.

Case 179.

AT a meeting of the Valuation Committee of Lanarkshire on 11th September 1895, the Furnace Gases Company, Limited, appealed against a valuation of £1180 placed by the Assessor upon certain ammonia works erected by them on ground leased by them from the Shotts Iron Company.

The appellants maintained that the case fell within exception 3 of section 4 of the Lands Valuation (Scotland) Amendment Act, 1895.*

These works had been erected by them under an agreement between the Shotts Iron Company and Messrs Robert and John Dempster, engineers, Manchester, whose rights under the agreement the appellants had acquired.

Under the agreement in question the Shotts Iron Company, for the royalty therein mentioned, conceded to the Dempsters the sole right to treat the gases of four close-topped blast furnaces belonging to them at Shotts Iron Works for the recovery of tar and ammonia from the gases, and to work up, manufacture, and mix with other products and substances the whole products obtained by the treatment of said gases; and the Dempsters undertook to provide plant and apparatus for the recovery of these products. Further, the Shotts Iron Company agreed to allot and let to the Dempsters all necessary and suitable ground, not exceeding four acres, as a site for the chemical or other works to be erected by them for treating the gases.

As the price of the rights granted to them by the agreement, the Dempsters agreed to pay to the Shotts Iron Company a shilling for every ton of twenty cwts. of coal consumed by them in the four furnaces from which gas was being drawn by them, "and which payments are hereinafter referred to by the expression 'royalty' or 'royalties.'"

The appellants craved that the entries should be expunged from the roll.

The Valuation Committee upheld the Assessor's valuation, and the Furnace Gases Company accordingly craved a case, in which the foregoing facts were stated.

Argued for the appellants;—The erections came under exception 3 of section 4 of the Lands Valuation (Scotland) Amendment Act, 1895. Under the agreement the royalty was calculated on the amount of coal burnt in the furnaces. As the amount of gas obtained by the appellants depended upon the amount of coal so burnt, the practical result was a lordship calculated on the amount of gas obtained.

Argued for the respondents;—This was not a lease of minerals at all. The case contemplated by the Act was a rent calculated by the amount obtained by the lessee. Here the rent was calculated on the amount of coal used by the lessor.

At advising,—

LORD MONCREIFF.—There is no doubt that the subjects in question fall within the proviso in the 4th section of the Lands Valuation Amendment Act, 1895 (as being erections or structural improvements which the appellants have made upon the ground let to them, the yearly value of which cannot, under section 6 of the Valuation Act, 1854, be entered in the Valuation-roll), unless the appellants are able to shew that they are entitled to the benefit of one or other of the exceptions to the proviso. They accord-

* The section of the Act is quoted *supra*, p. 687.

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ingly appeal to the third exception, which provides that the proviso shall not apply to "coke ovens or other structures in which coal or other minerals are treated, where the rent or lordship stipulated in such a lease or agreement as aforesaid to be paid in respect of such coal or other minerals is, by the terms of such lease or agreement, calculated upon the coke or other minerals as treated in such ovens or other structures."

The simple answer to this contention is, that that exception only applies to erections or improvements made by a tenant under a proper lease of minerals as a heritable subject where the rent or lordship in respect of coal or other minerals let is calculated upon the minerals in question as treated in ovens or other structures.

Now, here there is no lease of minerals to the appellants. What are the minerals said to be let? Are they the ironstone treated by the Shotts Company, or the coal used as fuel in their blast furnaces? The appellants simply have right to recover the tar and ammonia from the gases of the adjoining blast furnaces belonging to the Shotts Iron Company. This is not a lease of minerals, or of a heritable subject of any kind; and the fact that the return made by the appellants under the agreement is called a royalty, and is calculated at the rate of 1s. per ton on the coal consumed in the blast furnaces of the Shotts Iron Company, does not alter the nature of the transaction.

No question was raised before us as to the amount of the valuation, and I do not know how it is arrived at. But I wish to guard myself from being held as deciding that the royalties paid by the appellants to the Shotts Iron Company form the proper measure of the valuation of the erections made by them. But as the appellants have raised no question about the value, I say no more about it.

LORD KYLLACHY.—I concur.

THE COURT were of opinion that the determination of the Valuation Committee was right.

SIMPSON & MARWICK, W.S.—BRUCE & KERR, W.S.—Agents.

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Caledonian Railway Co. v. Assessor for Lanarkshire.

THE CALEDONIAN RAILWAY COMPANY, Appellants.—*Balfour*—*Deas.* ASSESSOR FOR LANARKSHIRE, Respondent.—*Cullen.*

Valuation Acts—Value—Fair Annual Value—Houses let by railway company to employees—Valuation of Lands (Scotland) Act, 1854 (17 *and* 18 *Vict. c.* 91), *sec.* 6.—The Caledonian Railway Company let houses by agreement to their employees at a rent fixed upon a general scale for their whole system, and having no relation to the values of similar houses in the locality.

Held that the rent was not "conditioned as the fair annual value" of the houses, and that the assessor was justified in disregarding it and in fixing the valuation by comparison with the rent of similar houses in the locality.

Lands Valuation Appeal Court. Ld. Moncreiff. Ld. Kyllachy.

AT a meeting of the Valuation Committee of Lanarkshire for the Middle Ward of the county held on 11th September 1895, the Caledonian Railway Company appealed against the valuation at £18 of a house in Bellshill belonging to the company and occupied by Thomas Struthers, a station-master in their employment, maintaining that the valuation should be reduced to £9, 2s.

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The following were the facts of the case as submitted to the

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Committee:—The house in question was a detached cottage, self-contained, situated outside the railway fence but closely adjoining the railway, and consisting of four rooms and a kitchen. It was let to Struthers at a rent of £9, 2s. per annum in addition to a fixed payment for water supply. Struthers occupied the house subject to certain terms of engagement contained in the company's book of rules and regulations and signed by him.*

At a proof before the Committee, John Gibson, assistant factor to the railway company gave the evidence quoted below.†

The Assessor led evidence, which was not contradicted by the railway company, to shew that £18 was the fair annual value of similar houses in the locality.

The Committee decided "(1) that, in the whole circumstances, the Assessor was entitled to fix the valuation of the subjects irrespective of the rent paid to the appellants, and (2) that the rent, at which one year with another the premises might reasonably be expected to let from year to year, was fairly stated at £18. They accordingly refused the appeal."

The Caledonian Railway Company obtained a case. From the case the foregoing facts appeared.

Argued for the appellants;—(1) As long as the rent was one fixed at so much a year, it did not matter that the landlord had it in his power to terminate at any time the tenancy. The house being let for £9, 2s. that sum must be taken as the true rent or value thereof, unless there was collusion or consideration other than rent. The only consideration suggested was the obligation of the tenant to remove at the landlord's pleasure, and that was really only a definition of the tenancy.

Argued for the respondent;—(1) There was here no yearly rent exigible by the landlord from his tenant as matter of right. The tenant only paid a weekly sum, and might be called upon to quit the house at any moment. In such a case a reasonable rent fell to be taken,[1] and £18 was shewn by the evidence to be fair. (2) It could

* The rules and regulations referred to were as follows:—"All dwelling-houses specially appropriated by the company for the accommodation of their servants, as such, are only let during their employment, and any servant taking or occupying such a dwelling-house shall be bound or entitled to remove therefrom on his receiving or giving notice of the termination of his employment, in accordance with the foregoing regulations, without the necessity of any other notice or warning, and he shall also be bound to remove therefrom instantly and without the necessity of any notice or warning whatever, on his dismissal or resignation or desertion from the service."

† "By the Assessor.—Can you tell me how the £9, 2s. is arrived at? (A.) They have a rate. They charge 1s. 9d. for a room and kitchen. The rest depends on the size of the apartments. It may be 6d. or 9d. The value of the property in any particular locality does not affect the rent charged. (Q.) So that this £9, 2s. is not fixed at all with reference to the value of house property in Bellshill? (A.) I do not know anything about the value of houses there. It is according to what the company consider their servants should pay for the houses that the rents are fixed. (Q.) It is not with any reference to the value of property in a particular district, but to a fair rent for the man who has to pay it? (A.) Not exactly a fair rent for the man—a fair rent for the houses. We won't rack-rent them."

[1] Black & Sons v. Assessor for Lanarkshire, Jan. 31, 1889, Lands Valuation App. Cases, New Series, p. 92.

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not be said that the tenant paid a rent conditioned as the fair annual value of the house, for the evidence shewed that it was really occupied as part of his wages, and moreover that it was fixed without regard to the true letting value of other houses in the locality. The Assessor was right in fixing the rent at £18, which was well within the letting value of similar houses in the locality.

At advising,—

LORD KYLLACHY.—This case raises questions of difficulty,—some of them of general application,—and the first question is this,—whether, when a house is let by a master to a servant at what is described as a yearly rent, but subject to the condition that the continuance of the tenancy shall depend on the continuance of the service, and the service may be terminated by either party upon four weeks' notice, and may be terminated by the master without notice on payment of certain wages, the house can in these circumstances be held to be let for "a yearly rent" in the sense of the 6th section of the statute?

It is said, on the one hand, that a yearly rent implies a yearly tenancy, that is to say, that it implies, as in ordinary yearly tenancies, an obligation by the tenant to pay, and a right in the landlord to exact, the full year's rent, whatever may be the period of actual occupancy; and that this cannot be predicated, as in the case supposed, where the tenancy may be terminated between terms, without payment to or liability for more than a proportion of the year's rent. It is said, on the other hand, that the statute says nothing about yearly tenancy, but speaks only of yearly rent; and that a tenancy even from week to week would quite suffice, if the rent be a rent fixed at so much a year.

A second question, which also arises, may be stated thus. A house is let by a master to a servant on terms which are terms of the contract of service. The house is, in short, really occupied as part of the servant's wages; and being so, it at least may happen that, if the rent was higher or lower, the wages would be just so much lower or so much higher. The question is, whether it can, in these circumstances, be held that the house is *bona fide* let to the tenant for a rent conditioned as the fair annual value of the subject? The one view is that the rent which the statute contemplates must be a rent in the amount of which both landlord and tenant have a real interest, and that, in the case supposed, the amount of the so-called rent is immaterial to either party. The other view is that, if the subject has been in fact let, and the rent in fact fixed, there is no room to inquire into the motives or considerations by which the parties were moved; or, at least, that the presumption is that the rent has been fixed by agreement, according to what the parties consider is the fair annual value of the subject.

Both of those general questions have been raised and argued, and, as general questions, they are not free from difficulty. In the view, however, which I am disposed to take, it is not necessary for the disposal of this case, or of the similar cases which follow, to decide either of them. There is, as it happens, a third question in all the cases,—a question depending on matter of fact,—and our decision on that question will, it appears to me, be sufficient for the disposal of the appeals.

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That third question is this,—whether, conceding to the appellants that there is here a yearly rent, and also that the presumption is that the rent fixed was conditioned as the fair annual value of the subjects, the evidence which is part of the case does not displace that presumption, and establish that in point of fact the rents in question were fixed on a different principle, viz., on a rule of the railway company that the rents charged to their servants shall be on a fixed scale, having no relation to the true letting values of the houses, or to the rents or values of similar houses in the locality.

Now, I am of opinion on the evidence that on this matter the respondents are right. I think that the evidence does establish that the rents of the houses in question, set forth in the company's pay-bills, do not really represent a contract rent conditioned as the fair annual value of the subjects, but represent merely the company's estimate of the annual value of that part of their servants' remuneration which consists in the occupation of a free house. I refer particularly to the evidence of James Gibson, the appellant's factor, who states quite frankly that, while the so-called rent is fixed over the company's system on a certain scale depending on the number and size of the apartments in each house, yet, "the value of the property in any particular locality does not affect the rent charged. . . . It is according to what the company consider the servants should pay for their houses that the rents are fixed." In view of this evidence, which, I have no doubt, correctly represents the fact, it is not, I think, necessary to consider any general question as to the inferences or presumptions to be drawn from the relation of the parties, or from the nature of the contract under which the houses are let or occupied.

On the whole, I see no reason to disturb the decision of the Valuation Committee.

Lord Moncreiff.—I agree with your Lordship that, on the evidence presented to us, these appeals should be dismissed. I understood that, as a general rule, where employers, such as the railway company, built dwelling-houses for their officials or workmen, and let them to them, the rent paid for such houses was accepted on both sides as the fair yearly value of the houses; and I take it that as a rule that is not a disadvantageous arrangement from an assessor's point of view. It may be regretted that this practice has now been departed from; but the Assessors have raised the question, and we must deal with it.

I agree that it is not necessary for us to decide some of the questions to which your Lordship has referred. It strikes me that the evidence is defective in more ways than one. In the first place, we are not given a very clear or satisfactory explanation of the basis on which the railway company fix the rents of such houses. In the next place, the appellants, relying, I suppose, upon the rent paid to them being accepted as the yearly value of the subjects, have been at no pains to traverse the evidence for the Assessor as to the true yearly value of the houses as compared with the rents of other subjects in the neighbourhood.

But taking the evidence as it stands, if it is the case, as is represented in the evidence, that the railway company in fixing the rent of dwelling-houses let to their officials do not take into consideration the letting value

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of houses in the district, and if, on the evidence, it appears that the rent paid is substantially below the rent of other houses of a similar class, I am afraid we have no alternative but to hold that the rent is not conditioned as the fair annual value of the subjects.

THE COURT were of opinion that the determination of the Valuation Committee was right.

HOPE, TODD, & KIRK, W.S.—BRUCE & KERR, W.S.—Agents.

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Shepherd v. Elliot.

ADAM SHEPHERD, Pursuer (Respondent)—*Comrie Thomson—M'Lennan—Ingram.*
SAMUEL ELLIOT, Defender (Reclaimer)—*Jameson—Watt.*

Expenses—Jury Trial.—The Court has a discretion in jury trials, as in other cases, to depart from the general rule whereby expenses follow the event.

A jury having returned a verdict for the defender in an action of damages for defamation, the Lord Ordinary (Kyllachy) who had presided at the trial found the defender only entitled to one-half of the taxed amount of his expenses, on the grounds (1) that the defender had provoked the action by persistently insulting the pursuer, and (2) that his pleadings had been uncandid. The defender having reclaimed, the Court *declined* to interfere with the manner in which the Lord Ordinary had exercised his discretion.

1ST DIVISION.
Ld. Kyllachy.

THIS was an action of damages for defamation at the instance of Adam Shepherd, Solicitor, Wick, against Samuel Elliot, Doctor of Medicine, Wick, the pursuer complaining that the defender had used calumnious language towards him in presence of third parties in the Caithness Club, Wick, and other places.

The case was tried before Lord Kyllachy and a jury.

The jury found for the defender.

The pursuer applied to the First Division for a rule, but the Court refused his motion and remitted to Lord Kyllachy to proceed. Thereafter Lord Kyllachy pronounced this interlocutor:—"The Lord Ordinary applies the verdict of the jury upon the issues in the cause; and, in respect thereof, assoilzies the defender from the conclusions of the action, and decerns: And having heard counsel on the question of expenses, finds the defender entitled thereto, subject to modification; modifies the same to half of the taxed amount thereof; allows an account to be lodged," &c.*

* "OPINION.—The defender has obtained absolvitor, and is therefore, *prima facie*, entitled to expenses. But that question is always in the discretion of the Court, both in jury trials and in proofs. In this case I am of opinion that the defender should have expenses, but subject to modification. It appears to me, in the first place, that the defender's pleadings in respect of the first issue were, to say the least, not candid, and I think the same observation applies to his attitude when an explanation was asked and an apology demanded by the pursuer's agent. I think I am also entitled to take into account that, upon his own shewing, the defender here provoked this action; that he behaved badly throughout; that, if he did not slander, he persistently insulted the pursuer, his motive being a private quarrel; and that in the final scene in the club, which was the immediate cause of the action, his insults got the length of, to say the least, conduct unworthy of a person in his position. On the whole matter, I think I deal leniently with the defender in restricting the modification to one-half of the expenses."

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The defender reclaimed, and argued;—The general rule in all cases was that expenses followed the result, and in jury trials the Court had no right to depart from that rule, unless success were divided, or the jury had made a recommendation, or where the jury had awarded a pursuer merely nominal damages—a case now provided for by statute.[1] At all events it was the universal practice of the Court, except in these cases, to allow expenses to follow the verdict.[2] There was no case of a jury trial where the Court had refused full expenses to a party who had been entirely successful. The practice of the Court was well illustrated by the case of *Ross*,[2] where, in an action of damages against a criminal officer for wrongous imprisonment, the defender who had been found by the jury to have committed gross dereliction of duty, was yet given full expenses because he had not been found liable in damages. Great inconvenience would result from a contrary practice, which would imply two trials, one by the jury on the merits, and a second by the Court, who would not have before them the necessary material for forming a correct judgment on the question of expenses. The contrary practice would lead to continual applications to the Court on the question of expenses. In jury trials the contest was limited to the acts put in issue, and it was contrary to the policy of that mode of trial to inquire into the previous conduct of parties. If such an inquiry were permissible it would be difficult to fix its limits. In any view the conduct of the defender did not justify the Lord Ordinary in refusing him full expenses.

Argued for the pursuer;—Where a case was not tried by jury, the Court applied its mind to the conduct of the parties in dealing with the question of expenses, and would, if the circumstances warranted it, refuse expenses to the successful party.[3] The same rule was applicable to jury trials.[4] Nothing was withdrawn from the Judge but the right to decide on the facts. The circumstances justified the action of the Lord Ordinary.

At advising,—

Lord President.—The principle upon which the Court proceeds in awarding expenses is that the cost of litigation should fall on him who has caused it. The general rule for applying this principle is that costs follow the event, the ratio being that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be, and that whosoever has resisted the vindication of those rights, whether by action or by defence, is *prima facie* to blame. In some cases, however, the application of the general rule would not carry out the principle, and the Court has always, on cause shewn, considered whether the conduct of the successful party, either during the litigation, or in the matters giving rise to the litigation, has not either caused or contributed to bring about the law suit.

The reclaimer does not question the propositions which I have thus stated:

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[1] Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 40.

[2] Ross v. M'Bean, Dec. 6, 1845, 8 D. 250, 18 Scot. Jur. 169; Dick v. Stewart, Feb. 13, 1836, 14 S. 478.

[3] Ewart v. Brown, Nov. 10, 1882, 10 R. 163.

[4] Mason v. Tait, July 2, 1851, 13 D. 1282, *per* Lord Justice-Clerk Hope, p. 1285, *per* Lord Murray, p. 1288, 23 Scot. Jur. 670; Rae v. M'Lay, Nov. 20, 1852, 15 D. 30, 25 Scot. Jur. 25; Rogers v. Dick, Feb. 4, 1864, 2 Macph. 591, 36 Scot. Jur. 288.

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but he has maintained that, in actions tried with a jury, the Court has no discretion, and the rule is absolute that costs follow the event. His argument was put, as I should think, needlessly high in two respects,—first, because in no possible view can the function of the jury conflict with the consideration by the Court of the conduct of the litigation—and second, because in many causes tried with a jury the conduct of the litigants antecedent to the litigation enters only in the slightest and most incidental manner into the subject of the jury's consideration. In questions of boundary, of right of way, of mercantile contract, and in numerous other instances, the conduct of the litigants touches but little, if at all, the trial of the issue.

In the case actually before us, and more or less in all actions for defamation, the conduct of the parties was necessarily and directly considered by the jury. But, then, it was so considered with reference solely to the questions in the issues. The jury had no duty or right to consider the question of expenses. Accordingly, if the reclaimer's argument be sound, the result is that in cases tried with a jury nobody can consider the conduct of the successful litigant as bearing on his right to costs. For the elimination in jury causes of this element, proper to the just determination of the question of expenses in all other cases, no reason can be suggested on the ground of principle. There is no difference in the nature of those cases which are generally tried with a jury which can found such a distinction. Accordingly it was rather argued as if this was, so to speak, a mechanical necessity of the conditions of jury trial. I am quite unable to see it. There is no incompatibility between the function of the jury in answering the issue, and the function of the Court in examining the same material for the decision of the separate question of expenses.

The exercise of this jurisdiction in cases tried by a jury is delicate, but the principles to be followed are clear, and are well illustrated in *Harnett* v. *Vise*.[1] The Court, however it may dissent from the verdict, must not take upon itself to overrule the finding of fact. In the present case, accordingly, it is to be assumed that there was no defamation. But, well within this admission, there may be ample material for cause being shewn that the conduct of the successful defender had been such as to conduce to the litigation.

I have only to add that, as far as I have observed, the Court exercises considerable reserve in departing from the general rule that costs follow the event; and, where the conduct of the parties has already been considered by a jury, although for a different purpose, probably an additional reason is furnished for caution in entering on doubtful questions. In the present case, the Lord Ordinary knew much more about the facts than I do; and for this reason, more than for any other, I am content to abide by his decision. I am therefore for adhering.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT adhered.

ALEX. MUSTARD, S.S.C.—A. & S. F. SUTHERLAND, S.S.C.—Agents.

[1] L. R. 5 Ex. D. 307.

No. 135.
Mar. 20, 1896.
Blackburn's Trustees v. Blackburn.

SIR DAVID CARRICK ROBERT CARRICK BUCHANAN AND OTHERS (Blackburn's Marriage-Contract Trustees), First Parties.—*Craigie—Blackburn.*

JOHN BLACKBURN AND ANOTHER, Second Parties.—*Craigie—Blackburn.*

MRS ELIZABETH BLACKBURN, Third Party.—*C. J. Guthrie—Macfarlane.*

Succession—Vesting—Marriage-Contract—Clause of survivorship—Power of appointment.—By antenuptial marriage-contract A bound himself "to make payment to the child or children that may happen to be procreate of this marriage of" £8000 "to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him" and his intended spouse, "which sum in the event of there being more children than one shall be divisible in such proportions as A shall appoint, by a writing under his hand at any time of his life, and failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life."

Thirty years after his marriage A executed a deed apportioning the fund among his children then alive (there being no issue of predeceasers) as follows,—to his son B, "whom failing, by his predeceasing the term of payment his issue," a certain sum and the remainder equally among his other children C, D, and E, "and the survivors and survivor of them, and the issue of such as may have predeceased the term of payment leaving issue."

A was survived by his widow and by these children.

In a special case presented during the lifetime of A's widow by the representative of one of the children who had survived A and had died without issue, and by the surviving children, *held* (1) that under the marriage-contract the right to the sum payable by A's executors at the first term of Whitsunday or Martinmas after the death of the surviving spouse did not vest in the children prior to that date; and (2) that the apportionment was valid.

1ST DIVISION. BY antenuptial contract of marriage, dated in 1850, Andrew Blackburn, Esq., Edinburgh, bound and obliged himself to make payment to his intended wife Miss Elizabeth Mary Buchanan in case she should survive him all the days of her life of an annuity of £500, and in part security of the payment of this provision he obliged himself, within six months from the date thereof, to make payment to trustees named in the deed of the sum of £5000, of which the interest was to be paid to himself during his life, and after his death to his widow, to be imputed towards payment of her annuity, and the fee was to be applied in manner after directed. He further bound and obliged himself, his heirs, and successors whomsoever, "to make payment to the child or children that may happen to be procreate of this marriage of the following sums of money, viz., if one child, £5000; if two children, £6000; and if more than two, £8000, to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him and the said Elizabeth Mary Buchanan, with interest during the not-payment thereof, which sum, in the event of there being more children than one, shall be divisible in such proportions as the said Andrew Blackburn shall appoint, by a writing under his hand at any time of his life, and failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been

entitled had they been in life: And the said Andrew Blackburn obliges himself and his foresaids to aliment, maintain, and educate his said children suitably to their station until the term of payment of their said provisions: And it is hereby declared that the foresaid sum of £5000 to be vested in trustees as aforesaid shall form part of the provisions in favour of children, and shall be applied accordingly, failing whom the same shall, upon the death of the said Elizabeth Mary Buchanan, be paid over to the heirs or assignees of the said Andrew Blackburn." These provisions were declared to be in full of the legal rights of the children.

By deed of appointment, dated in 1885, Mr Blackburn, after referring to the terms of the marriage-contract, provided as follows:—"And further, considering that there are at present four children of the said marriage surviving,—*videlicet*, John Blackburn, Andrew Buchanan Blackburn, David William Ramsay Blackburn, and Mrs Euphemia Blackburn or Fergusson . . . and that there exists no issue of deceased children thereof: And now seeing that I have resolved to execute and use the power of apportionment conferred on me by the said contract of marriage: Therefore I do hereby apportion out of the said sums of £6000 or £8000 as the case may be to the said David William Ramsay Blackburn, whom failing, by his predeceasing the term of payment, his issue £200: And I apportion the remainder of the said sums of £6000 or £8000 as the case may be to and between and among the said John Blackburn, Andrew Buchanan Blackburn, and Euphemia Blackburn or Fergusson, and the survivors and survivor of them, and the issue of such as may have predeceased the term of payment leaving issue, equally between and among them, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life."

Mr Blackburn died in 1885, survived by his wife, and the four children mentioned in the deed of apportionment. At the date of the special case after mentioned the widow still survived. Of the children David died in 1888 unmarried, and Andrew in 1895, survived by a widow (Mrs Elizabeth Blackburn), but without issue. Andrew left a will bequeathing his whole estate to his widow, and appointed her his sole executrix.

Questions having arisen during the lifetime of Mrs Elizabeth Mary Buchanan or Blackburn between the two surviving children of Mr Blackburn and Mrs Elizabeth Blackburn as to their respective rights in the sum of £8000 which Mr Blackburn bound himself to pay after the death of the longest liver of himself and his wife in the event of there being more than two children procreated of the marriage, a special case was presented, to which Mr Blackburn's marriage-contract trustees were first parties, his two surviving children second parties, and Mrs Elizabeth Blackburn third party, in order to obtain the opinion of the Court upon the following questions:—"(1) Was the said deed of apportionment within the power of the said Andrew Blackburn, and does it now regulate the succession to the fee of the provisions made by the said Andrew Blackburn in favour of the children procreated of his marriage? (2) In the event of question No. 1 being answered in the affirmative, is vesting of said provisions postponed until the date of the death of Mrs Elizabeth Mary Buchanan or Blackburn?"

The third party maintained that the fee of the provision of £8000 vested in Mr Blackburn's children as they came into existence, or

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otherwise at the dissolution of the marriage, and that the deed of apportionment was *ultra vires* of Mr Blackburn, and that her husband was at the date of his death vested in one-fourth of the provision in his own right, and in one-eighteenth as one of the heirs *in mobilibus* of his deceased brother David.

The second parties maintained that the deed of apportionment was *intra vires* of Mr Blackburn, and that, whether that deed was valid or invalid, the fee of the provision of £8000 did not vest in any child of the marriage until the death of the longest liver of the spouses.

Argued for the third party;—(1) The general rule was that marriage-contract provisions vested at the dissolution of the marriage, and there was nothing in the present contract to displace the rule. The postponement of payment was on account of the widow's liferent, and the mere interposition of a liferent never operated to postpone vesting. The power of appointment was not limited to survivors, and the deed being a marriage-contract and not a *mortis causa* settlement, the period to which the condition of survivorship introduced in the following clause referred was the dissolution of the marriage.[1] (2) If vesting took place at the dissolution of the marriage, the deed of apportionment was *ultra vires*, because, contrary to the intention of the contract, it postponed vesting, made the uncertain element of survivorship a condition of taking benefit, and, by the destination to the issue of predeceasers, introduced persons who were not proper objects of the power of appointment.[2]

Argued for the second party;—(1) The clause of survivorship was according to the usual rule referable to the period of payment, which was the death of the longest liver of the spouses. Until that date, therefore, no right transmissible by will vested in any individual child of the marriage.[3] The destination over of the £5000 held by the trustees to the heirs and assignees of the husband supported the view that vesting was postponed. (2) If vesting were postponed until the death of the survivor of the spouses, no objection could be stated to the deed of apportionment, but that deed was valid even if vesting took place at an earlier date. A power of appointment enabled the person possessing it to select among the objects of the power those whom he desired to benefit. If he could exclude directly, it would seem to follow that he could do so indirectly, as by postponement of vesting. The appointment to the issue of predeceasers was in accordance with the power given by the marriage-contract.

At advising,—

LORD M'LAREN.—The case submits to the decision of the Court, first, the question whether a deed of appointment executed by Mr Andrew Blackburn in the year 1885 is a deed within the powers reserved by him in his contract of marriage, and then in alternative questions, in what manner and at what time did the children's right under the contract vest. But it is evident that the question, whether the deed of apportionment is or is not a valid exercise of the power must depend on the true construction of the

[1] Rogerson's Trustees v. Rogersons, March 10, 1865, 3 Macph. 684, 37 Scot. Jur. 343; Romanes v. Riddell, &c., Jan. 13, 1865, 3 Macph. 348, 37 Scot. Jur. 167.

[2] Wright's Trustees v. Wright, Feb. 20, 1894, 21 R. 568.

[3] Vines v. Hillou, July 13, 1860, 22 D. 1436, 32 Scot. Jur. 666; Boyle v. Earl of Glasgow's Trustees, May 14, 1858, 20 D. 925, 30 Scot. Jur. 546.

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destination in the contract of marriage, and I shall therefore consider this question first in order.

The obligation undertaken by Mr Blackburn in contemplation of marriage is thus expressed—leaving out of view for the moment the power of apportionment—it is to make payment to the child or children of the marriage of the following sums of money, viz., if one child £5000, if two children £6000, and if more than two £8000, to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him and his spouse, with interest. Then, passing over the power of apportionment, the deed proceeds,—and failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life.

There is nothing unusual in this destination; it is neither elliptical nor redundant in expression; and there is nothing in the context that suggests a different construction from that which would be put on the destination if it stood alone. Now, if we apply to this destination the established principle of construction, that words of survivorship are presumed to refer to the period of payment or conveyance, the clause which I have quoted must be taken as confining the benefit of the provision to such of the issue of the marriage as may survive the longest liver of Mr Blackburn and his spouse. The fund which he undertakes to provide is to be divided equally amongst the members of his family who may be then surviving, amongst whom it is explained the issue of a deceased son or daughter are to be included, but only to the effect of taking the parent's original share. It is quite true that where a marriage obligation in favour of children is expressed in general terms the law presumes that the obligation is prestable at the dissolution of the marriage. But all such presumptions must give way before the plainly expressed conditions of the obligation, and I cannot admit the existence of any *jus crediti* on the part of children of such weight as should compel a father or his representatives to confer a benefit at an earlier period than he intended, or to include in the benefit of the provision members of his family for whom he has not undertaken to provide in this particular way. I have only to add on this question that the words of the power which I am about to read do not in my judgment affect the construction of the destination, because the power only enables the father to divide the fund unequally amongst the objects of the gift, whoever these may be. The same observation may be applied to the provisions vesting the sum of £5000 in trustees; this trust fund is applicable to the purposes of the destination, but the trust purpose has no influence on the construction of the destination, which, as I have already said, stands by itself.

Coming now to the power of apportionment, I see no reason to doubt that the persons amongst whom the fund is to be apportioned are the same as those who would take under the provision for equal division in case of the power not being exercised. The meaning of any power of apportionment is that the fund is to be divided, but may be divided unequally, amongst the members of the class who would take failing apportionment. Any other construction, if not exactly a contradiction in terms, would at

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least involve a departure from the principle of apportionment. I do not read the power as meaning anything different from a division amongst the class, because nothing more is said than that in the event of there being more children than one the fund "shall be divisible in such proportions as the said Andrew Blackburn shall appoint." If this be the meaning of the power, then I cannot doubt that it was well exercised by the deed of 8th March 1885, because the deed of division is an echo of the destination in the marriage-contract, and follows closely the lines of that destination. The result is that, in my opinion, the power of apportionment is well exercised, and that the vesting of the estate is postponed until the death of Mrs Blackburn.

In this view the first and second questions of law will be answered in the affirmative.

LORD ADAM.—In this case Mr Blackburn bound and obliged himself, his heirs, executors, and successors, to make payment of £5000 or £8000, according to what the number of children might happen to be, to the child or children of the marriage. The period of payment was to be the first term of Whitsunday or Martinmas after the death of the longest liver of him, and Mrs Buchanan if she should be his widow. Now, it is clear that that being the term of payment, there could be no period of division different from, or at least prior to, the period of payment, for the simple reason that the sum was in the hands of nobody to divide. By his will the executors are in possession of the money and they are debtors in the obligation undertaken by Mr Blackburn; they are not in any sense trustees, and in no sense do they hold the fund for the children. Now, if that be so, the next thing is that Mr Blackburn has a power of appointment, and the direction in this deed is to divide the money according to such proportions as he may appoint by deed of apportionment, and failing apportionment, equally, and the parties to whom this payment or division is to be made are the survivors of the same, and the issue of such as may predecease leaving issue, such issue succeeding always to the shares which their parents would have been entitled to if in life. Now, I entertain no doubt that the survivors, to whom payment is to be made, are the children surviving at the date of payment, that is, at the first term of Whitsunday or Martinmas after the death of the longest liver of the spouses, and failing such survivance, to the issue—that is to say, to the issue of such as may predecease, that is, of such of the children as may predecease. They are to take their parent's share. Now, if that be so, there can be no doubt at all, in my humble opinion, that this fund vested, and could vest only, on the death of the longest liver of the spouses. I can see no other possible period at which it could vest. It is quite true that there was a sum of £5000 held by the trustees in security of an annuity which Mr Blackburn provided for his widow, if that should be necessary for that purpose, but that would make no difference on that sum, for the direction is that the fee of that £5000 is to be applied in manner after directed, the manner after directed being the manner prescribed in the clause which I have just been dealing with.

If that be so, and if there was no vesting at any period prior to the period of payment, then it follows, and was not disputed, that the deed of appoint-

ment was perfectly valid. I therefore agree that the first two questions must be answered in the affirmative, and that the other requires no answer.

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LORD KINNEAR.—If we were to read the obligation contained in this marriage-contract as we ought to do, for the purpose of ascertaining the fair meaning of the words used in it according to the ordinary acceptation of language, irrespective of any previous decision, there could be very little doubt indeed as to the meaning of the obligation. The husband obliges himself to pay a certain sum or certain sums, varying according to the number of children, at the first term of Whitsunday or Martinmas after the death of the longest liver of himself and his wife, and then he goes on to provide—(omitting words which are not necessary for the construction of the obligation itself, but which only describe the qualifications which pertain to the right created by that obligation)—that this sum which he obliges himself to pay at that time is to be divisible, failing apportionment by him, among the survivors of his children and the issue of such as may have predeceased. That appears to me to be an obligation to the children surviving the term of Whitsunday or Martinmas after the death of the longest liver of the spouses, and to the issue of those who predecease, and to nobody else; and therefore I have no hesitation in coming to the conclusion which your Lordships have expressed that the husband had undertaken no obligation in favour of anybody except the children surviving at the time.

If that be the natural meaning of the words used, the only question is whether there is any rule in law founded on prior decisions which obliges us to put upon this marriage-contract a construction different from that which we would otherwise place upon it. I am not aware of any such rule, and, taking it by itself, I concur.

The LORD PRESIDENT concurred.

THE COURT answered the first and second questions in the affirmative, and found it unnecessary to answer the third.

MACKENZIE & BLACK, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

WILLIAM COCHRANE FERRIER, Pursuer (Reclaimer).—*Dickson—Constable.*
JAMES HENRY COWAN, Defender (Respondent).—*Johnston—C. N. Johnston.*

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Ferrier v. Cowan.

Right in Security—Catholic Security—Contribution of separate estates to common burden—Annuity.—Where two heritable estates, which were both subject to the common burden of an annuity, passed into the possession of separate proprietors, *held*, in a question between these proprietors, that each estate was bound to contribute to the annuity from year to year, in proportion to the amount of its free rental after deduction of the interest on prior burdens.

WILLIAM COWAN, of Kirkton, Boghall, and Linburn, died in 1875. By his trust-disposition and settlement, dated 28th April 1873, Mr

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Cowan directed his trustees to infeft his widow in an annuity of £200 per annum, "to be paid to her out of the rents" of his estate of Boghall, "in each year, so long as she lives, and continues my widow." He also directed his trustees to convey Boghall to his eldest son, James Henry Cowan, and to convey the estate of Drumcrosshall and Kirkton to his second son, John Robert Cowan.

By a codicil, dated 19th November 1874, Mr Cowan directed his trustees, when the time arrived to "convey my estates of Drumcrosshall and Kirkton to John Robert Cowan, my second son, to do so under burden of the annuity of £200 in favour of my wife," and to convey Boghall to his eldest son free from said annuity.

After Mr Cowan's death the trustees duly implemented these directions, and conveyed Boghall to James Henry Cowan free of the annuity, and Drumcrosshall and Kirkton to John Robert Cowan, under the real burden of the annuity.

In 1886 the estate of Kirkton was sold by a heritable creditor, and was purchased by William Cochrane Ferrier. The disposition in Mr Ferrier's favour disponed the lands under the real burden of the annuity.

In 1887 John Robert Cowan disponed the estate of Drumcrosshall to his brother, James Henry Cowan. There was excepted from the warrandice, "any right which Mrs Cowan . . . has to receive payment of her annuity of £200 per annum, or part thereof, out of the lands of Drumcrosshall."

After Mr Ferrier acquired the estate of Kirkton he was called upon to pay the annuity to Mrs Cowan, and from Whitsunday 1886 to Martinmas 1894 he paid the whole annuity, receiving from Mrs Cowan assignations of her right to the part of the annuity payable by the estate of Drumcrosshall.

In 1895 Mr Ferrier, as an individual, and as assignee of Mrs Cowan, brought an action against James Henry Cowan for declarator (1) that the lands of Drumcrosshall, belonging to the defender, were and had all along been, before and since they were acquired by the defender, along with the lands of Kirkton, subject to the real burden of Mrs Cowan's annuity; (2) that £875, being one-half of the annuity, less income-tax, for the period between Whitsunday 1886 and Martinmas 1894, or otherwise, the *cumulo* amount of such other proportion of the annuity for that period, less income-tax, as the Court should fix, with interest on each termly payment, still formed a real burden on the lands of Drumcrosshall; and (3) that the pursuer was entitled to payment from the lands of Drumcrosshall of the sum of £875, or the *cumulo* amount of such other proportion of the annuity as should be fixed, with interest.

The pursuer set forth the facts already narrated, which were not disputed, and further averred;—(Cond. 10) "The rentals of Kirkton and Drumcrosshall are practically equal in amount, and the defender's lands are liable for one-half of the said annuity."

The defender stated;—(Stat. 1) "At the date of Mr Cowan's death in 1875, the estate of Drumcrosshall was burdened with a debt of £10,000, heritably secured. This debt, which still subsists, ranked prior to the annuity of £200 to his widow secured over the estates of Drumcrosshall and Kirkton." (Stat. 2) "At the date of pursuer's purchase of the estate of Kirkton, the securities upon the two estates were as follows:—

"1. Mrs Cowan's annuity of £200 secured over both estates.

"2. Bond over Drumcrosshall only, preferable to said annuity, ...	£10,000	0	0
"3. Bond in favour of Samuel Lewis, and assigned by him to the Scottish Equitable Insurance Company, over both estates, postponed to annuity, ...	3,000	0	0
"4. Bond over both estates, postponed to annuity,	7,950	0	0
"5. Do. do., . .	1,000	0	0
	£21,950	0	0"

(Stat. 5) "The pursuer purchased the said estate of Kirkton at the reduced upset price of £6115, which was applied in payment of the exposer's (Scottish Equitable Company) bond for £3000 and interest and expenses, and in payment of the postponed bond for £7950 to the extent of £2500. The balance of said bond, amounting to £5450, and the bond for £1000 remained burdens on Drumcrosshall alone. The nett rental of said estate of Kirkton, after deducting public burdens, was £519, and in fixing the upset price, as was well known to the pursuer, allowance was made for the whole annuity of £200 payable to Mrs Cowan, it being known that the remaining heritable debt would more than exhaust the estate of Drumcrosshall." (Stat. 6) "The estate of Drumcrosshall is now burdened with the following heritable bonds:—Said £10,000, for which the defender has undertaken personal liability; said £5450, and said £1000, both originally catholic securities, but now exclusively secured on Drumcrosshall, and for which the defender is not personally liable. Hitherto the rental of the estate has enabled the defender to do little more than keep down the interest on the primary bond for £10,000, and for crop and year 1894 there was no surplus whatever for the postponed bondholders, and were any portion of Mrs Cowan's annuity to be paid out of Drumcrosshall, even on an improved rental, the result would be to the prejudice of the holders of said postponed bonds for £5450 and £1000."

In answer to the defender's statements, the pursuer denied that the debt of £10,000 ranked prior to the widow's annuity, and explained "that by his settlement William Cowan directed his trustees to pay off out of his moveable estate the whole heritable debts affecting his lands before they conveyed his estates to his sons. It is believed that William Cowan left sufficient moveable estate to pay off the heritable debt referred to. . . . Explained further, that instead of securing the discharge of the debt, John Robert Cowan, to whom the estate of Drumcrosshall was conveyed by his father's trustees, voluntarily undertook personal liability for the debt, and by the terms of the disposition in his favour the defender also became personally liable for the said sum of £10,000. Since the defender acquired the property the debt has been due on his personal obligation, and he is primarily liable for payment both of principal and interest."

The pursuer pleaded;—(1) In respect of the respective titles of the parties, and of the payments made by the pursuer, and of the assignations in favour of the pursuer, the pursuer is entitled to decree as concluded for. (2) The defences are irrelevant. (3) The defender being primarily the debtor in the bond for £10,000 is not entitled to charge the estate with the interest or principal thereof in a question with the pursuer. (4) In any case, the truster having directed the said debt to be paid out of his moveable estate, the defender

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The defender pleaded;—(1) The action is irrelevant. (2) The pursuer having purchased the estate of Kirkton expressly under burden of the payment by him out of the said estate of the whole of the said annuity, he is not entitled to relief against the defender or the estate of Drumcrosshall. (3) In any view the pursuer is not entitled to recover from the defender any sum in respect of past payments of the annuity except in so far as he can instruct that the defender has drawn surplus rents from Drumcrosshall, and in proportion to the amount of said surplus rents in relation to the free rent of Kirkton. (4) In any view the defender is entitled to require that the annuity to Mrs Cowan be taken out of the estate of Kirkton to the effect of enabling him to make full payment of the interest due to the postponed bondholders on the estate of Drumcrosshall. (5) *Separatim*, In case that it shall be found that the estate of Drumcrosshall is liable to contribute to the said annuity, the said bond for £10,000 over Drumcrosshall being preferable to said annuity, said bond and the interest thereon falls to be taken into account in any allocation of the annuity between Drumcrosshall and Kirkton.

On 21st December 1895 the Lord Ordinary (Low) "repels the fourth plea in law for the pursuer and the second plea in law for the defender: Before further answer, allows to the defender a proof of his statements on the defences in regard to the burdens on the estates of Kirkton and Drumcrosshall, and also as to the value of the latter estate; and to the pursuer a proof of his averments in answer thereto: Appoints the said proof to proceed," &c.*

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* "OPINION.— . . . The pursuer avers that Kirkton and Drumcrosshall are practically of the same value, and that therefore, in a question between him and the defender, each estate is liable to contribute one-half of the annuity.

"I did not understand the defender seriously to dispute that, as a general rule, when two estates, upon which a debt is secured, came into the hands of separate proprietors, they must pay the debt rateably according to the value of the estates. He contended, however, that the debt of £10,000 having been secured over Drumcrosshall before the widow's annuity was made a burden upon that estate, the interest upon the £10,000 must be deducted from the rental, and only the surplus rental taken into account in comparing the value of the two estates, and allocating the annuity beween them.

"The answer which the pursuer makes to that view is that, even assuming that the debt of £10,000 is preferable to the annuity, which he does not admit, William Cowan gave directions to his trustees to pay out of his moveable estate the whole heritable debts affecting his lands, before they conveyed his estates to his sons. The direction in the settlement upon which the pursuer founds is to sell certain railway stock and to pay the heritable debts out of the proceeds. In a codicil, however, Mr Cowan directed his trustees only to realise the railway stock in certain events, and declared his wish to be that 'the existing mortgages shall remain secured on my estates of Boghall, Drumcrosshall, and Kirkton, until all my other debts are paid.' It is not said that the railway stock has been realised, or that all the other debts of Mr Cowan have been paid, and therefore if it were material to consider whether in terms of the settlement the debts with which Drumcrosshall is burdened might not have been paid off, inquiry would be necessary.

"It seems to me, however, that the pursuer has no title to found upon

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The pursuer reclaimed, and argued;—The pursuer's right to an apportionment of the common burden was clear,[1] and the rental of the two estates being practically equal, they were bound to contribute equally to the burden, for which each was bound up to its full value. There was no authority for the view that, in fixing the relative liability of two estates subject to a common burden, prior burdens affecting either estate were to be taken into account. In a question arising *inter hæredes* as to liability for the debts of a common ancestor different considerations arose, and it might well be that the liability was proportioned to the nett value of the estate taken by each. But that would involve the deduction of all burdens imposed before the estate was received, whether prior or postponed to the common burden. It was evident that this principle could not be applied to a case of singular successors like the present, and it was not so contended. In their case, the theory that the surplus or reversionary values of two estates were the true measure of their liability seemed

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the directions in the settlement. Drumcrosshall and Kirkton were both left to John Robert Cowan, and if he chose to allow the heritable debts to remain upon these estates, or either of them, instead of calling upon the trustees to pay them off, it seems to me that he was quite entitled to do so. If the security for the widow's annuity had depended upon the debts being paid, she might perhaps have had right to insist that the directions of the settlement should be carried out, but I do not think that the pursuer has any such right. I think that he must take matters as they stood when the separation of the estates occurred by his purchase of Kirkton, and at that date (assuming the defender's statement to be correct) Drumcrosshall was burdened with a debt of £10,000 preferably to the widow's annuity.

"I am therefore of opinion that the defender's contention, that if the bond for £10,000 is preferable to the annuity it falls to be taken into account in any allocation of the annuity between Drumcrosshall and Kirkton, is sound.

"The defender further contends that the pursuer is barred from making any claim of relief against him or the estate of Drumcrosshall, in respect, first, that in the disposition of Kirkton to the pursuer the whole annuity is declared to be a burden upon that property; and, secondly, that the upset price at which the pursuer purchased Kirkton was estimated, to his knowledge, upon the footing that the whole annuity was exigible from the estate.

"In regard to the first point, the whole annuity was, as matter of fact, a burden upon Kirkton, and the disposition seems to me to do no more than state that fact in order that there might be no dubiety on the point between disponer and disponee.

"In regard to the second point, if the defender's statement is correct, that after deducting the preferable debt of £10,000 there is practically no free value or rental of Drumcrosshall to meet the annuity, it was very natural that the bondholders in fixing the reduced upset price of Kirkton should have proceeded upon the assumption that the purchaser would have to pay the whole annuity. I do not think, however, that the way in which the sellers arrived at the upset price, even if known to the pursuer, barred him from enforcing any right of relief which he might find to be open to him.

"The defender also argued that no part of the annuity could be demanded against Drumcrosshall, because to do so would prejudice the rights of the postponed creditors on that estate.

"The defender argued that the pursuer could have no higher right than

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[1] Bell's Comm. ii. 417; Kames' Princ. of Equity, i. 125; Rose v. Rose, April 2, 1787, 3 Pat. App. 66.

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to rest on no ground of principle. The remedy sought in the present case was a real remedy against the lands, which were certainly liable *quantum valeant*. The application of the rule of surplus value was a limitation sought to be fixed in the personal interest of the owner; and yet the surplus contended for was determined at a period long before that owner acquired the property, and had no meaning relatively to him. Further, the adoption of the theory contended for by the defenders would result in many difficulties and anomalies, *e.g.*, it would make the liabilities of two estates depend on the mere incident—generally determined entirely on grounds of convenience—of whether bonds in transactions with purchasers were taken over or discharged and received. Again, it would make it possible for the proprietor of one estate, with the aid of the catholic creditor, to throw the whole common burden upon the other. The only practicable rule in estimating the relative values of two estates for the purpose of contribution was to disregard bonds altogether.

In the present case there was an additional and most material reason against taking the bond into account. The defender was personally and primarily liable for the debt due under the bond, the estate being only bound in security. In estimating the comparative liability of the estates, matters were to be taken as they stood now, when the claim for relief was made, not as they stood at the period of separation. If, however, the defender was entitled to go back to the time when the common burden was imposed, the pursuer was entitled to rely on the terms of the settlement imposing the burden. In terms of that settlement the bond in question should have been paid off. It was the duty of a purchaser to have a catholic security allocated. If he failed to do this, he was himself to blame if the application was made at a worse time for him.

The defender had no title to plead the interest of the postponed bondholders. If he had, their interest could not prejudice the right of the pursuer to have the catholic burden apportioned according to the value of the estates. The equity which required a catholic creditor to exercise his rights so as not to prejudice other creditors unnecessarily could not be pleaded by the debtor.[1]

Argued for the defender;—Apportionment was an equitable remedy, and must be applied equitably, and not according to the technicalities of conveyancing law. The legal position was that the creditor in a catholic security could exact payment out of any one estate subject to the burden, but the debtor who was compelled to pay more than

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the widow had, and that she as a catholic creditor was not entitled to prejudice the secondary creditors over Drumcrosshall by demanding payment of any part of her annuity out of that estate, Kirkton being sufficient for the payment of the whole annuity.

"The question is one of some nicety, but although it was stated, there was little argument upon this point, and no citation of authorities, and I do not propose at this stage to express any opinion upon it, because as the defender's statements in regard to the burdens upon the estates are not admitted, the facts must be ascertained.

"I am therefore of opinion that I am now in a position to repel the fourth plea for the pursuer and the second plea for the defender, and before further answer I shall allow the defender a proof of his averments in regard to the burdens upon the two estates, and in regard to the value of Drumcrosshall."

[1] Littlejohn v. Black, Dec. 13, 1855, 18 D. 207, 28 Scot. Jur. 87.

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his proper share was entitled to an assignation, in order that he might operate his relief out of the other estates, the rule being that each estate was liable to contribute to the common burden rateably according to its relative value.[1] The only equitable mode of applying the remedy was to take the reversionary value of each estate, after deduction of burdens ranking prior to the catholic security, as the true measure of its liability, and that value, so far as burdens were concerned, must be taken as at the date of the separation of the estates, for it would be inequitable to increase the liability of the proprietor of an estate to a catholic burden merely because he had paid off a burden affecting his own estate only. In England the rule with regard to annuities chargeable on separate estates was that each must contribute to the annuity rateably according to its rental *de anno in annum*.[2] If the rental of one estate increased largely, *e.g.*, owing to the discovery of minerals, its liability to the common burden would be modified, but this rule was not applicable to a case of burdens separately affecting the estates. So far as these were concerned, it was quite consistent with the English rule that the apportionment should be fixed once for all at the date when the estates passed to separate proprietors. The fact that the defender was personally bound for payment of the prior bond over his estate could not affect the apportionment of the common burden, the question being one of real rights, with which personal obligations had nothing to do. Nor could the pursuer found upon the provisions of Mr Cowan's will, with which he had no concern.

At advising,—

LORD KINNEAR.—The estates of Kirkton and Drumcrosshall, belonging to the pursuer and defender respectively, are subject to the common burden of an annuity of £200, payable to the widow of William Cowan, a former proprietor. The burden is imposed by the trust-disposition and settlement of Mr Cowan, who directed his trustees to infeft his widow in an annuity of £200 a year, "to be paid to her out of the rents of the estate of Boghall in each year so long as she lives and continues my widow"; and by a codicil he directed that the estates of Kirkton and Drumcrosshall should be conveyed to his son, John Robert Cowan, under burden of this annuity, and that the estate of Boghall should be conveyed to his son James Henry entirely free from the said annuity. The disposition to John Robert Cowan which the trustees executed in terms of the direction has not been laid before us, but the parties are agreed that the directions of the truster were duly carried out by his trustees. So long as Kirkton and Drumcrosshall remained in the hands of John Robert Cowan there could be no question of contribution as between these estates. But the question arose when the two estates were separated and came into the hands of different owners by the pursuer's purchase of Kirkton in 1886. Since that date the pursuer avers that he has been required to pay the entire annuity to Mrs Cowan as if it had been a burden upon his property of Kirkton alone, and he brings this action, founding upon assignations which he has taken from the

[1] Rose v. Rose, April 2, 1787, 3 Pat. App. 66; Moncreiff v. Skene, June 29, 1825, 1 W. and S. 672.

[2] Fisher on Mortgages, 4th edn. 660; Ley v. Ley, 1868, L. R., 6 Equity, 174.

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annuitant, for the purpose of establishing his claim to a proportional relief from the Drumcrosshall estate. It is not now disputed that both estates must contribute rateably to the annuity, but the parties are in controversy as to the conditions on which the common liability is to be apportioned. The Lord Ordinary has decided three questions which have been raised, but he has reserved his judgment as to a fourth point until the facts shall be ascertained. I think that this was a proper course, and also that, subject to one qualification, his Lordship's judgment on the points he has decided is right. The Lord Ordinary holds, in the first place, that the burden must be apportioned according to the value of the estates. If this means the saleable value or the capitalised value of the rental, I am unable to agree with it. It is unnecessary for the present purpose to consider what the remedy of the annuitant might be if the rents were insufficient to meet her claim. But primarily at all events, her annuity is a charge upon the rents, or if the lands be unlet, upon the income or annual proceeds of the estates. I think it follows that in the application to this particular case of the general rule which his Lordship has correctly stated, the contribution must be in proportion to the rent or annual proceeds. The burden to be divided is an annual charge from year to year during the widowhood of the annuitant, and the contribution must be made from year to year as the claim arises in proportion to the income of each year. On the second point which the Lord Ordinary has decided, I agree with him, for the reasons he has stated. The defender claims that the interest of a heritable debt of £10,000 which was secured over Drumcrosshall before the burden was imposed, and is therefore preferable to the claim of the annuitant, must be deducted, and that only the balance of the rental is to be taken into account in apportioning the annuity between the two estates. This appears to me to follow from the rule that the burden is to be divided in proportion to the value of the estate charged. The estate of Drumcrosshall is charged with the annuity, subject always to the preferable claims of the creditors in the £10,000 bond. The annuitant could not have attached the rents which have in fact been applied, or the rents which may in future years be applicable to payment of interest on the bond; and the pursuer cannot look for his relief from rents which are beyond the reach of the annuitant. I agree with the Lord Ordinary that the pursuer has no title to inquire whether the debt might or might not have been cleared off by Mr Cowan's trustees in the execution of their trust. He has no personal claim against the defender, who is under no personal obligation either to him or to the annuitant. His right to relief depends upon the incidence of real burdens, and these must be taken as they stood when he acquired the estate of Kirkton, and as they still stand when his claim for contribution is brought forward. If the debt on Drumcrosshall were cleared off the income available from that estate to meet the annuity would be enlarged, and the proportionate liability of the estate to contribute along with Kirkton would be increased. But, in the meantime, there is a real security over Drumcrosshall which is preferable to the annuity, and the rental available for the annuity must be so much the less so long as that security subsists.

The third point decided by the Lord Ordinary is not now in dispute.

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His Lordship has repelled the second plea in law for the defender, and that part of his interlocutor is not brought under review.

The question which the Lord Ordinary has reserved is whether the pursuer is entitled to a decree which may prejudice the interests of secondary creditors over Drumcrosshall. The only point of this kind that has been argued is whether the equity which in certain circumstances enables creditors holding postponed securities over part of an insolvent estate to prevent a catholic creditor from impairing their securities unnecessarily in the exercise of his preferable rights can be made applicable to such a case as the present, where the right which it is proposed to control by equity is not that of another creditor on the estate of a common debtor but of the owner of a separate property, who is under no personal obligation either to the creditor in the real burden or to the creditors on the other estate over which the burden extends. But it is not clear that that question arises in the shape in which it was presented in argument. We have heard no argument as yet as to the precise terms of the decree to which the pursuer may be entitled, and I think it would be premature to decide anything as to the rights of postponed creditors until the conclusions of the summons have been fully considered. I am of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutor, the words 'said estates' being substituted for the words 'latter estate' in the said interlocutor: Refuse the reclaiming note, and decern," &c.

CARMENT, WEDDERBURN, & WATSON, W.S.—DALGLEISH & BELL, W.S.—Agents.

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Mar. 20, 1896.
Stevenson's Trustee v. Campbell & Sons.

JAMES LANDELL SELKIRK (Stevenson's Trustee), Appellant.—*Johnston—D. Dundas.*
THOMAS B. CAMPBELL & SONS, Respondents.—*Lees—A. S. D. Thomson.*

Contract—Sale—Cautioner.—B, a builder, in the course of erecting certain houses became unable to get building materials on his own credit and applied to S. S carried on the work, employing B as a servant and paying him wages, and also paying for materials which B ordered.

S informed C & Co. of the arrangement and promised to see them paid for any materials supplied to B's order.

Held that C & Co. had a claim against S as buyer of the goods.

Birkmyr v. *Darnell*, 1 Smith's Leading Cases (10th edit.), 287, *approved.*

1ST DIVISION.
Sheriff of Lanarkshire.

T. B. CAMPBELL & SONS, metal merchants, Glasgow, lodged a claim for £192, 12s. 7d., upon the sequestrated estate of the deceased James W. Stevenson.

The trustee, James Landell Selkirk, C.A., having rejected the claim *in toto*, Campbell & Sons appealed to the Sheriff of Lanarkshire. In a minute lodged by them they stated that their claim was for the amount of goods delivered by them on the order and on the credit of William Stark, and of Stevenson & Lauder, of which firm the deceased had been a partner.

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The trustee denied that the goods were delivered on the order or on the credit of Stevenson & Lauder.

Proof was led, of which the material results were as follows:—

In 1890 William Stark had certain building contracts in hand, which he was unable, without financial assistance, to carry through. Stevenson & Lauder acted as financial agents for the properties on which the buildings were to be erected, and arrangements were made by James W. Stevenson to enable Stark to obtain material for the completion of the work.

Thomas Wallace, Campbell & Son's cashier, deponed,—"I told him (Stevenson) that we were not fond of giving Stark goods unless we had some security for the money. Mr Stevenson told me that Stark was doing work entirely for him. Mr Stevenson was a property speculator. It did not suit him to have the account in J. W. Stevenson's name, but said his firm of Stevenson & Lauder would bind and oblige themselves to see us paid, and so these transactions went on for a series of years, —I think three. During that time we got about £500 paid to us by the late J. W. Stevenson. The settlement took place in almost every case in the same mode as the bill before the Court. We put on Stark & Son, and Stevenson & Lauder indorsed the bill. It was arranged that Mr Stark was to order the goods, and that we should render the accounts and draw on Stark, and Stevenson should indorse the bills. I looked to J. W. Stevenson as the party ordering the goods. Stark was simply ordering the goods as a workman employed by Stevenson, and Mr Stevenson was to see us paid. . . . We stopped Stark's account immediately we knew that Stevenson was dead. . . . Cross.—Mr Stevenson told me that he would see me paid for what Stark ordered."

Ebenezer Gilchrist, a partner of the dissolved firm of Stevenson & Lauder, deponed,—"My firm acted as financial agents in connection with certain properties in Langside and Shawlands. Stark was carrying on the building operations in connection with these transactions. My firm drew all the advances in connection with the buildings, and paid Stark's wages and the material in connection with the work . . . I had general instructions from Mr Stevenson that if Mr Stark presented the appellants any orders, I was to sign or initial them. (Q.) Did you not understand that Mr Stevenson had agreed to pay the material got from the appellants; was that not the footing on which you were dealing with them? (A.) It practically amounts to that."

William Stark deponed,—"I said to Mr Stevenson that if I carried on he would require to become security for the stuff I required. I think Mr Gilchrist told me to go up to T. B. Campbell's and order what stuff I wanted. . . . I understood by my arrangement with Mr Stevenson that it was on his behalf that I was ordering that material. . . . Cross.— . . . I got my wages, and the stuff was guaranteed by Stevenson & Lauder. . . . The goods supplied by the appellants (Campbell & Sons) was not on my own account, it was for the properties I was completing. I had no credit, and Mr Stevenson was security."

To the extent of £22, 1s. 10d. the orders for the goods referred to in the claimants' account were initialed by Stevenson & Lauder.

The claimants also produced in support of their claim a bill for £84, 19s. 2d., payable on 15th September 1893, and undischarged, drawn by them upon Stark, and indorsed by Stevenson & Lauder, and evidence, which need not be further referred to, was led to shew

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that the indorsation imputed an obligation on Stevenson & Lauder to retire the bill at maturity.

On 5th February the Sheriff-substitute (Erskine Murray) recalled the deliverance of the trustee, and appointed him to rank the claimants to the extent of £107, 1s., that being the amount of the bill indorsed by Stevenson & Lauder, and of the orders initialed by them, upon the ground that the indorsations and initialings were given to infer the liability of a security.

The trustee appealed, and argued;—The obligation of the bankrupt and his firm, if there was any obligation, was merely cautionary. They had come under no direct obligation for the price of the goods supplied to Stark, but had merely interponed their credit to enable Stark to get goods. He was not, therefore, liable as principal debtor. Further, he could not be made liable as security, for there was no valid evidence of a cautionary obligation.

Argued for the claimants;—It was proved that Stevenson was Stark's employer. It followed that Stevenson was liable for the price of the goods supplied to Stark. He had also undertaken to see the claimants paid, and this imported a primary liability against him.[1] At all events his liability as cautioner to the extent allowed by the Sheriff was validly proved.

At advising,—

LORD PRESIDENT.—I am unable to take the Sheriff-substitute's view of this case. To my thinking the true question is, were the goods admitted to have been delivered to William Stark so delivered under a contract of sale with the bankrupt; or was the agreement between T. B. Campbell & Sons and the bankrupt merely that he should be cautioner for Stark? On this question I adopt the former alternative, and I am therefore for recalling the Sheriff-substitute's interlocutor and also the deliverance of the trustee, and am for remitting to the trustee to rank T. B. Campbell & Sons for £192, 6s. 7d., being the full amount of their claim, *minus* 6s. for noting a bill.

The question which I have stated is to be determined on the evidence as a whole. The bankrupt was a building speculator. He found Stark in labouring circumstances, with a contract on hand which he had not the means to execute. Thinking there was money in the contract, the bankrupt is said to have "financed" Stark. What this exactly means, so far as concerns the ultimate adjustment of accounts between the bankrupt and Stark, I do not know, for the parties were unable to explain. It is enough to know that the bankrupt had a material interest to get the work finished, and, so far as the present question is concerned, we are required to see what he did, rather than why he did it. Now, his partner says quite plainly, "My firm drew all the advances in connection with the buildings and paid Stark wages and the material in connection with the buildings." If this be so, then the case of T. B. Campbell & Sons is simply an instance of the system, for their account is for material in connection with the buildings. When it is read as a whole, I think that the evidence comes to this, that the execution of the contract was undertaken by the bankrupt, Stark being reduced to the position of a servant on wages, and that this was the footing on which T. B. Campbell & Sons supplied the material in question.

[1] Morrison v. Harkness, Oct. 20, 1870, 9 Macph. 35, 43 Scot. Jur. 19.

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In my judgment the present case is in substance and very nearly exactly that stated by the Court in *Birkmyr* v. *Darnell*,[1] "If two come to a shop, and one buys and the other . . . says, Let him have the goods, I will be your paymaster . . . this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT recalled the interlocutor of the Sheriff-substitute, and remitted to the trustee to rank the claimants for £192, 6s. 7d.

DAVID TURNBULL, W.S.—J. STEWART GELLATLY, S.S.C.—Agents.

SUMMER SESSION.

No. 138.

May 12, 1896. Wilson v. Turnbull & Co.

WILLIAM A. WILSON, Pursuer (Appellant).—*Chisholm.*
JOHN TURNBULL & COMPANY, Defenders (Respondents).—*W. Campbell—Constable.*

Sale—Horse—Warranty—Proof of warranty—Sale of Goods Act, 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 14.—Circumstances in which *held* that an oral statement, by a dealer in horses to a purchaser who said that he wished to buy a horse quiet to ride and drive, that a horse was quiet to ride and drive, did not imply a warranty.

Sale—Horse—Warranty.—The purchaser of a horse the second day after he received it rejected it on the ground that it had been warranted quiet to ride and drive, and that it was disconform to warranty.

It appeared that on the day after it had been put in the purchaser's stable it had been tried in the saddle by the purchaser and had given satisfaction, that on the following day the purchaser drove it in a dogcart along a road new to it, and that on coming near a bridge over a railway it was scared by the steam of a train which it could not see; that it then reared and turned round and refused to proceed.

Opinion, per cur., that even if the warranty were proved the conduct of the horse in the exceptional circumstances in which it was placed did not shew that it was not quiet to drive, and that the purchaser was not entitled to reject it without further trial.

2D DIVISION. Sheriff of Roxburghshire.

WILLIAM A. WILSON, merchant, Newcastle-on-Tyne, raised this action in the Sheriff Court at Selkirk against John Turnbull & Company, job and postmasters, Selkirk, who had a sale of horses in October 1894 at Cooper's Yard, Newcastle-on-Tyne. The summons concluded for payment of £34 as the price of a horse bought by the pursuer from the defenders at Newcastle.

The pursuer averred;—"On 29th October 1894 the pursuer purchased from the defenders a black horse, which John Turnbull, a partner of defenders' firm, warranted to the pursuer sound and quiet to ride and drive. The price was to be made up of the value of a grey horse belonging to the pursuer, and delivered to defenders at the time of sale, and the balance of £14 in cash. The value of the pursuer's grey horse is £20."

The pursuer further averred that on 31st October he tried the horse in harness and found it unsafe to drive, and that thereupon he rejected it as disconform to warranty.

[1] 1 Smith's Leading Cases, 10th ed. 287.

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The defenders denied "that any warranty was asked or given by either party, or that any price or standard of value was put on either horse."

A proof was allowed.*

* The pursuer deponed,—"I saw John Turnbull of defender's firm on Monday morning, the 29th of October. I then told him what sort of horse I required. . . . I said I wished a horse to carry me occasionally, and that my wife could drive,—a thorough quiet, aged horse, but sound. I said I wished it quiet in harness. No one overheard this conversation. I saw Turnbull afterwards on the same day, and then I sent my groom, Turner, to look at defenders' horses. Turnbull said he had a black horse that he thought would suit me. That was after I had described the horse I wished. Turner has been with me about three years. He is an experienced man, and knows a deal about horses. He reported that he thought the horse would be a very suitable one. I asked the horse to be sent along for my inspection to my house at five o'clock that day. Turnbull came a little after that. It was getting dark when he arrived. I went out to the stable to see the black horse. I found it in my stable. . . . Turnbull said it was a horse that had been regularly hunted, and was a great favourite with the gentlemen around, and was thoroughly quiet in both single and double harness. . . . I bought the horse on his statement—on the statement he had made to me that the horse was perfectly sound, and quiet to ride and drive. I would not have bought the horse if he had not made that statement. . . . On the following morning, the 30th October, the horse was tried in the saddle, and he went very well. . . . I tried him in harness on the morning of the 31st of October. He was yoked in a dog-cart. It was not a trial. I used him to take me to the train. I drove the horse myself. The groom was sitting beside me. About 300 yards from my house is a railway bridge. The horse went quite well to within a short distance of the railway bridge. A train was passing, and when he saw the smoke he stopped, and got up on his hind legs. I tried to get him to face the bridge, but found it dangerous. He reared two or three times. I could not get him to go forward, the horse turned from the bridge in spite of me. I said to my man, This horse is no use to me, take him back to the stable. I am sure it was dangerous to drive that horse past there. My man went back for another horse. I consider I gave the horse a fair trial on that occasion. I thought at the time that the horse was not what it had been represented to be as to quietness. . . . Cross-examined.— . . . I relied upon the opinion of Turner about the horse, or I would not have sent him. . . . When the horse was brought, I told Turnbull that unless it was perfectly quiet it was no use to me. I am quite sure I said that. After we had made the bargain, in presence of his groom and my coachman, he said that my wife need have no regret in parting with the grey; that the black horse was just as good in every respect, and was as quiet as a lamb. The words, as quiet as a lamb, I took to be a warranty. He used the same words in my house. I do not think that he tried the grey horse, but I believe it was run up the street. He took my word, and did not ask me for any warranty. . . ."

W. A. Wilson, the pursuer's son, who was on the dog-cart when the horse reared, deponed that there was not much smoke from the train, but a great deal of steam.

John Turnbull deponed,—"I remember pursuer coming to the stables on 27th October. . . . He said he wanted a horse, and described the sort of horse he wanted. He said he wanted a thick-set, old-fashioned made horse, about eight or nine years old. I said I had something to suit him. I shewed him a brown horse, but we did not come to terms about this horse. . . . Next time I saw pursuer was on Monday, the 29th October, in the forenoon. I saw him in the yard. . . . I drew his attention to another horse, the black horse in dispute in this case. I said here was a horse like suiting his purpose, that I had just got in. He saw

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On 14th February 1896 the Sheriff-substitute (Harper) pronounced this interlocutor:—"Finds the pursuer's case depends upon an alleged warranty of the black horse in question: Finds in law the said alleged warranty is not proved: Therefore assoilzies the defenders."

The pursuer appealed to the Court of Session, and argued;—There was evidence of warranty that the horse was quiet to ride and drive. If a purchaser asked for a horse quiet to ride and drive and a seller said, "Here is such an one," that amounted to warranty.[1] It was not necessary to use the word "warranty." It was always a question for a jury or a Judge whether representations came up to warranty, and this was to be inferred from the nature of the sale and the circumstances of the case. Even if there was not express warranty, at least under the Sale of Goods Act, 1893, sec. 14 (1),* there was implied warranty. Even although the horse was sent for inspection, that could not remove the *onus* to the buyer's side, because he could not there and then decide if the horse was quiet. He gave it a fair trial, and the result was to disclose inherent vice.

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him ridden in the yard, and shewed up and down. . . . He said he would send his man to look at it. . . . I bought that horse on the Monday forenoon after breakfast time. I bought it from John Lowther, horsedealer, Carlisle. Lowther said he would sell a horse to me as quiet to ride and drive, and a good hunter. I did not take that as a warranty. . . . Turner put the horse now in question to trials at the stables, in my presence. He seemed pleased with him, and said he would go along and see his master. He returned and said I was to be out at his master's house at five o'clock. I went out at that time to the pursuer's house. Stewart was with me. I drove. The horse went very well. We had some difficulty in finding the house, and in that way we spent some time on the road. The horse gave every satisfaction to me as it went. When we arrived at the pursuer's he was not at home, and we put the horse in the stables. Pursuer came in shortly afterwards. The black horse and the grey horse were both driven out. We then set to bargaining. We came to terms. . . . We went into the pursuer's house. . . . The bargain was completed before we went in. We saw Mrs Wilson in the house. She came out with us, to say good-bye to the grey horse. I did not understand in making the bargain that I was giving the pursuer a warranty with the black horse. Neither the word warranty nor guarantee was used by either of us. I said that the horse was quiet to ride and drive, so far as I knew, and sound. It was after dark when the bargaining was done. I had a conversation with Mrs Wilson, and told her she need not be sorry to part with the grey horse. I might have said the black horse was as quiet as a

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[1] Steel v. Scott, Dec. 9, 1857, 20 D. 253, 30 Scot. Jur. 129.

* The Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), sec. 14, enacts,—"Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) When the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

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Argued for the defenders;—There was a presumption against warranty in (1) the low price of the horse; (2) the absence of evidence of the seller's misrepresentations regarding the nature of the horse; (3) the pursuer sending a man to inspect the horse, and relying on his opinion; and (4) the numerous occasions on which the horse was exhibited and inspected, in none of which the word "warranty" was used. To constitute warranty the representations must be made in such circumstances that the seller should realise that the buyer was looking for warranty, and was relying for this on the seller's words. The words used were only the usual recommendations common to horse-dealers, and did not amount to warranty.[1] No question was asked of the seller to shew him that the sale depended on his answer, and this differentiated the case from *Scott* v. *Steel*.[2] (2) There was no implied warranty under the Sale of Goods Act, 1893, as the pursuer was relying on his own and his groom's inspection. (3) Assuming a warranty, the horse had not had a fair trial, and in the circumstances the behaviour of the horse did not amount to breach of warranty.[3]

LORD JUSTICE-CLERK.—Cases relating to warranty generally present considerable difficulty, for the border line between mere recommendation and warranty is a very hazy one. The authorities to which we have been referred illustrate this difficulty. In this particular case, however, I think there is

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lamb. It is a common expression. I did not say to her that it had been driven by a lady. The recommendations I have mentioned were just general statements made to the pursuer, not in answer to questions put by him. The pursuer did not say that he was relying upon anything I was saying as a warranty. I consider that the transaction being a swop, a warranty was not customary. I did not ask a warranty for his horse, and he did not ask me for one for mine. Pursuer had seen the horse tried, and seemed satisfied. He had also sent his man to try the horse. All the circumstances I have mentioned, to my mind, exclude the idea of the pursuer putting reliance upon what I had said as a warranty. . . . Wilson said he wished the horse quiet to ride and drive. I am quite sure that I had the black horse in Cooper's yard on the Monday forenoon when Mr Wilson came. I pointed out this horse to him. I told him this horse had just come in. Pursuer's groom described the kind of horse his master wanted, quiet to ride and drive, for his master was a big weight. . . . In driving the black horse out to the pursuer's house on the Monday, we did not pass any steam. I was thoroughly pleased with it, and thought he was the quietest horse I had ever seen. I did not give a warranty with the horse. I would scruple to give a warranty with any horse; we never give a warranty with a swop. I would be very much against giving a warranty with any horse. If I was in the habit of warranting horses, I would have had no hesitation in warranting this horse as quiet to ride and drive, after driving it out to pursuer's house. I consider that in offering this horse to the pursuer I was offering him the sort of horse he wished. If a gentleman comes to me and asks for a horse quiet to ride and drive, and I say here is a horse that will suit you, I do not consider that a warranty. I often do that. I did that in this case. . . ."

[1] Robeson v. Waugh, Oct. 30, 1874, 2 R. 63, *per* Lord President Inglis, p. 66; Rose v. Johnston, Feb. 2, 1878, 5 R. 600, *per* Lord Justice-Clerk Moncreiff, p. 603.

[2] 20 D. 253.

[3] Buckingham v. Reeve, Court of Exchequer, Dec. 1, 1857 (not reported), *per* Pollock, C. B., quoted in Oliphant's Law of Horses, p. 122; Thomson v. Miller, March 15, 1859, 21 D. 726, 31 Scot. Jur. 382.

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no evidence sufficient to justify us in finding that a warranty was given. The Sheriff-substitute has gone carefully into the circumstances of the case, and I agree with him in finding that the defenders gave no warranty. It is unnecessary for me to go into all the circumstances which lead me to that conclusion. I think the quotation from the late Lord President's opinion in the case of *Robeson* v. *Waugh*,[1] 2 R. at p. 66, is clearly in point here. I refer to the passage where he says, "It would be absurd to attach any importance to such words, which were merely *verba volantia*." I am therefore satisfied that here there was no warranty.

But apart from that I agree with the Sheriff-substitute that even if there was a warranty there was no sufficient trial. To take a strange horse, in a strange vehicle, in strange hands, and in a strange country, and to drive it to a place where it would suddenly be confronted with the smoke and noise of an unseen train, to which it was not accustomed, was to expose it to a very severe trial. I am not surprised that the horse reared a little and tried to turn back. Even if it had been quite up to the warranty that it was quiet to drive, it would not have been at all remarkable if it had been startled in the circumstances disclosed in the evidence, particularly if it had not been long out and was fresh. The circumstances were the most trying conceivable to the nerves of any horse, and its conduct upon such an occasion might not indicate anything incompatible with perfect quietness in harness. The best of horses may occasionally be taken suddenly by surprise and rear up. I think there is no ground for interfering with the judgment of the Sheriff-substitute.

LORD YOUNG and LORD TRAYNER concurred.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact (1) that on 29th October 1894 the pursuer purchased a black horse from the defenders, which was duly delivered and the price thereof paid to the defenders; (2) that the pursuer on 31st October thereafter rejected said horse as disconform to warranty, which he alleged had been given by the defenders, and that the defenders refused to accept said rejection; (3) that said horse was not warranted by the defenders: Find in law that the pursuer was not entitled to reject said horse: Therefore assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses," &c.

P. MORISON, S.S.C.—CONSTABLE & JOHNSTONE, W.S.—Agents.

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May 12, 1896. Sutherland v. Hutton.

WILLIAM SUTHERLAND, Pursuer (Appellant).—*Lorimer.*
MRS MARIANNE HUTTON, Defender (Respondent).—*Cook.*

Horse—Agreement to winter a horse—Injury to horse—Liability of custodier—Proof—Onus.—A farmer undertook to winter a colt belonging to a postmaster. In the course of the winter the colt was found to have sustained a serious injury to its right eye. The postmaster raised an action of damages against the farmer, averring that the injury to the colt's eye was caused by its being struck in the face by the defender, or some person for whom she was responsible; or otherwise, that the injury was caused through

[1] Robeson v. Waugh, Oct. 30, 1874, 2 R. 63.

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the colt's eye having come in contact with some of the sharp edges of the reed fence in which the colt, with culpable negligence, was enclosed, and pleaded that the injury having been caused by the fault or neglect of the defender, she was liable in damages.

The Court *assoilzied* the defender, on the ground that the pursuer had failed to prove that the accident to the colt had been caused by the fault of the defender.

Opinion (*per* Lord Young) that the custodier of an animal in such circumstances is only liable for an accident to it if fault is proved against him.

2D DIVISION.
Sheriff of Fife and Kinross.

WILLIAM SUTHERLAND, postmaster, Cupar, raised this action in the Sheriff Court at Cupar against Mrs Marianne Hutton, tenant of Cults Farm, Fifeshire, for payment of £40 as damages for injury sustained by a colt belonging to the pursuer, which the defender had agreed to winter from 1st November 1894 to 31st March 1895, for £3.

The pursuer's averments included the following statements:—(Cond. 4) "It was an inherent or implied part of said bargain, and it is the practice in the county of Fife in such bargains, that the party receiving a colt in terms of such a bargain is bound to see to it that the colt is well cared for and treated, and well and safely housed, and placed in no dangerous or injurious proximity, or with any such surroundings, that it comes by no harm or injury, and that at the end of the wintering period arranged for it is equal in health and condition to the state in which it was when first left on the farm, or that the person receiving the colt and taking it in charge is responsible to the owner of it for the loss and damage the owner may sustain if the colt be not at the end of the period of wintering in similar health and condition to that in which it was when taken in hand at the beginning of the period."

On 14th January 1895 a messenger from Cults informed the pursuer that the colt had received an injury to its right eye. On that day he visited the colt, and finding the injury serious, he employed a veterinary surgeon to treat it, but without effect, and the colt ultimately became blind in that eye.

(Cond. 9) "The injury to said colt's eye was caused either through its being struck on the face by defender, or a person or persons for whom she is responsible, with a ragged or a sharp-pointed stick, or a hayfork, or a stone or a graip; or otherwise, the injury was caused through the colt's eye having come in contact with some of the sharp edges of the reed fence in which the colt was, with culpable negligence, enclosed. On pursuer calling on defender's manager to explain how the colt received the injury he professed his inability to do so, although he was bound to have been in a position to give the required information. Defender's counter averments are denied."

The defender averred that her son Alexander Hutton, who managed her farm, discovered the injury to the colt on the evening of 13th January, and on the earliest possible opportunity next morning sent word to the pursuer. She admitted her inability to explain the cause of the accident, explained that in her view the injury was the result of pure accident, and denied the pursuer's statements of the manner in which the injury was inflicted, and of the practice in Fifeshire in such bargains. She stated that it "was a distinctly expressed condition of the arrangement that the animal, during its stay at Cults Farm, was to be at the risk of the owner, and that if an accident occurred to it the defender was at once to inform the pursuer thereof."

The pursuer pleaded;—(1) Said colt having been injured while in

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defender's custody, and by the fault or neglect of the defender, as stated, she is liable to pursuer in the loss and damage thereby sustained. (2) Defender having through fault or neglect failed to restore the said colt to pursuer at 31st March 1895 in sound and good condition, and pursuer having thereby sustained loss and damage to the extent of £40, defender is liable to pursuer in that sum. (3) Said colt having suffered damage through the failure or neglect of defender to observe and fulfil the conditions of pursuer's said bargain, and pursuer having thereby suffered loss and damage to the extent of £40, defender is liable to pursuer in that sum, and in any event the injury to the colt having been aggravated by defender's neglect thereof, defender is liable to pursuer in reparation therefor. (4) Pursuer having sustained damage through the fault or neglect of the defender, is entitled to reparation as craved.

The defender pleaded;—(1) The colt in question not having sustained injury through the fault or negligence of the defender, or of those for whom she is responsible, the defender is not liable in damages to the pursuer. (2) The defender having bestowed all reasonable care and attention on the colt while in her custody, is not liable for the consequences of an accident, against which no amount of forethought or care could provide. (3) It being an express or implied condition of the bargain between the parties that the animal while it remained in the defender's custody was at the pursuer's risk, the defender is entitled to be assoilzied.

After a proof, the Sheriff-substitute (Henderson) found, *inter alia*, that it was one of the conditions of the bargain that the colt was to stand at the owner's risk; that the cause of the injury could not be ascertained; and that the injury was one of the risks which the pursuer undertook; and assoilzied the defender.*

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* "NOTE.—If this case had to be decided apart from the conditions under which the bargain was made—which it is however proper to remark appear to be the usual conditions in Fife, and even elsewhere—I am inclined to think that the result would be very different.

"The whole tendency of the law of Scotland with regard to injuries suffered by horses, whether hired, lent, or grazed out, seems to me to make the hirer, borrower, or custodier liable for any injuries which the animal may receive while under his control, unless he can prove that the injury suffered was not owing to any fault in himself, his servants, or anything for which he is responsible. He must prove that he has exercised that reasonable care with reference to the animal entrusted to him which a prudent man would take of his own property. While fully recognising this as the regular rule of law in such circumstances, I feel that in this case, and indeed in all similar cases in Fife, unless the owner makes a separate bargain for himself, the custodier of a wintering colt is understood not to be under that rule. The only obligation he seems to be under is to intimate the occurrence of an accident to the owner as soon as he knows of it himself. Whether this practice has arisen from the infrequency of accidents, or on account of the wretchedly low sum paid for wintering, it is useless to inquire. The practice has been proved to exist, and even if it did not exist as the rule in Fife, it was expressly made a part of the bargain in this case. . . .

"On the general rule of law, apart from special bargain, a very interesting argument was adduced to me, and the following authorities were cited, and have been carefully considered :—

"For Pursuer— ——— v. *Davidson*, June 2, 1749, M. 10,081; *Robertson* v. *Ogle*, June 23, 1809, F. C., No. 120; *Marquis* v. *Ritchie*, June 11,

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The pursuer appealed, and argued;—The horse being uninjured when placed in the defender's custody, and injured when returned, *fault* was to be presumed, and it lay on the defender to prove that there was no fault on her part.[1] The pursuer averred fault, but he did not require to prove it, for his case rested on fault presumed, not on fault proved. The Sheriff-substitute was wrong in not applying the law which he correctly stated. He took the case out of the common law by holding that a special contract was made. But this special contract did not relieve the defender of responsibility for injury caused by her fault.

Counsel for the defender was not called upon.

LORD JUSTICE-CLERK.—This case in certain aspects might have raised considerable difficulty, especially in view of certain observations on the law occurring in decided cases. But in the view which I take it is not necessary to consider these questions. The pursuer in his averments and the pleas which he has based on these averments, asserts that in point of fact the defender was in fault. I have considered the evidence and the arguments which have been presented to us upon that evidence, and I find that the facts as proved do not establish any fault on the part of the defender, and therefore that no facts are proved to support the pleas upon which the pursuer's case is based. These pleas cannot therefore be upheld. On the case I am of opinion that the judgment of the Sheriff-substitute is right, and ought to be affirmed.

LORD YOUNG.—I am of the same opinion. But I would be prepared to go a step further. I think that not only was this action laid upon fault, but it does not occur to me that it could have been laid upon anything else. If we look at the ninth condescendence we find that it sets forth the grounds of the pursuer's case.—(His Lordship read the article). I should have thought that the colt's eye was hurt by coming in contact with a projection or nail in the fence, a chance to which all cattle in a field are exposed, though the chances are very considerably in favour of their not hurting themselves in that way. I think the probability is that the animal's eye was hurt in the second of the ways indicated in the article of the condescendence which I have read. If it had been proved that the reed was enclosed in a dangerous manner, in a way in which no person who engages to take care of other people's cattle was entitled to have it enclosed, the only question would have been whether such a case was supported by the evidence. It is admitted, and very properly admitted by Mr Lorimer, for the pursuer, that there is no evidence of anyone having struck the colt, or of its having been injured owing to the dangerous state in which the fence was left. So it came to this, that the pursuer said,—"I don't know how this injury happened, but by law the person who

1823, 2 Sh. p. 386; *Pyper* v. *Thomson*, Feb. 4, 1843, 5 D. 498; *Smith* v. *Melvin*, Dec. 9, 1845, 8 D. 264; *Pullars* v. *Walker*, July 13, 1858, 20 D. 1238; *Wilson* v. *Orr*, Nov. 22, 1879, 7 R. 266; *M'Laren* v. *Warnock*, June 28, 1883, 10 R. 1052, Bell's Com. i. 488.

"For Defender—*Bain* v. *Strang*, Dec. 6, 1888, 16 R. 186; *Tavendale* v. *Gray*, Feb. 16, 1875, 1 Guthrie's Select Cases, 494."

[1] Wilson v. Orr, Nov. 22, 1879, 7 R. 266.

No. 139. takes charge of an animal under such circumstances is liable, unless he can shew that it was not his fault." I am quite prepared to negative that, and to say that that is not the law of Scotland, but that the law is that the risk of accident is not with the custodier but with the owner. The custodier is liable for neglect or any actionable fault, but not for accident without fault. I think that that was what happened here. There was an accident which happened without anyone being to blame for it. That was just a risk—an infinitesimal risk—to which the colt was exposed. I think it will be sufficient in pronouncing our interlocutor to negative the statements of fact on which the pursuer's case rests, to find that in fact there was no fault, and that in point of law there was consequently no liability.

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LORD TRAYNER concurred.

THE COURT pronounced this interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact that the pursuer has failed to prove that the accident to the colt in question belonging to the pursuer was caused through the fault or negligence of the defender: Find in law that the defender is not liable in damages to the pursuer: Therefore assoilzie her from the conclusions of the summons, and decern."

WILLAM BLACK, S.S.C.—GEORGE INGLIS & ORR, S.S.C.—Agents.

No. 140. MRS ELLEN MILLWARD OR FARNHAM, Pursuer (Appellant).—*T. B. Morison.*
THE NEW BANK COAL COMPANY, LIMITED, Defenders (Respondents).—*W. Campbell—Younger.*

May 12, 1896. Farnham v. New Bank Coal Co., Limited.

Reparation—Master and Servant—Coal Mine—Person in superintendence—Engineman—Employers Liability Act, 1880 (43 *and* 44 *Vict. cap.* 42), *section* 1, *subsection* 2—*Fault in failing to light pit.*—A brought an action of damages against a coal company on account of the death of her son, who had been employed in one of the defenders' pits, and had met his death by falling down the shaft. She claimed damages (1) under the Employers Liability Act, 1880, on the ground that the accident was due to the fault of the engineman in hoisting the cage from the midworking, where the pursuer's son was employed, before the indicator shewed that the gate at the entrance to the shaft was closed; and (2) at common law on the ground that the accident had been caused by the defenders' failure properly to light the pit-bottom.

Held (1) that the engineman was not a person having superintendence entrusted to him in the sense of subsection 2 of section 1 of the Employers Liability Act, and that the action was therefore irrelevant under the statute but (2) that there was a case for trial at common law in regard to the alleged failure of the defenders properly to light the pit-bottom.

1ST DIVISION. Sheriff of Ayrshire.

MRS ELLEN MILLWARD OR FARNHAM, residing at Galston, brought an action of damages in the Sheriff Court at Kilmarnock against the New Bank Coal Company on account of the death of her son, William Millward, who had been employed as a driver and bottomer in a midworking of one of the defenders' pits, and had met his death by falling down the shaft.

The pursuer averred;—(Cond. 3) "The duty of the said William

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John Millward was to run the hutches, which the other two men filled, from their working place to the shaft, a distance of about 200 yards. He had also to remove the empty hutch from the cage, draw it into a short lye, and push the full hutch on the cage. He then required to lower a bar across the entrance to the shaft, and signal to the engineman to draw the cage with the full hutch to the pit-head." (Cond. 4) "The shaft of the pit is protected by two bars across the entrance, one at a distance of about two feet and the other at a distance of four feet from the ground." (Cond. 5) "When these bars are raised in order to allow a hutch to be placed on or taken from the cage, the shaft remains open. This is shewn at the pithead by an indicator, and it is provided by rule 2 of the additional special rules for East and West of Scotland mining districts, 'the engineman is prohibited from moving the cage from said midworking until the indicator shews that the gate is closed.'" (Cond. 6) "Prior to and at the date of the accident after mentioned, the defenders were in fault in not having a light at the pit-bottom where the said William John Millward was working, as, in the absence of a light, the open shaft was a source of constant danger to the workmen in the pit. . . . Since the date of said accident a light has been provided for said pit-bottom." (Cond. 7) "In the course of his employment during the night of said 17th December 1894, the said William John Millward took from the cage an empty hutch which had been sent down from the pithead and pulled or pushed it into said lye. Immediately afterwards he pushed forward a full hutch, which he had a short time previously brought from the working place of the said . . . During the short interval which had elapsed between his taking off the empty hutch and pushing forward the full one, the engineman, ——— Martin, carelessly, negligently, and in breach of the foresaid regulation, removed the cage upwards towards the pithead, the result being that the said William John Millward was precipitated down the shaft along with the full hutch which he had just been engaged pushing along towards the cage, and was instantaneously killed." (Cond. 8) "The said accident was due to the engineman having raised the cage to the pithead in contravention of the foresaid rule. The said engineman is a person in the service of the defenders having superintendence entrusted to him, and the accident referred to happened whilst he was in the exercise of such superintendence, and was caused by his negligence." (Cond. 9) "Said accident was also caused by the fault of the defenders and their manager in failing to place a light near the part of the shaft at which the deceased was working. This was, on the part of the defenders and their said manager, neglect of a precaution which was indispensable to the safety of the deceased and the defenders' other employees; and the said open shaft did, in the darkness, form a trap which, even with the exercise of more than ordinary care, would not have been avoided by the deceased. . . ."

The defenders denied that the engineman was a person to whom superintendence was entrusted, or that they were in fault in not having lights at the places mentioned by the pursuer.

On 12th February 1896 the Sheriff-substitute (Hall) allowed a proof.

The pursuer appealed for jury trial.

The defenders objected to the relevancy, and argued;—(1) An engineman was employed wholly in manual labour, and was not a person to whom superintendence was entrusted in the sense of the

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Employers Liability Act.[1] The case of persons in charge of engines was not overlooked by the Legislature in framing the Act, for it contained a special clause dealing with those in charge of locomotive engines.[2] (2) There was no case at common law, for it was the negligence of the engineman, and not the absence of light, which was put forward as the primary or real cause of the accident.[3] Employers were under no obligation to take special precautions to obviate the possible results of breaches of duty on the part of their servants. Further, miners were not in the habit of trusting to fixed lights, but to the lamps which they carried with them. There were no provisions in the Coal Mines Regulation Act[4] making lighting obligatory.

Argued for the pursuer;—(1) The defenders were liable under the Employers Liability Act for the fault of the engineman, who was a person having superintendence entrusted to him in the sense of the Act.[5] (2) The averments as to the failure of the defenders properly to light the pit were sufficient to support the action at common law.

LORD PRESIDENT.—I think the pursuer has no case under the Employers Liability Act, but condescendence 9 makes statements as to the light which seem to me to make it impossible to preclude inquiry, and the inquiry must be in the ordinary form of trial before a jury.

I observe that the issue does not specify the alternative sum claimed under the Act, and therefore in approving the issue we are really determining that the case is one solely on the question of light.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT approved the issue proposed.

MACPHERSON & MACKAY, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

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May 13, 1896. Alexander v. Alexander.

MRS ELIZABETH ALEXANDER, Pursuer (Reclaimer).—*Comrie Thomson—M'Lennan.*

JOHN ALEXANDER, Defender (Respondent).—*W. Campbell—Clyne.*

SAMUEL ELLIOT, Defender (Respondent).—*Jameson—Watt.*

Contract—Construction—Specialia derogant generalibus—Sale of medical practice, including book debts.—A firm of medical practitioners was dissolved by the death of one of the partners on 15th April 1894. On 21st July 1894 his widow and executrix agreed to sell to the assistant of the late firm "the deceased's whole right and interest in the practice carried on" by the firm, "consisting of (first) the deceased's share, right, and interest in the horses, harness, machines, and others"; (second) his share in the medical and surgical instruments and books; and (third) "the deceased's share, right, and interest in the book debts, including the goodwill of the business belonging to the firm," for £485, the purchaser undertaking to free and relieve the seller and the representatives of the deceased "of all debts and obligations due by the said firm . . . in any manner of way whatsoever."

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[1] 43 and 44 Vict. cap. 42, section 1, subsection 1; Moore v. Ross, May 24, 1890, 17 R. 796.

[2] Section 1, subsection 5.

[3] Robertson v. Linlithgow Oil Co., Limited, July 18, 1891, 18 R. 1221.

[4] 50 and 51 Vict. cap. 58.

[5] Morgan v. London General Omnibus Co., 1884, L. R., 13 Q. B. D. 832.

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2D DIVISION. Ld. Kyllachy.

Held that the sale embraced the deceased's whole interest in the assets of the firm, including not merely the book debts outstanding at the date of the agreement, but all fees received by the firm since the last division of profits on 31st January 1894.

THE late Alexander Alexander, M.B., C.M., Pulteneytown, Wick, carried on a medical practice in Wick in partnership with his brother, John Alexander, M.D., Wick, and Samuel Elliot, M.D., was their assistant. Dr Alexander Alexander died on 15th April 1894, and his widow, Mrs Elizabeth Alexander, was decerned his executrix-dative.

By minute of agreement, dated 21st and 26th July 1894, between Mrs Alexander, executrix-dative of her husband, and Dr Elliot, the former sold to the latter "the deceased's whole right and interest in the practice carried on by the said firm of J. & A. Alexander, and now belonging to the first party as his executrix-dative *qua* relict, consisting of (first) the deceased's share, right, and interest in the horses, harness, machines, and others belonging to the said firm of J. & A. Alexander; (second) the deceased's share, right, and interest in the medical and surgical instruments and medical books belonging to the said firm; (third) the deceased's share, right, and interest in the book debts, including the goodwill of the business belonging to the said firm," all in consideration of the sum of £485, Dr Elliot undertaking to free and relieve Mrs Alexander and the representatives of the deceased of all debts and obligations due by the firm of J. & A. Alexander in any matter of way whatsoever.

In January 1895 Mrs Alexander, as executrix of her late husband, raised this action against Dr John Alexander for count and reckoning as to the profits of the late firm due to the pursuer for the period between 31st January 1894, the date of the last division of profits, and the date of her husband's death, and for payment.

The pursuer averred that between the 31st January 1894 and the 15th April there were banked sums of money collected by the partners of the firm from patients and others, and that between 15th April and 21st July there were collected by the defender Alexander sums in respect of business done by the firm prior to her husband's death, although not paid for until after that event. She averred that the nett profits amounted to £371, 18s. 4d., of which the half was the share of her late husband.

With regard to the agreement the pursuer averred;—"In respect of said agreement the pursuer lays no claim in the present action to any sum in consideration of the deceased's interests disposed of to Dr Elliot under the said agreement, and limits her claims to the deceased's share of the partnership funds actually recovered and *in bonis* of the firm prior to the date of the said agreement."

The defender Alexander pleaded;—(1) No title to sue; (2) All parties not called.

Dr Elliot was thereafter allowed to sist himself as defender, and lodged defences. He pleaded;—(2) No title to sue.

On 26th February 1896 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Sustains the first plea in law for the defender Dr Alexander, and the second plea in law for the defender Dr Elliot, and therefore assoilzies the defenders from the conclusions of the action, and decerns." *

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* "OPINION.— . . . The pursuer concludes as executrix of her husband for an accounting for the profits of the firm or copartnery effeiring to

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The pursuer reclaimed, and argued;—The pursuer was entitled to the deceased's share of the profits from 31st January to 15th April 1894 in so far as ingathered before 21st July 1894. The agreement only applied to debts outstanding at its date, and not to sums already *in bonis* of the firm. Ingathered money was not a "book debt." After 15th April the firm still existed for winding up, and sums in the defender Alexander's possession belonged to the firm, and were debts due by him to it. A balance in bank was not a book debt.[1] A book debt was a debt on current account.[2] Book debts were particularly specified as assigned to Dr Elliot, and excluded collected money under the maxims *specialia derogant generalibus* and *enumeratio unius est exclusio alterius*.[3] This was not a *mortis causa* transaction, but one *inter vivos*, and the passage in M'Laren on Wills[4] relied on by the defenders did not apply.

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the period between 31st January 1894, when there was a division of the profits between the two brothers, and the 15th of April 1894, when the firm was dissolved by the death of the pursuer's husband. The defence is, or rather one defence is, that the pursuer has no title to sue, in respect that the whole interest of the deceased in the assets of the firm was assigned by the pursuer, by a certain agreement of 21st July 1894, to the defender Dr Elliot.

"Now, that being so, the question I have to decide is a question upon the construction of that agreement. It is on the one hand maintained that the agreement dealt merely with certain corporeal moveables belonging to the firm, with the goodwill of the firm, and with certain book debts which were outstanding at the date of the agreement of July 1894. The other view, the view of the defenders, is that the agreement covered the whole assets of the firm, and that in particular it covered all book debts, whether collected or uncollected, which had been outstanding at the date of the deceased's death, and whether these book debts had been incurred prior to 31st January 1894, the date of the last division of profits, or between that date and 15th April 1894, when, as I have said, the partnership was dissolved. It appears that between January 1894 and the date of dissolution a number of book debts,—that is to say, fees due by patients,—were ingathered and put in bank; and it also appears that certain further collections were made by the surviving partner between the date of dissolution and the date of the agreement of July. And the point really in controversy is, how far the book debts thus collected and placed in bank are to be dealt with as within the agreement. Now, I have had a good deal of difficulty about that matter. The agreement, I must say, does not seem to me to be very well expressed,—it is, indeed, very loosely expressed; but after full consideration I have not seen my way to hold otherwise than that the agreement covers the whole assets of the firm, including the whole book debts, whether collected or uncollected, whether they remain payable by customers or have been paid by them and lodged in bank. Of course so far as they were in that position they were not book debts in the popular sense, but debts due by the firm's bankers to the partners. Still I think they must be held to have been book debts in the sense of the agreement."

[1] *In re* Stevens, Stevens v. Kelly, May 2, 1888, W. N., pp. 110, 116; Official Receiver v. Tailby, Nov. 20, 1886, L. R., 18 Q. B. D., 25, *per* Lord Esher, M. R., p. 29.

[2] Bell's Com. i. 347 (M'Laren's Edition).

[3] Trayner's Latin Maxims, 182, 230; Earl of Kintore v. Lord Inverury, April 16, 1863, 4 Macq. 520, *per* Lord Westbury, p. 522; Erskine's Institutes, iii. 4, 9.

[4] M'Laren, Wills and Succession, p. 623.

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May 13, 1896.
Alexander v. Alexander.

Argued for the defender Elliot;—This was a question of construction, and the intention of the agreement clearly was to transfer to him the deceased's whole interest in the firm and all his claims against it. On the defender's part he agreed in lieu of this to take over all the deceased's liabilities. The specification in the agreement did not exclude the generality.[1] The various things mentioned were only illustrations.[2] In this view book debts included not only those still outstanding but those already collected. If less had been intended it should have been expressed.

Counsel for the defender Alexander adopted the argument for the defender Elliot.

LORD JUSTICE-CLERK.—There can be no doubt that this agreement was not very fortunately expressed, but I think it was plainly the intention of the parties to make a complete settlement between this lady and Dr Elliot. No doubt if we were to put a very strict and technical meaning on the expression book debts, the proceeds of debts which had been collected would not fall under that expression, but I have come to be of opinion with the Lord Ordinary that we must read the term book debts in the sense of the agreement, and that the intention of the agreement was that all the moneys due to the firm should be collected by the defender and retained for his own use, he undertaking all responsibility for the firm's liabilities.

LORD YOUNG.—I am of the same opinion, and have practically nothing to add. I think that the meaning of the parties to this agreement was that the executrix was to transfer the whole of the deceased's interest in the undistributed fees of patients. She gave up all right to claim as representing the deceased, and she was relieved from all liability as representing him. I concur with the Lord Ordinary, and think that his interlocutor should be affirmed.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT adhered.

ALEX. MUSTARD, S.S.C.—A. & S. F. SUTHERLAND, S.S.C.—THOMAS LIDDLE, S.S.C.—Agents.

No. 142.

May 14, 1896.
Henderson's Trustees v. Dunfermline District Committee of Fife County Council.

THE HON. HEW H. H. D. MERCER HENDERSON AND OTHERS (Mercer Henderson's Trustees), Pursuers (Respondents).—*W. Campbell.*
THE DUNFERMLINE DISTRICT COMMITTEE OF THE FIFE COUNTY COUNCIL, Defenders (Appellants).—*C. J. Guthrie—Chisholm.*

Road—Power of road trustees to use steam crushing machine in quarry—General Turnpike Act, 1831 (1 *and* 2 *William IV. cap.* 43), *sec.* 80—*Roads and Bridges (Scotland) Act*, 1878 (41 *and* 42 *Vict. cap.* 51), *Schedule C.*—*Held* that the power given to road trustees by the General Turnpike Act, 1831, section 80, "to search for, dig, and carry away materials for making or repairing roads" out of the enclosed land of any person does not entitle them to bring upon the ground machinery for crushing stones into road metal.

[1] M'Laren, Wills and Succession, p. 623.
[2] Dean v. Gibson, Feb. 26, 1867, L. R, 3 Eq. 713.

No. 142.

May 14, 1896. Henderson's Trustees v. Dunfermline District Committee of Fife County Council.

1st Division. Sheriff of Fifeshire.

THIS was an action at the instance of the testamentary trustees of the deceased George W. Mercer Henderson, of Fordel, as proprietors of the estate of Fordel, upon which Pitadro Quarry was situate, against the Dunfermline District Committee of the Fife County Council, who in terms of the Local Government Act, 1889, acted as road trustees within their district. The pursuers craved the Court to interdict the defenders "from introducing a stone-breaking machine with steam traction engine, or any other machinery for the purpose of breaking stones which have been taken from" Pitadro Quarry, "and from making into road metal by said stone-breaking machinery in said quarry the stones quarried therefrom."

The pursuers averred:—(Cond. 3) "The defenders and their predecessors have for a considerable number of years quarried stones from said Pitadro Quarry for the purpose of providing metal for the roads under their charge. Recently they have adopted a novel method of dealing with the stones which are quarried from said Pitadro Quarry. Instead of merely searching for, digging, and carrying away materials for making or repairing roads, footpaths, &c., the defenders have, notwithstanding the remonstrances of the pursuers, persisted in introducing from time to time into said quarry a stone-breaking machine and steam traction engine, the stone-breaking machine being driven by the said traction engine, and the stones quarried by the defenders are broken into road metal by the said stone-breaking machinery within said quarry. In particular, this has been done, in spite of the pursuers' remonstrances, so recently as November 1895. Said quarry is situated within the policy wall of the estate of Fordel, and the defenders' operations, as condescended on, are detrimental to the interests of the pursuers as proprietors of said estate."

The defenders stated:—"(1) The defenders and their predecessors have for a period exceeding forty years quarried stones from Pitadro Quarry under the powers conferred on them by the General Turnpike Act (1 and 2 Will IV. cap. 43), and the Roads and Bridges (Scotland) Act, 1878.* (3) For a good many years after the quarry was opened

* By section 80 of the General Turnpike Act (1 and 2 William IV. cap. 43), which is incorporated with the Roads and Bridges (Scotland) Act, 1878, schedule C, it is enacted—"That it shall be lawful for the trustees of any turnpike road, or any person authorised by them, to search for, dig, and carry away materials for making or repairing such road, and the footpaths thereof, or building, making, or repairing any toll-house, bridge, or any other work connected with such road, from any common land, open uncultivated land or waste, or to deposit mud or rubbish thereon, without paying any surface damages or anything for such materials, except for stone to be used for building, and to carry the same through the ground of any person; . . . and also that it shall be lawful for such trustees, and other persons authorised by them as aforesaid, to search for, dig, and carry away any such materials in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building and for surface damage done to the land from whence such materials

the rock or stone was broken only by hammers used with the hand, but in the year 1881 the defenders introduced a stone-breaking machine into the quarry in question. It was used during the stone-breaking seasons 1881-2 and 1882-3. The machine then in use was found not to be adapted to the work, and was discontinued. A new machine was introduced in August 1893, and has wrought in the quarry during the last three seasons. The average time during which the working has gone on has been ten days during each season. The only difference between the former practice and the later is that in the one case the breaking was by hand, and in the other by a machine. The machine causes no damage whatever to the property of the pursuers, and no damage is alleged to have occurred through the use of the machine."

The defenders pleaded;—(1) The proceedings of the defenders as regards the acts complained of being warranted by the statutes founded on, interdict should be refused.

On 13th February 1896 the Sheriff-substitute (Gillespie) repelled the defences, and granted interdict in the terms craved.*

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shall be dug and carried away or over, or on which the same shall be carried or landed, as such trustees shall judge reasonable," or, in case of difference between them and the proprietor, as the Sheriff or Justices of the Peace for the shire shall determine.

* "NOTE.—The Sheriff-substitute, though with much hesitation, concurs in the decision of the Sheriff Court of Perthshire, referred to at the debate—*Whitson* v. *Road Trustees of the County of Perth*, 1887, 24 S. L. R., p. 42.

"The road authorities are empowered by section 80 of the General Turnpike Act, incorporated in the Roads and Bridges (Scotland) Act, 1878, 'to search for, dig, and carry away materials' for certain purposes. In the words of Sheriff Gloag, now Lord Kincairney,—'That is what the trustees are empowered to do, and that only, and it may be conceded for the purposes of this case that they are entitled to do all acts and to use all appliances and novel inventions which may be of use to them in searching for materials, digging them, and carrying them away, and which may enable them to take the materials and remove them in a convenient and economical fashion; but the point of this case seems to me to lie here, that it cannot be affirmed that a stone-breaking machine is brought into the quarry for the purpose of either searching for, digging, or carrying away materials, or of aiding in any way these operations. Its use is utterly foreign to any of them. The defenders do not allege that they used or wished to use a stone-breaker for any of these purposes, and yet it does not appear that they have power to enter on or occupy the quarry for any other purposes whatever. They are not empowered to store their materials in the quarry, although it may be that a limited power of storage might be allowed as incident to their other powers. Neither are they empowered to prepare materials. They are only empowered to take them away, and to be on the private property of pursuer only for such limited period as may enable them to make their statutory powers effectual with reasonable despatch. They are no more than trespassers when they occupy the quarry for any other purpose.' These sentences express the Sheriff-substitute's view better than he could have done himself, and it may be hazardous to add to them. He thinks it, however, respectful to the very able argument for the defenders to make a few remarks with special reference thereto.

"1. If it had been intended to confer the power of preparing materials on the ground, nothing would have been easier than to confer it in express terms. The statute is a copious one, in which words are not stinted, and the

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The defenders appealed to the First Division.
Counsel for the pursuers were not called upon.

LORD PRESIDENT.—Under the General Turnpike Act, road trustees have a right "to search for, dig, and carry away materials for making or repairing" a road. That is a somewhat serious interference with private rights, such as could be licensed only by statute, and in considering the statute we must have regard to that fact. All that the road trustees are authorised to do is to search for and carry away materials for repairing the roads. What is now complained of is that they did not forthwith carry away the materials, but manufactured them by means of a stone-breaking machine in preparation for use on the roads. Now, it seems to me that to do this is simply to add to the statutory burden upon the adjacent proprietor, and to impose upon him a new and unauthorised burden. Instead of forthwith carrying away the materials, the road authority encamp upon the pursuers' grounds in the quarry, and there prepare the stuff for its ultimate use.

I do not think that there is anything in the word "materials," for I think it is used in the sense of raw material, and it is a complete satis-

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addition of a single word would have sufficed,—'search for, dig, prepare, and carry away.'

"2. The question was pressed, what possible object the Legislature could have had in withholding a power to use private land for the purpose of preparing materials. If it is clearly not given, the pursuers are not bound to find a reason. But it may quite well be that the framers of the Act thought that what would virtually be a power of occupation of the land might lead to interference with proprietary rights more burdensome than was consistent with a gratuitous privilege.

"3. It is too much to say that the construction maintained by the pursuers renders the powers conferred abortive. It is well known that until recently stones were usually broken into road metal not in the place from which they were taken, but at the side of the roads.

"4. It was properly admitted that if the pursuer's construction is sound, it involves that the occupation of private ground for breaking of stones into road metal, whether by machinery or by manual labour, is outside the powers conferred by the statute. But there is no inconsistency in their seeking interdict only against the use of a steam-breaker. Because a person does not stand on his extreme rights, and does not object to a comparatively innocuous excess of power, he is not thereby debarred from complaining of what he considers a burdensome nuisance.

"5. It is perhaps worth while to repeat again that the question is not one of new methods as against old methods, but of purposes,—whether are they authorised or unauthorised? A proprietor might not be able to object to the use of a 'steam navvy,' because that is for the purpose of digging, which is authorised. He might be able, if he thought it worth while, and if the Court did not apply the maxim *de minimis non curat prætor*, to prevent the respectable old man, over whom the defenders' agent was humorous, breaking stones into metal in his lands, because that is not one of the authorised purposes. An enabling statute frequently involves some anomalies, especially when it comes to be applied to a state of matters unknown at its date.

"6. The defenders' agent ingeniously founded on the use of the word 'materials' in the following section, to shew that the framers of the Act meant prepared as well as raw materials. But it is often found that a word

faction of the powers given by the statute to hold that, having sought for and found the materials in such form that they can be carried away, the road trustees shall carry them away and the proprietor be relieved of their presence.

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Upon these grounds, which are very well stated in the Sheriff-substitute's note, I am for affirming the interlocutor appealed against.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT refused the appeal.

DAVIDSON & SYME, W.S.—WALLACE & BEGG, W.S.—Agents.

SAMUEL MILLIGAN, Appellant.—*A. J. Young.*
ALEXANDER COWAN, Respondent.

No. 143.

May 16, 1896.

Milligan v. Cowan.

Revenue—Excise—Licence to carry armorial bearings—Customs and Inland Revenue Duties Act, 1869 (32 *and* 33 *Vict. cap.* 14), *sec.* 19, *subsec.* 13.—*Held* that a device upon a ring consisting of a shield charged with a crowned lion rampant was an armorial bearing in the sense of subsec. 13 of sec. 19 of the Customs and Inland Revenue Duties Act, 1869.

1ST DIVISION. Exchequer Cause.

SAMUEL MILLIGAN, an officer of the Inland Revenue at Inverness, brought a complaint against Alexander Cowan, wine and spirit-merchant, Inverness, charging him with having contravened the 27th section * of the Act 32 and 33 Vict. cap. 14, by having worn armorial bearings on a ring without having a proper licence under the Act, whereby he was liable to a penalty of £20.

On 3d February 1896 the Justices of the Peace for the county of Inverness, at Petty Sessions, assoilzied the respondent from the complaint.

Milligan appealed to the next General Quarter Sessions, at which the

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left undefined in a statute is not used precisely in the same sense wherever it occurs.

"7. The defenders' agent skilfully put questions, such as whether it would be within the powers of the defenders to break up a big stone in the quarry into manageable pieces in order to carry them away, and if so, why should they not be allowed to break up these pieces into smaller fragments, and so ultimately into road metal? The answer is, that the road authorities are entitled to perform any acts which are fairly incidental to the powers conferred in the statute, and no others. It is but a slender argument against the soundness of a particular construction of a statute that it may give rise to difficult questions. In every enabling statute the line must be drawn somewhere, and wherever the line is drawn there will always be cases in which it is difficult to say on which side of the line they lie. The Courts must deal reasonably with each case as it arises. In this case, if the principle maintained by the pursuers is sound, there is no difficulty in its application.

"8. It is for the Legislature, and not for the Court, to consider whether it would be expedient to confer upon road authorities the power of using lands for preparing materials, and if so, with what limitations and conditions as to compensation or otherwise."

* The Act 32 and 33 Vict. cap. 14, sec. 27, enacts that any person wearing or using armorial bearings "without having a proper licence under this Act . . . shall forfeit the penalty of £20 over and above any other penalty to which such person may be liable. . . ."

No. 143. May 16, 1896. Milligan v. Cowan.

Justices resolved, before pronouncing judgment, to state a case for the opinion and direction of the Court of Exchequer in terms of section 84 of 7 and 8 Geo. IV. cap. 53.

The facts stated were these:—"On 6th December 1895, at Union Street aforesaid, the respondent wore and used a signet ring on which there was a shield charged with a lion rampant, surmounted by a crown or coronet or other ensign. At the base or bottom of the shield there was a bar or other cutting. There was no wreath. An enlarged sketch of the device on the ring is herewith submitted. The respondent had not an Excise licence in force authorising him to wear or use armorial bearings."

The questions put to the Court were:—"(1) Whether the device on the ring is an armorial bearing, crest, or ensign, within the definition of 'armorial bearings' contained in subsection 13 of section 19 of 32 and 33 Vict. cap. 14?* (2) Whether, upon the facts stated, the respondent contravened the statute, and is liable as charged in the complaint?"

Argued for the appellant;—A device borne on a shield was an armorial bearing. The device in the present case was a well-known heraldic device, although that was not necessary to satisfy the definition of armorial bearing in the Act.—*Grieve*, Assessed Tax Cases (Scottish), No. 482; *Duncan*, Assessed Tax Cases (Scottish), No. 1098.

No appearance was made for the respondent.

LORD PRESIDENT.—My opinion is that both questions should be answered in the affirmative.

LORD ADAM.—I am of the same opinion. My view is that this is an armorial bearing. It is an ordinary heraldic lion on a shield. I do not know what else constitutes an armorial bearing.

LORD M'LAREN.—If the question were whether this was such a bearing as anyone was entitled to use in accordance with the rules of the Heralds' College, one would like to be better informed as to the laws of heraldry before deciding it, for there are rules of a highly artificial character with regard to the bearing of shields and like matters. But on inspection of the statute it appears to me that it is not required of an armorial bearing before it becomes subject to duty that it should be regular; so that even though the person making use of the sign was not entitled to use it, still if it is used by that person as an armorial bearing that would be sufficient to subject it to duty. We have here a shield with a well-known heraldic cognisance, and I cannot doubt that it subjects its owner to duty.

LORD KINNEAR.—I agree with all that your Lordships have said.

THE COURT answered both questions in the affirmative.

SOLICITOR OF INLAND REVENUE, Agent.

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* The Act 32 and 33 Vict. cap. 14, sec. 19, subsec. 13, provides,—"'Armorial bearings' means and includes any armorial bearing, crest, or ensign, by whatever name the same shall be called, and whether such armorial bearing, crest, or ensign shall be registered in the College of Arms or not."

MRS CHARLOTTE BROWN, Pursuer (Respondent).—*M'Lennan—Munro.*
BERNARD HALBERT, Defender (Appellant).—*W. Campbell—A. S. D. Thomson.*

No. 144.

May 19, 1896.

Brown v. Halbert.

Parent and Child—Illegitimate Child—Aliment—Custody—Father's offer to receive and support male child of seven years—Religion of Child.—The rule that the father of an illegitimate male child seven years of age is entitled to be relieved of the burden of alimenting it in its mother's custody if he offer to support it in his own home will not be applied when it appears that it would be detrimental to the welfare of the child to remove it from the mother's custody.

Circumstances in which *held* that such an offer by a father could not be accepted without detriment to the child, and that the father was bound to aliment it in its mother's custody.

Question whether such an offer by a Roman Catholic father, who declares his intention to bring up the child in his own faith, will relieve him of the obligation to aliment the child if the Protestant mother chooses to retain the custody of the child, and states that she wishes the child to be brought up as a Protestant.

2D DIVISION. Sheriff of Dumfries and Galloway.

MRS CHARLOTTE BROWN, Glenluce, raised this action in the Sheriff Court at Wigtown against Bernard Halbert, miller, Wigtown, for aliment for her illegitimate child at the rate of £6 per annum until the child should attain the age of fourteen years, on 7th March 1902.

The defender admitted that he was the father of the child, and stated that he had paid aliment to September 1893, and was willing to continue to pay it till 7th March 1895, when the child would attain the age of seven years, but no longer, offering to take it into his own care and custody.

The pursuer stated that she was a Protestant, and that she was anxious to bring up the child as a Protestant; that the defender was a Roman Catholic; and that it would be detrimental to the child's physical and moral welfare to place him in the defender's custody.

The defender admitted that he was a Roman Catholic, and stated that he failed to see "that the interest of the child would be in any way prejudiced by his father bringing him up in the religious faith to which he (the father) belongs, until the child is of age to judge of such matters, when he can make his own choice." He denied the pursuer's averments *quoad ultra.*

Proof was led. The import of the proof is given in the note to the Sheriff-substitute's interlocutor. The Sheriff-substitute (Watson), on 11th February 1896, pronounced this interlocutor:—"Finds in fact (1) that the defender admits that he is the father of the pursuer's male child, which was born on 7th March 1888; (2) that the defender has paid aliment for the said child down to 7th March 1895, when the child reached the age of seven years, but that he now refuses to pay further aliment, offering instead to take the child into his own custody and keeping; (3) that the pursuer is a Protestant and is anxious to bring up the child in the Protestant faith, whereas the defender is a Roman Catholic; (4) that apart from the question of religion, for reasons which are mentioned in the subjoined note, it would be detrimental to the child's welfare that he should be transferred to the guardianship of the defender: Finds in law that the pursuer is entitled to retain the custody of the child, and that in the circumstances of this case the defender is not freed from liability to contribute to the aliment of the child by the offer which he has made to take

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him into his own custody: Therefore repels the defences, decerns and ordains the defender to make payment to the pursuer of the sum of £6 yearly as aliment for the said child, until the said child attain the age of ten years complete, viz., on 7th March 1898, . . . reserving to the pursuer right to apply for extension of aliment on due cause shewn, and to the defender his defences as accords." *

The defender appealed to the Sheriff (Vary Campbell), who, on 14th March 1896, adhered to the Sheriff-substitute's interlocutor.†

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* "NOTE.— . . . The pursuer is not in any case bound to part with her child, but if she keeps him she cannot claim aliment any longer from the defender unless she has proved that the child's welfare would be injuriously affected by his being transferred to the defender's custody. . . . The result of the proof, in the opinion of the Sheriff-substitute, is to shew that it would be detrimental to the child's welfare that he should now be removed from his mother, and live henceforth with the defender. In the first place, the pursuer is a Protestant, and has brought up her child in the Protestant faith, whereas the defender is a Roman Catholic. In the case of an illegitimate child it is the mother's right, by the law of Scotland, to direct the religious upbringing of her child, and this right has always been carefully guarded by the Courts—See *Brand* v. *Shaws*, 16 R. 315." The Sheriff-substitute then referred to a judgment of Lord Craighill in the Outer-House in *M'Carroll* v. *Kerr*, 15 S. L. R. 106, "to the effect that such a difference in religious creed as here exists is sufficient to entitle the mother to retain her child without losing her claim against the putative father for aliment. Following this judgment, the Sheriff-substitute is of opinion that the difference in religious faith is of itself a good ground for deciding against the defender. . . .

"Apart from the question of religious creed other considerations combine to shew that it would be injurious to the child's welfare to be transferred to the custody of the defender. The child is attached to his mother, and extremely averse to the proposal that he should live with the defender. He is of nervous temperament, and the change would probably involve some risk to his health. The pursuer is generally reputed to be leading a respectable life, though, of course, her moral character has been destroyed by the defender, to whom she has borne two children. . . . The defender's own establishment, on the other hand, would be an eminently unsuitable and unwholesome home for a boy of seven years to be reared in. The defender is a bachelor, his house is at present kept by a young niece who is out all day working, and there is another female servant. For some years the defender has had a constant succession of new housekeepers and servants. The witness Agnes Milligan, who served in the house for some months in 1893 and 1894, deponed that immoral relations had subsisted between her and the defender during that period, and that she had sued him for aliment in respect of two children. Since the evidence was taken in this case proof has been led in Milligan's actions, and the Sheriff-substitute has found that while in the case of the elder of the two children there was no evidence to corroborate her charge against the defender, in the case of the younger child, which was born in July 1895, the defender's paternity was established by evidence of immorality within the house.

"On these combined grounds the Sheriff-substitute is of opinion that the defender's offer does not exonerate him from liability to pay aliment, and that the pursuer is entitled to decree."

† "NOTE.—The defender desires to discharge a pecuniary claim for the aliment of this child in the manner least burdensome to himself. He has no right to the custody of the child, but he has the privilege of meeting this claim for further payments by offering to take the child into his own house and under his own charge. The benefit of the child must be the

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The defender appealed to the Court of Session, and argued;—The mother of an illegitimate son was entitled to his custody and to aliment from his father until he was seven years old. After that the father was entitled to select the form in which his support should be given, and a *bona fide* offer to receive the child into his house and support him, if rejected by the mother, absolved the father from his liability to support.[1] The ground of the judgments of both Sheriffs was too slender. No serious aspersions were cast on the defender's character, and the difference of religious faith, which seemed to be the main ground of the judgments, was not relevant to the question.

Counsel for the pursuer were not called on.

LORD YOUNG.—This is an ordinary action of filiation and aliment by the mother of an illegitimate child against the father. The latter acknowledges the paternity and his liability, but he pleads that while it was right that the mother should have the custody of the child and receive aliment from him until the child reached the age of seven, he, the father, is now entitled to substitute for his liability for aliment a *bona fide* offer to take the child into his own custody.

The common case where the father takes up this position is where his circumstances are such as to make it hard upon him to pay £6 or £7 per annum to the mother, when he can at less expense to himself support it in his own house. But this is not the position of the defender. He is in easy circumstances; a miller keeping servants and having an apparently prosperous business. The want of money is therefore not the reason of his asking for the custody of the child.

The mother, on the other hand, has led evidence to shew that the child is well kept by her, that its comfort is well attended to, that its education is taken care of, and that the father's house would not be a suitable home for it.

I am of opinion that the child should be left with the mother, and that the father should pay aliment to her till the child reaches the age of ten. Both the Sheriff and the Sheriff-substitute have arrived at the conclusion that it would be better for the child's welfare that it should remain with its mother until it is ten, and that the father's house is an unsuitable home for it, and they have ordained the defender to pay aliment until the child has

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chief consideration. Here the child is being brought up as a Protestant by the mother, who has the legal right to the custody and to determine the religion of the child—a right not always to be affected by agreement—*Macpherson*, 14 R. 780; *Brand*, 16 R. 315. The health of the child is good, though it is of a nervous temperament, and the mother evidently attends well to its comfort and has secured its affection. The defender accompanies his proposal to take the child in future into his own hands, with the announced condition that he will have the child brought up as a Roman Catholic,—that is, that he will change its religion. I do not think that he is entitled to discharge his obligations to contribute to this child's aliment under any such condition, contrary to the lawful wish and determination of the mother as to the boy's religion and training. Moreover, the defender, from the evidence, is not quite the man to be entrusted with the guidance and training of this boy. I adopt and follow the opinion of Lord Craighill in the case of *M'Carroll*, Outer-House, 15 S. L. R. 106."

[1] Bell's Prins. sec. 2262; Corrie v. Adair, Feb. 24, 1860, 22 D. 897.

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attained the age of ten. The child will attain that age in a year and eight or nine months. The question therefore comes to be whether there is any ground for interfering with the judgment of both the Sheriffs. It would require very satisfactory arguments to induce me in a case of this kind to interfere with a judgment pronounced by both Sheriffs, and no such arguments have been adduced here.

I must confess, looking to the defender's circumstances, that his conduct in limiting his contribution for the maintenance of his child till it arrived at the age of seven to £4 per annum is not very satisfactory. I think it would have been more becoming on his part if he had been more liberal.

As regards the difference in the religious denomination of the father and the mother, I may say that that consideration does not influence my judgment in the case.

On the whole matter I am of opinion that the evidence does not supply us with any good reason for interfering with the judgment of the Sheriffs, and that it ought to be affirmed, with expenses.

LORD TRAYNER.—I agree. There is a settled general rule that the father of an illegitimate son is not bound to pay aliment to the mother after the child has attained the age of seven years if he then makes a *bona fide* offer to receive the child into his home and to support him there. But there are exceptions to the rule, and the most forcible exception occurs where it is certain that such a change of circumstances would be detrimental to the child's health.

The first question in this case is, what is the best course to follow in the interests of this child, and I am of opinion that the result of the proof is that it would be detrimental to the child's health and welfare generally to remove it from its mother's care. The Sheriffs are agreed on this point, and in my opinion the evidence substantially supports their view.

For my part I am not moved by the consideration that the father proposed to bring up the child according to a different faith from that professed by the mother. Such a consideration I regard as hardly relevant to the question whether the custody of the child should be with the father.

LORD MONCREIFF.—I agree with the opinions expressed by your Lordships on the question of the defender's right to the custody of this child. The defender is only entitled to the custody of the child as a discharge of his obligation to contribute to his support, but this abstract right to discharge his obligation is qualified by the condition that his charge of the child shall not be detrimental to his (the child's) health. On this latter point proof was led, and it appears to me that the result is to disclose sufficient grounds for the belief that the removal of the child from his mother's house would be injurious to him. I think that three elements contribute to that result. First, there would be a change in the religious teaching of the child; second, his health would probably suffer; and third, the defender's establishment does not appear to offer a very desirable home and training for a child.

I do not think it is necessary to consider whether any one of these elements taken separately would be sufficient, for I am of opinion that taken together they form a sufficient ground of decision. Especially with

regard to the first, I desire to reserve my opinion whether it would by itself form a sufficient ground for refusing to the reputed father the custody of an illegitimate child.

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LORD JUSTICE-CLERK.—I concur. I go entirely upon the fact, which I think is proved, that it would be detrimental to the child at its present age to be removed from the custody of the mother.

THE COURT dismissed the appeal; found in fact and in law in terms of the interlocutor of the Sheriff-substitute, dated 11th February 1896; and of new ordained the defender to pay to the pursuer £6 yearly as aliment for the child in question until 7th March 1898.

ROBERT BROATCH, L.A.—ADAIR & FENWICK, S.S.C.—Agents.

ALEXANDER S. PATERSON, Pursuer (Appellant).—*T. B. Morison.*
ALEXANDER KIDD AND ANOTHER (Kidd's Trustees), Defenders (Respondents).—*A. S. D. Thomson.*

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Paterson v. Kidd's Trustees.

Process—Appeal for jury trial—Competency—Consent to proof before answer precluding appeal for jury trial.—The defenders in an action of damages having pleaded that the pursuer's averments were irrelevant, the Sheriff, "before answer, of consent" allowed a proof.

Held (*dub.* Lord M'Laren) that an appeal for jury trial was incompetent, in respect that the interlocutor set forth a contract between the parties as to the procedure to be followed.

1ST DIVISION.
Sheriff of the Lothians and Peebles.

ALEXANDER S. PATERSON, plumber, Musselburgh, brought an action of damages in the Sheriff Court at Edinburgh against the trustees of the deceased William Kidd, on account of injuries which he alleged he had sustained through their negligence, while executing certain work in a house leased by them. The defenders pleaded that the pursuer's averments were irrelevant.

On 27th March 1896 the Sheriff-substitute (Hamilton), "of consent, before answer" allowed a proof.

The pursuer appealed for jury trial under the 40th section of the Judicature Act.*

The defenders objected to the competency of the appeal, and argued;—The pursuer and defender having consented to proof being taken before answer in the Sheriff Court, it was incompetent for either to resile from that arrangement. The interlocutor of the Sheriff-substitute in fact set forth a contract between the parties as to the procedure to be followed in the litigation, from which neither could withdraw.

Argued for the pursuer;—The pursuer was not barred by consenting to the allowance of proof any more than if he had himself moved

* The Judicature Act (6 George IV. cap. 120), sec. 40, provides "that in all cases originating in the inferior Courts in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which shall be passed at once without discussion and without caution."

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for proof, in which case an appeal under the 40th section of the Judicature Act would have been competent.

At advising,—

LORD PRESIDENT.—There does not appear to be any reason why the interlocutor appealed from should not be construed according to its natural and legal import. So read, it sets forth a contract between the parties to the litigation as to the procedure to be followed. This becomes more clear when we attend to the state of the pleadings when the interlocutor was pronounced. The defenders had on record a plea to relevancy, and according to the ordinary course, the Sheriff would have had first of all to hear parties on this plea and then dispose of it. From the interlocutor it appears that the parties agreed that the facts should first be ascertained by way of proof before this plea was determined. The present appeal is intended to upset this arrangement, for the pursuer now asks us to settle an issue and send the case to a jury. I do not see how the defender could be allowed to appeal (as is sometimes done under the 40th section) in order to have the action thrown out on relevancy without a breach of the arrangement that the evidence should be led before this question was determined, and both parties must be free, or neither.

I hope I have made it plain that my judgment rests on the words in the interlocutor, "of consent, before answer." I am for dismissing the appeal.

LORD ADAM.—I concur.

LORD M'LAREN.—My first impression was that no apparent distinction could be taken between an interlocutor proceeding upon a consent and an interlocutor proceeding merely upon the motion of one of the parties. But your Lordship's opinion is clear to the effect which has been stated, and as this is merely a question of practice, I have not such confidence in my opinion as to lead me to dissent.

LORD KINNEAR.—I concur with your Lordship in the chair.

THE COURT dismissed the appeal.

MARCUS J. BROWN, S.S.C.—FINLAY & WILSON, W.S.—Agents.

No. 146. May 21, 1896. Taylor's Trustees v. M'Gairgan.

JAMES TAYLOR Junior AND OTHERS (Taylor's Trustees), Pursuers (Reclaimers).—*M'Lennan.*

JOHN M'GAIRGAN AND OTHERS, Defenders (Respondents).—*Younger.*

Process—Reclaiming Note—Competency—Court of Session Act, 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 11—*Court of Session Act*, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.—A Lord Ordinary, who had previously assoilzied the defenders in an action and found them entitled to expenses, reserving as to modification, pronounced an interlocutor approving of the Auditor's report on the defenders' account, modifying the taxed amount, and decerning for the amount as modified.

Held that it was competent to reclaim against this interlocutor within twenty-one days.

Baird v. *Barton*, June 22, 1882, 9 R. 970, and *Crellin's Trustee* v. *Muirhead's Judicial Factor*, Oct. 21, 1893, 21 R. 21, *followed.*

1ST DIVISION. Lord Kincairney.

IN this action the Lord Ordinary (Kincairney), on 20th January 1896, pronounced an interlocutor in the following terms:—"The

Lord Ordinary having resumed consideration of the cause . . . assoilzies the defenders from the whole conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits it, when lodged, to the Auditor of Court to tax and report, reserving as to modification."

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On 7th March the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary approves of the Auditor's report on the defenders' account of expenses: Finds that the taxed amount thereof is £77, 15s. 9d., and having heard counsel on the question of modification, modifies the taxed amount to the sum of £67, 5s. 9d., and decerns against the pursuers for payment to the defenders of that amount accordingly."

On 20th March the pursuers reclaimed against this interlocutor.

The defenders objected to the competency of the reclaiming note, and argued;—An interlocutor modifying expenses—the cause having otherwise been disposed of previously—could only be reclaimed against within ten days.[1] The authority of *Cowper* was untouched by the recent case of *Crellin's Trustee*,[2] which only decided that a reclaiming note timeously lodged against an interlocutor modifying expenses brought prior interlocutors under the review of the Court.

Argued for the pursuers;—An interlocutor modifying expenses was really a final interlocutor, and could be reclaimed against within twenty-one days.[2] The reclaiming note was therefore competent.

At advising,—

LORD PRESIDENT.—In my opinion this case is ruled by *Baird* v. *Barton* and *Crellin's Trustee* v. *Muirhead's Judicial Factor*. The reclaiming note is therefore competent.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE cause was sent to the roll.

CUMMING & DUFF, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

JOHN BERRIE BROWN (Stewart's Trustee), Pursuer (Reclaimer).—*W. Campbell—M'Lennan.*
MRS CATHERINE STEWART OR ROBERTSON (Stewart's Executrix), AND ANOTHER, Defenders (Respondents).—*Guy.*

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Stewart's Trustee v. Stewart's Executrix.

Executor—Liability of executor who has carried on deceased's business to his creditors—Bankruptcy.—The executrix-dative of a deceased wine and spirit-merchant, having obtained a transfer of the certificate for the sale of exciseable liquors into her own name, continued the deceased's business. Eighteen months after the death of the deceased his estates were sequestrated, and the trustee in the sequestration called upon the executrix to deliver the certificate and licence to him, to cede possession of the licensed premises, and to account for the profits she had made by carrying on the business. *Held* (*aff.* judgment of Lord Kyllachy, and following *Globe Insurance Company* v. *Mackenzie*, 7 Bell's App. 296), that the executrix was not a trustee for the creditors of the deceased, and therefore, that

[1] Court of Session Act, 1850 (13 and 14 Vict. c. 36), sec. 11; Cowper v. Callender, Jan. 19, 1872, 10 Macph. 353.

[2] Baird v. Barton, June 22, 1882, 9 R. 970; Crellin's Trustee v. Muirhead's Factor, Oct. 21, 1893, 21 R. 21; Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 53.

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she was only liable to account for the value of the estate of the deceased, including the goodwill of his business, as at the date of his death.

JOHN STEWART, wine and spirit-merchant, 34 Dalrymple Street, Greenock, died intestate on 5th December 1893. On 15th January 1894 his widow obtained from the Magistrates of Greenock a transfer of the certificate standing in John Stewart's name for the sale of exciseable liquors for the year from 15th May 1893 to 15th May 1894. On 2d February 1894 Mrs Stewart was appointed executrix-dative to her deceased husband. Mrs Stewart gave up an inventory of his estate, in which its value was stated at £70, including £50 for "goodwill, furniture, and fittings," and on 19th February she obtained confirmation. At the Licensing Courts in April 1894 and April 1895 Mrs Stewart obtained renewals of the certificate. She also obtained from the landlord of the premises at No. 34 Dalrymple Street a lease from Whitsunday 1894, at which date the lease granted to her deceased husband expired, to Whitsunday 1895, and at Whitsunday 1895 she obtained a lease for five years.

At the date of his death John Stewart was indebted to various creditors, and in March 1895 the creditors obtained sequestration of his estates.

In October 1895 John Berrie Brown, the trustee in the sequestration, brought an action against the widow of John Stewart, as his executrix, and as an individual, and against James Robertson, her second husband, concluding for declarator, *inter alia*, that the transfer of the certificate granted to Mrs Robertson had been granted to her solely as executrix of her deceased husband, or as intromitter with his estate, and that upon her appointment and confirmation as executrix-dative all right in the certificate, licence, licensed premises, goodwill, and other estate of John Stewart, had become vested in her solely as his executrix, and for behoof of all persons legally interested in his estate, and that all right in these subjects had passed to the pursuer upon his appointment as trustee in the sequestration. He further concluded for decree ordaining the defender Mrs Robertson (fifth) to remove from the licensed premises that he might enter thereto, (sixth) to deliver up the certificate, transfer, renewals, and licences, so far as not cancelled, and the whole stock in trade, and tenant's fittings, in the premises; (seventh) as alternative to the fifth and sixth conclusions, to realise the goodwill of the wine and spirit business, the right to occupy the licensed premises to the end of the term of possession contracted for by the defender, the stock in trade, and tenant's fittings, and whole estate of deceased, and pay the proceeds to the pursuer; (eighth) to account for the profits she had made by carrying on the business; and (ninth) or otherwise, as alternative to conclusions five to eight, to pay the pursuer £550 with interest from the date of John Stewart's death.

The pursuer averred:—(Cond. 1) At the date of his death John Stewart was in debt to the amount of about £650. His estate, if duly realised at his death, would not have sufficed to pay his creditors in full. (Cond. 3) The principal creditors agreed to allow the defender to carry on the business as executrix under an arrangement for the gradual liquidation of the debts, but she refused to sign the agreement. (Cond. 4) The magistrates granted the transfer of the certificate to Mrs Robertson on being informed that she was the widow and representative of John Stewart, and was applying for appointment as executrix. (Cond. 5) "Upon obtaining the transfer

of said certificate and being confirmed as executrix, it became the duty of the said defender, Mrs Robertson, forthwith to realise the goodwill, stock in trade, and tenant's fittings pertaining to the said business, and generally her deceased husband's estate, for behoof of his creditors. In breach of her said duty she . . . deliberately failed to take any steps to effect such realisation. If then realised, the said goodwill and fittings would have produced a sum not less than £450, while the stock in trade and other estate would have produced not less than a further sum of £75. These sums would have sufficed to pay the creditors a substantial portion of their claims. The said defender, at her husband's death, took possession of the licensed premises, which had been held by her husband as a yearly tenant. She had no title to occupy them except as executrix foresaid. Notwithstanding this, she proceeded to carry on the business of a wine and spirit-merchant in said premises, and to appropriate the profits for her individual behoof and for the maintenance of herself and her family. The claims of her husband's creditors were entirely ignored by her." (Cond. 6) The fresh certificate granted to Mrs Robertson in 1894 was expressly granted to her in her capacity as executrix. Having obtained it, she "negotiated for a lease of the licensed premises, and carried on business therein by virtue of her title as executrix. She thus, instead of realising the executry estate, employed the same in trade, contrary to her trust duty. She similarly, in April 1895, obtained a renewal of the transferred certificate for the year from 15th May 1895 to 15th May 1896. About the same time, she, with the express object of endeavouring to defeat the creditors' rights, induced the landlord to grant her a five years' lease of the licensed premises, under which it is believed that assignees and subtenants are excluded. She continued, and still continues, to employ the executry estate in said business. The whole proceeds and profits of the business thus carried on by the said defender, after deduction of rent and expenses of management, belong, in the above-mentioned circumstances, to the deceased John Stewart's estate, and the present goodwill of the business, and the stock in trade and tenant's fittings now connected therewith, similarly form assets of the said John Stewart's estate. . . . ."

The defenders stated that the value of the goodwill, furniture, and fittings, had been entered in the inventory at £50, being the sum fixed by the valuator, but they denied that the goodwill itself was of any value, and denied that the transfer and renewal of the certificate had been granted to Mrs Robertson as executrix. They stated that Mrs Robertson had, prior to the sequestration, paid £83 to the creditors of John Stewart, and that she had since declared her willingness to pay £76 more, and that these two sums exceeded the value of the estate left by him.

The pursuer pleaded;—1. The pursuer is entitled to decree in terms of the declaratory conclusions, and also in terms of the conclusions for removing and delivery, in respect that—(1) The defender, Mrs Robertson, in breach of her duty as executrix of John Stewart, failed to realise the assets of his estate, and appropriated said assets and applied them in a hazardous trade; (2) The business carried on by said defender, by means of said assets, constitutes a trust in her person for behoof of those legally interested in John Stewart's estate; (3) The existing assets of the said business now belong to the pursuer, as trustee on John Stewart's sequestrated estates. 2. Alternatively,

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the said assets of John Stewart's estate, or the assets now coming in place thereof, being still realisable, the defender, Mrs Robertson, is bound forthwith to realise the same, and to account to the pursuer, as trustee foresaid, for the proceeds to be realised therefrom. 3. The said defender, Mrs Robertson, having, in breach of her duty as executrix of John Stewart, employed the assets of his executry estate in trade, is liable to account to the pursuer for the profits realised from the employment of said assets in such trade; and failing an accounting, decree should be pronounced in terms of the alternative conclusions thereanent. 4. In any view, the defender, Mrs Robertson, having, as executrix of John Stewart, failed to realise the assets of his estate, and having appropriated the said assets to herself as an individual, is personally liable to pay to the pursuer the value of said assets as at the date of John Stewart's death, with interest from that date, as concluded for.

The defenders pleaded;—(6) The defender being only bound to account for the value of the estate of her late husband as at the date of his death, and she having been all along, and still being, willing so to account, and having so accounted, the action was unnecessary, and ought to be dismissed.

On 20th March the Lord Ordinary (Kyllachy) repelled the first and third pleas for the pursuer, and before further answer, allowed the parties a proof of their respective averments "as to the value and disposal of the deceased John Stewart's estate." *

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* "OPINION.—The defender in this case is the widow of a public-house keeper in Greenock, who died in 1893. At his death the defender was appointed his executrix-dative and gave up an inventory, and obtained confirmation. The estate, as given up by her, amounted to only £70, including £50 for 'goodwill, furniture, and fittings.' The debts seem to have considerably exceeded the assets, but the creditors took no steps, and the widow continued the deceased's business. She obtained a transfer of the licence into her own name, and at the next and succeeding Licensing Courts she obtained renewals. She also made arrangements with the landlord, by which she continued in possession of the shop, and she ultimately obtained from him a five years' lease in her own favour. She is still in possession, and still carrying on the business. It is not alleged that any agreement was made between her and the creditors. She made some payments, but she has not hitherto been asked to account. In other words, she has been allowed, without any special arrangement, to continue in possession of what there is or was of her husband's estate.

"The creditors have now, however, moved apparently by the defender's success in the business, which, as I have said, she still conducts, taken steps to enforce payment of their debts. They have had the estate of the deceased debtor sequestrated, and the trustee in the sequestration now brings the present action against the defender. Had it been an ordinary action of accounting for the defender's intromissions with the executry estate, there could have been no doubt of its relevancy, although there might, in view of the defender's attitude, have been a question as to its necessity. But the question I have to decide is whether, taking the facts as I have stated them, and as set forth by the pursuer on record, there is any room for at all events the leading conclusions of the action.

"Having considered the argument which I lately heard in the Procedure Roll, I have come to the conclusion that in its leading conclusions the action cannot be supported. It proceeds, as it seems to me, on a view of the defender's position in relation to her husband's creditors which is not tenable in point of law. It assumes that the defender has all along

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The pursuer reclaimed, and argued;—An executor was a trustee for the creditors of the executry estate, and it was his duty to realise the estate for their benefit.[1] His fiduciary position was exemplified by the fact that he was bound to communicate to one creditor the benefit of cases he had obtained from other creditors.[2] If the duty of realising the estate were not fulfilled, the unrealised subjects were held for behoof of the creditors,[3] for the executor, being a trustee, could not take benefit to himself from the administration of the trust-estate, his position in regard to the estate being analogous to that of a tutor in regard to the estate of his ward,[4] or a partner towards the estate of the copartnery.[5] The Lord Ordinary was mistaken in the view he took of the *Globe Insurance Company's* case.[6] That case did not decide that an executor was not a trustee for creditors, but only that he was not a trustee for rateable distribution, and therefore that an individual creditor could secure himself a preference by diligence. Further, that was a case of an executor-nominate, and an executrix-dative was in a somewhat different position. In the present case the goodwill of the deceased's business was a realisable asset,[7] which

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acted and carried on her business substantially as trustee for the creditors, that any profits made by her are theirs, and that the successive licences, as also the lease of the shop, have been obtained for their benefit. Accordingly, its conclusions are (1) for delivery of the licences; (2) for removal from the shop; and (3) for accounting for all profits made in the business. There is an alternative conclusion for payment of a certain sum as the alleged value of the deceased's estate at the time of his death, but on this matter there is no dispute. The defender denies the amount, but is quite willing that there should be inquiry.

"Now it is not, I think, necessary to consider what is the defender's position as executrix-dative with respect to her children—the next of kin. It may be that towards them she stands in a special position. I do not desire to express any opinion on that question. But towards the creditors of the deceased it appears to me that she is simply *eadem persona cum defuncto*, standing to the creditors in no other relation than the deceased stood, except that she is a debtor with limited liability, viz., a liability limited by the amount of the deceased's estate. An executor is not a trustee for the deceased's creditors. He is no more so than an heir entering *cum beneficio inventarii*. He is, in a question with creditors, the proprietor of the estate, under burden of payment of their debts. He is not a depositary. He is a debtor, and the equities which result from the position of a depositary,—that is to say, of a trustee,—are wholly inapplicable. The law on this subject is, I think I must hold, fixed by the opinions and judgment of this Court and of the House of Lords in the case of the *Globe Insurance Company* v. *Mackenzie*, 11 D. 618, 7 Bell's App. 296, where, although in a different connection, the rights and liabilities of executors were fully discussed and considered.

"On the whole matter, I consider that I must repel the pursuer's first and third pleas, and allow, unless parties can arrange for admissions or for a remit, a proof as to the value and disposal of the deceased's estate."

[1] Bell's Prin. secs. 1899 and 1900; Ersk. Inst. iii. 9, 42.

[2] Farquhar v. Paton, 1709, M. 3833; Elphinstone v. Paton, 1710, M. 3835.

[3] Bee v. Wallace's Executor, 1745, M. 6008.

[4] Wilsons v. Wilson, 1789, M. 16,376.

[5] M'Niven v. Peffers, Dec. 2, 1868, 7 Macph. 181, 41 Scot. Jur. 104.

[6] Globe Insurance Co. v. Scott's Trustees, Feb. 16, 1849, 11 D. 618, Aug. 5, 1850, 7 Bell's App. 296, 22 Scot. Jur. 625.

[7] Donald v. Hodgart's Trustees, Dec. 8, 1893, 21 R. 246; Philp's Executor v. Philp's Executor, Feb. 1, 1894, 21 R. 482.

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the widow ought to have realised for the creditors' behoof. She must accordingly be held to have carried on the business for the creditors' benefit, and was bound to deliver up the certificate and licence[1] as an accessory of the executry estate, and to account to the pursuer for the profits she made by use of the estate. The proof should therefore not be limited as it had been by the Lord Ordinary.

Counsel for the defender was not called upon.

LORD M'LAREN.—It is often a matter of discretion requiring much discrimination to determine in the Outer-House whether proof should be allowed upon the whole case before answer, subject to reconsideration as to the relevancy of part of the allegations, or whether proof should be limited to those averments which amount to a relevant statement of legal liability, to the exclusion of averments not of that character. Now, where the Lord Ordinary has been able to separate the relevant from the irrelevant averments, and to limit the proof to certain parts of the case, thereby carrying out his powers under the Court of Session Act, 1868, I think that, unless the principles of law on which the Lord Ordinary has proceeded can be shewn to be erroneous, we ought to adhere to his decision. I do not say that, if a proof at large had been allowed, we should have interfered, but we are dealing with a case as to which the Lord Ordinary has thought one part,—namely, the first and third pleas and relative averments,—clearly separable from the rest, and capable of being disposed of on the ground that no legal liability on the part of the defender is disclosed. Considering the case in this light, I am bound to say that I entirely agree with the Lord Ordinary.

The material facts are, that the widow and executrix of a licensed victualler, who had carried on his business apparently on very slender means, entered into the management of her husband's business, and with the assistance of friends succeeded in carrying it on and making a living out of it. The creditors of the deceased, being unable to get payment of their debts from the executrix, have obtained sequestration, which, perhaps, they might have applied for with advantage at an earlier period. The trustee is by his appointment fully vested in everything which belonged to the deceased, and no legal process is necessary to make his right effectual unless the property is wilfully withheld. But the theory of this action is not that the estate is extant in such a form that it can be delivered to the trustee, but that the money which Mrs Stewart has made by carrying on the business of her deceased husband, and the existing stock and furniture of her business, are to be treated as a *surrogatum* for the goodwill, stock, and furniture left by her husband. I am unable to see how such a claim can be substantiated. It would be necessary to shew that an executor is a trustee for the creditors of the deceased, and is subject to all the equities to which a trustee is subject. It is not said that Mrs Stewart ever agreed to administer the executry estate for the creditors. They were anxious that she should come under some obligation to them, but it is conceded that she refused to enter into any contractual relation with her husband's creditors, and took up the estate for her own benefit, leaving the creditors to their legal remedies. Just as little should I be disposed to admit that the position of a trustee for creditors devolved upon the executrix by operation

[1] Selkirk v. Coupland, Jan. 6, 1886, 23 S. L. R. 456.

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of law. If such were the position of an executor it would be difficult to see what advantage would accrue to creditors from using diligence or obtaining sequestration. It is just because an executor is not a trustee for creditors, and because creditors are at a disadvantage in obtaining payment through a person who does not hold for them, that the remedy of sequestration of a deceased debtor's estate was given them by the Bankruptcy Act, 1856. But it is needless to specify reasons for not accepting the opposite view, because I agree with the Lord Ordinary that the decision of the House of Lords in the case of the *Globe Insurance Company* v. *Mackenzie*[1] is a clear authority against it. No doubt the question in that case was whether an executor was justified, after the lapse of six months, in paying to a creditor who had used arrestments, but the ground on which the validity of the payment was disputed and a rateable distribution contended for was that an executor—it was an executor-nominate in that case, but there is no difference in this respect between an executor-nominate and executor-dative—was bound to deal with creditors precisely in the same manner as with beneficiaries, and if he was in doubt as to the rights of creditors, to bring a multiplepoinding. Now, the concurring judgments of the Court of Session and House of Lords negatived that proposition, and decided that each creditor acts for his own interest against the trust-estate. In coming to that conclusion Lord Brougham was explicit in stating that there is no fiduciary relation between an executor and a creditor, that the executor is in the shoes of the defunct and represents him and not the creditors at all, and I think that Lord Brougham is at pains to point out that the only expression of doubt in the Court of Session fell from Lord Jeffrey, and that this expression of doubt was eventually withdrawn by Lord Jeffrey, who expressed his formal concurrence in the judgment of the Court. The result is that an executor is not bound in any segregation of the executry estate for behoof of creditors. It is sufficient if he retain funds of the value of the defunct's estate at the date of his death, and is ready to pay claims to the extent of the value. If he is not bound to segregate the estate, he can incur no liability for the profits which he may make from the use of the estate.

My opinion then is, that while the inventory lodged by an executor is not a conclusive limitation of the executor's obligation, that obligation is limited to the value of the estate of the defunct as at the date of his death, and this is the view of the Lord Ordinary.

Lord Adam.—I am of the same opinion. The pursuer claims that the executrix-dative is *prima facie* bound to pay the debts of her deceased husband. Her answer to this claim is that she is only statutorily liable to account for the value of the estate belonging to the deceased at his death. I agree that an executor, dative or nominate, is in one sense a trustee,—that is for beneficiaries,—but I am unable to see that he is so for creditors, who are in a totally different position with reference to the estate, and who should take their own measures to protect their interests. In this case the executrix is bound to produce or account for the value of the estate as at the death of her husband.

[1] 7 Bell's App. 296.

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It is said, without being disputed, and I see no reason to dispute it, that part of that estate consists of the goodwill of the deceased's business, and, accordingly, I think that the pursuer may well be entitled, in order to ascertain the value of the estate, to inquire how the goodwill has been disposed of, and that we should follow the Lord Ordinary in allowing the pursuer a proof with that object in view.

But I agree with his Lordship that the pursuer is not entitled to anything more. It has been argued that where an executor does not pay creditors in full, and fails to account for particular assets, if such exist in *forma specifica*, the creditor is not bound to take the executor's account, but may follow up and vindicate them from him. I am not aware that the authorities go beyond this, but in any view there is no such case here.

The claim made is not for the value of the goodwill as it existed at the death of the deceased, but for a very different thing, viz., for the value of the profits of the business which has been carried on by the executrix.

I agree with your Lordship that the proof allowed by the Lord Ordinary is sufficient to enable the pursuer to get everything to which he is entitled.

LORD KINNEAR.—I agree that there is no reason for interfering with the interlocutor of the Lord Ordinary.

He has done no more than repel the first and third pleas in law for the pursuer, and allow the parties, before answer as to the remaining pleas, a limited proof. The pleas which have been repelled are intended to impose upon an executrix the equities and liabilities of a trustee, to make her responsible for the profits earned in a business which it is said she has carried on wrongfully, inasmuch as she has made use for that purpose of a part of the assets belonging to the deceased's estate. The pleas are based upon two propositions, that the executrix in breach of trust is using the assets of the deceased in carrying on a precarious business, and that having so used them she is bound, as a trustee in default, to account for the profits which she has made in that business. I agree that the propositions are untenable, unless we disregard the judgment of the House of Lords in the case of the *Globe Insurance Company*.[1]

But, having repelled these pleas, the Lord Ordinary has not gone on to dispose of the conclusions of the summons, even of those which Mr Campbell admits he would not now maintain, nor has he assoilzied the defender nor dismissed the action. He has allowed the parties "a proof of their respective averments as to the value and disposal of the deceased John Stewart's estate," and I agree that a proof in accordance with these terms will enable the pursuer to establish all the facts averred by him relating to the claims in his conclusions. The Lord Ordinary has allowed his second and fourth pleas to remain, which are sufficient to allow the pursuer to maintain any views which Mr Campbell indicated his intention of maintaining, except those touching the two pleas repelled.

The LORD PRESIDENT concurred.

THE COURT adhered.

MILLER & MURRAY, S.S.C.—A. C. D. VERT, S.S.C.—Agents.

[1] 7 Bell's App. 296.

THOMAS WILSON AND OTHERS (Crawford's Trustees), Pursuers (Respondents).—*C. J. Guthrie—Cullen.*
JAMES LENNOX, Defender (Appellant).—*Jameson—Orr.*

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Trade-mark—Hotel—Hotel Sign—"Golden Lion"—Interdict.—In January 1896 the proprietors of the Golden Lion Hotel, Stirling, raised an action against Lennox, the tenant of that hotel, and proprietor and occupant of the Station Hotel, Stirling, to interdict him "from using in any way upon or in connection with the Station Hotel a gilt figure or trade sign of a lion, or any painted or printed copy or facsimile thereof which has been used in connection with and recognised as the trade sign of the Golden Lion Hotel, Stirling." They averred that the defender, whose lease ended at Whitsunday 1896, had formed a scheme for ruining the business of the Golden Lion Hotel; that in July 1895 the defender, with the view of transferring the business of the Golden Lion Hotel to the Station Hotel, had removed the gilt figure of a lion which had for a long period been on the porch of that hotel to the roof of the Station Hotel for the purpose of misleading the public into the belief "that the Golden Lion had ceased to exist, and that the proprietor of the Station Hotel had acquired the right to use the golden lion, and so the right of the proprietors of the Golden Lion Hotel," and that the defender in his Station Hotel bills and cards used the figure of a lion. They averred that they had sustained loss, and would sustain further loss, by the defender's proceedings, but they did not allege that any person had in fact been misled by the defender. It was admitted that the gilt lion had been purchased by the defender from the previous tenant, and that the words "Station Hotel" were conspicuous on the front and side of that hotel.

Held that, having regard to the fact that the words "Station Hotel" were conspicuous on that hotel, the use of the gilt lion on the roof implied no representation that the business of the Golden Lion Hotel had been transferred to it, and did not tend to mislead the public, and that as the pursuer did not aver that any members of the public had in fact been misled, he was not entitled to prove that such was the fact.

Great North of Scotland Railway Co. v. *Mann*, July 15, 1892, 19 R. 1035, *distinguished.*

2D DIVISION. Sheriff of Stirlingshire.

THOMAS WILSON AND OTHERS, testamentary trustees of the late William Crawford, Stirling, and proprietors of the Golden Lion Hotel there, raised this action in the Sheriff Court of Stirling against James Lennox, tenant of the Golden Lion Hotel, and prayed the Court "to interdict the defender from using in any way upon or in connection with the Station Hotel, Stirling, a gilt figure or trade sign of a lion, or any painted or printed copy or facsimile thereof which has been used in connection with and recognised as the trade sign of the Golden Lion Hotel, Stirling; to ordain the defender to remove the said figure of a lion placed by him upon the said Station Hotel; to declare that the defender has no right to use the said figure or trade sign of a lion, or any painted or printed copy or facsimile thereof, as a trade sign elsewhere than in connection with the said Golden Lion Hotel, with expenses."

The pursuers averred that the defender was tenant of the Golden Lion Hotel under a lease which expired at Whitsunday 1896. (Cond. 4) "For about thirty years a gilt figure of a lion of about life size has been placed and exhibited over the front door of the said premises." (Cond. 5) "About four years ago the defender purchased another hotel in Stirling situated in Murray Place and known as the Station Hotel, and since Whitsunday 1892 he has carried on business there as well as

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at the Golden Lion Hotel." (Cond. 6) "Since entering into occupation of the Station Hotel the defender has endeavoured in various ways to divert the business which he previously carried on at, and which legitimately belonged to, the Golden Lion Hotel to the Station Hotel. He has ceased to give frequenters of the Golden Lion Hotel the comfort and attention which they were accustomed to and entitled to expect in a first-class hotel like the Golden Lion Hotel. He has also removed from the Golden Lion Hotel to the Station Hotel almost every good article of furniture which he had in the Golden Lion Hotel, including the billiard table, all with the view of injuring the Golden Lion Hotel." (Cond. 7) "About the month of July 1895 the defender, with the view of further injuring the Golden Lion Hotel, and transferring its business to the Station Hotel, removed, without warning to the pursuers, the said gilt figure of a lion from its position above the door of the Golden Lion Hotel and placed it upon the Station Hotel." (Cond. 8) "It is believed and averred that the defender has formed a scheme for ruining the business of the Golden Lion Hotel. The removal of the gilt figure of the lion from the Golden Lion Hotel, with which it was used as a trade sign and has been associated for so many years, and the placing of it over the Station Hotel, was done solely for the purpose, amongst others, of misleading the public into believing that they were going to the Golden Lion Hotel, that the Golden Lion Hotel had ceased to exist, and that the proprietor of the Station Hotel had acquired the right to use the golden lion, and so the right of the proprietors of the Golden Lion Hotel. There is only one bus used for conveying travellers from the railway station to both hotels, and, after leaving the station, the bus is drawn up at the door of the Station Hotel, where the gilt figure of the lion may be seen, and travellers going to the Golden Lion Hotel, but who may be unacquainted with the outside appearance of the latter, alight, under the impression that it is the Golden Lion Hotel, this being heightened by the figure of the lion over the Station Hotel." (Cond. 9) "With the view of leading the public to believe that the Station Hotel has right to the business and trade sign of the Golden Lion Hotel, the defender has placed in all the rooms of the latter a ticket similar to the one produced herewith, and has circulated in Stirling and neighbourhood a list of charges for carriages from the Station Hotel, which list bears on one corner an impression of a lion. Further, the defender, in making up his bills for charges to frequenters of the Golden Lion Hotel and the Station Hotel, does so on forms with the name of the Station Hotel, and which forms have also an impression of a lion. Defender is called on to produce the form of bill which has been given lately to the frequenters of the Golden Lion and Station Hotels." (Cond. 10) "In consequence of defender's said actings of removing the figure of a lion from the Golden Lion Hotel to the Station Hotel, and the use of the sign of the lion elsewhere than in connection with the Golden Lion Hotel, the pursuers have sustained, and will still further sustain, considerable loss and damage by the depreciation in value both for letting and selling of the Golden Lion Hotel, and for which loss and damage they reserve their right of action against the defender."

The pursuers pleaded;—(1) The said gilt figure of a lion having been recognised as the trade sign of the Golden Lion Hotel, Stirling, the defender is not entitled to use it in connection with the Station Hotel or elsewhere than in connection with the Golden Lion Hotel,

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and interdict and declarator to that effect ought to be granted as craved. (2) The defender having improperly and without authority placed the said gilt figure of a lion over the Station Hotel, ought to be ordained to remove same as craved.

The defender pleaded;—(2) The pursuers' averments are irrelevant, and insufficient in law to support the prayer of the petition. (3) The figure of the lion in question being the property of the defender, and the pursuers never having had any right or property therein, or to the figure or sign of a lion in connection with their premises, the defender should be assoilzied from the petitory conclusions of the prayer. (4) The pursuers never having had any property or right in the trade sign of a lion in connection with their premises, interdict should be refused. (6) In any event, the pursuers not having any property in or exclusive right to the use of a figure of a lion in connection with their premises, the defender is entitled to absolvitor from the declaratory conclusion of the prayer of the petition. (7) The defender, being entitled to place the figure of a lion on his Station Hotel, and to apply it on tickets, lists, bill-forms, and other documents in connection therewith, should be assoilzied, with expenses.

It was admitted that the figure of the golden lion had been made about thirty years ago for a former tenant, who had paid for it, and sold it to the defender, to whom it now belonged. On the bills of charges used by the defender at both hotels the figure of the golden lion was printed. One bill was headed "Golden Lion Hotel, King Street, Stirling, James Lennox, Lessee," the other was headed "Station Hotel (late Hendry's), Stirling, James Lennox, Proprietor (late of Golden Lion Hotel)." The list of charges for carriages from the Station Hotel bore on its title-page the figure of the golden lion, with the words "Station Hotel, Stirling, James Lennox, Proprietor." Cards advertising the respective hotels each displayed the figure of a lion, but the figures were not identical.

The defender produced a photograph which shewed the figure of the golden lion on the roof of the Station Hotel, and on the front and side of the hotel, in large letters, the words "Lennox's Station Hotel."

On 7th March 1896 the Sheriff-substitute (Buntine) pronounced this interlocutor:—"Having heard parties' procurators, and made avizandum, for the reasons stated in the subjoined note, repels all the pleas stated for the defender, and interdicts, ordains, and declares, all in terms of the conclusions of the petition." *

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* "NOTE.—The following facts are admitted on record. . . . For more than thirty years this hotel has gone by the name of the Golden Lion Hotel, and for the same period the gilded figure of a lion couchant, which has been recently removed by the defender, has been fixed over the front door.

"There can be little doubt that this long usage of name and trade sign created a property in the person of the owners of the hotel in both the name and trade sign, and that they have a right to interdict against any other person calling an hotel in Stirling by the same name, or placing over it the same trade sign—(*Great North of Scotland Railway Company* v. *Mann*, 19 R. 1035). . . .

"It is not material to the present case whether the defender is the owner of this gilded image or not. The Sheriff-substitute has come to the opinion that even if he was owner of it, and so entitled to remove it from its old place over the door where it had stood for so many years, he is not entitled to place it, or any figure resembling it, over the door of any hotel in Stir-

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The defender appealed to the Second Division of the Court of Session, and argued;—The pursuers' averments were irrelevant. It was not alleged that anyone had been misled by the defender's actings. This was essential.[1] The facts were sufficient to dispose of the case, for the hotel, which bore in conspicuous letters the title "Lennox's Station Hotel," could not be mistaken by reasonable persons for the "Golden Lion Hotel." The essential element of misrepresentation and misleading[2] was absent.

Argued for the pursuers;—The figure of the lion on the roof was much more important than the name on the side of the Station Hotel, for it had become identified with a particular house, and the natural conclusion to observers was that the house on which it stood was the Golden Lion Hotel. Thus the public might be misled, and the *Great North of Scotland Railway Company* v. *Mann*[1] was in point in favour of the pursuers. "Station Hotel" had been held to be not sufficiently distinctive.[3] The only object in using the figure of the lion was to induce the belief that the Station Hotel was the Golden Lion Hotel. The defender hoped to suggest this to the mind of the travelling public, and that was sufficient ground for interference. The pursuers were entitled to proof of their averments.

At advising,—

Lord Justice-Clerk.—The facts of this case as practically agreed upon are these:—Mr Lennox, the appellant, who was for some time tenant of the Golden Lion Hotel in Stirling, became proprietor of the Station Hotel. When he entered the Golden Lion Hotel he bought the moveable articles of furniture, and he bought also the figure of the lion which stood on the top of the porch of the hotel. It appears that about 30 years ago that lion was placed over the door of the hotel by a former tenant, and shortly afterwards the house came to be known as the Golden Lion Hotel. As the end of his lease of the Golden Lion Hotel was approaching, the appellant began to remove his own possessions which he had purchased, including the lion, which he placed on the top of the Station Hotel in the position in which we see it in the photograph produced. It was not placed on the

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ling. It is certain that a large sign such as this would mislead the public, and this is made doubly certain when the actual image is itself appropriated, and that by the man who had formerly a right to use it as an hotel sign.

"The question in all such cases as the present depends upon whether or not the use complained of involves misrepresentation and consequent misleading of the public, and injury to the owner's interest.—See Lord Kyllachy's opinion in *Cowan* v. *Miller*, 28th June 1895, 22 R. 833.

"The Sheriff-substitute is of opinion that the use of this trade sign over the door of the Station Hotel is of necessity misleading, and thus injurious, or is likely to injure the pursuers by robbing them of custom which had been earned by the reputation of the house over which the sign had been placed in the past.

"Accordingly he is satisfied that the pursuers are entitled to the remedy they seek without any proof."

[1] Great North of Scotland Railway Company v. Mann, July 15, 1892, 19 R. 1035.

[2] Charleson v. Campbell, Nov. 17, 1876, 4 R. 149; Mason v. Queen, April 8, 1886, 23 S. L. R. 641; Cowan v. Millar, June 28, 1895, 22 R. 833.

[3] Charleson v. Campbell, 4 R. 149.

porch as it had been at the Golden Lion Hotel, but on the top of the building. It was also stated, and not denied, that in his Station Hotel bills and cards the appellant uses the figure of a lion.

Now, the question, I think, is stated very fairly by the Sheriff-substitute in his note when he says :—"The question in all such cases as the present depends upon whether or not the use complained of involves misrepresentation and consequent misleading of the public and injury to the owner's interest." We have here no case of that kind stated on record. There is no averment that any effect of that kind was produced by the lion being placed where it was. The averments on record rather point to this, that Mr Lennox had a purpose rather to disparage the Golden Lion Hotel as he was leaving it, and to give a high character to the Station Hotel to which he had gone, and which he intended to occupy as his sole hotel. There is no allegation on record that I can find to the effect that what has been done has caused anybody to make any mistake whatever. If there had been averments to the effect that people who wished to go to the Golden Lion Hotel had been misled, had been taken to the Station Hotel, and that the lion had been pointed to to make them believe that that hotel was the Golden Lion Hotel, I think there would be much to be said for allowing such facts, if averred, to be proved. But there are no such averments. What is averred is that the appellant endeavoured to disparage the old Golden Lion Hotel and to give it a bad name because he wished to improve his own prospects as the proprietor of the Station Hotel. Now, the photographs which were exhibited to us bring out very clearly that every person coming from the station, and every person coming down the street towards that hotel in other directions, must see the name of the "Station Hotel" on the house, because it is on the end of the house in large letters, and it is on the front of the house also in large letters. As regards the bills, the hotel is spoken of in them solely as the Station Hotel, and in one of them there is a statement, under the name of the proprietor of the Station Hotel, that he was "late of the Golden Lion Hotel."

I have been unable in those circumstances to come to the conclusion that the use of the figure placed upon the top of the house was a misrepresentation, and that as a consequence the public were misled, to the injury of the Golden Lion Hotel. I cannot see that there is any ground for coming to that conclusion. It is quite certain that the proprietor of the Golden Lion Hotel has no monopoly of the use of the figure of a lion, whether golden or of any other colour. He is entitled to have any figure he pleases, and probably he would prefer to have the figure of a golden lion, as his hotel has got that name. But I cannot assent to the proposition that he is entitled on that account to exclude everybody else from using a lion as a sort of ornament on any part of their premises. If a man uses what is his own in such a way as to misrepresent, and by the way he places it, the way he uses it, and the way his servants speak of it, to lead people to believe that they are going to a certain hotel when that is not the case, and if he in fact does lead people to such an erroneous belief, that is a thing which the law will always step in to prevent. In the case of *The Great North of Scotland Railway Company* v. *Mann*, 19 R. 1035, which was cited to us, there was a strong illustration of that doctrine. In that case the former

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occupant of an hotel in Aberdeen, which was called the Palace Hotel, having been deprived of the occupancy of that hotel and having set up another hotel in the immediate neighbourhood, called his new hotel "Mann's Palace Hotel," thereby as plainly as possible giving it the name of "Palace," and only indicating that it belonged to a person of the name of Mann. That was held by the Court to be a practical misrepresentation tending to mislead the public into thinking that his hotel was the Palace Hotel, whereas the fact was that the Palace Hotel was elsewhere. We have no such case here. I think the Sheriff-substitute has erred in the conclusion he has come to, and that the petition ought to be dismissed.

LORD YOUNG.—I have arrived at the same conclusion—that this case is irrelevant. Mr Guthrie very candidly said that he was aware of no case in which interdict and an order of the kind asked here had been pronounced without inquiry or proof, and his motion accordingly was, not that we should affirm the judgment, but that we should allow a proof, and in support of that motion he said he was informed that some people had been misled, and had gone to this hotel under misapprehension. There was no such deceit averred upon record, but if any case had been made for amending the record we could have done that. I inquired what the misapprehension was, and I got no more particular information.

One can hardly imagine anybody—in his senses and fit to go about alone—thinking because he saw a lion's figure upon a hotel, although there were on the side of it the words "Station Hotel," and also over the front door, very conspicuously, "Lennox's Station Hotel," and no other name—one can hardly listen to the statement that anybody thought when he was going into that hotel in Murray Place that he was going into the Golden Lion Hotel in King Street, or that wanting to go to the one he was misled into the other, or into believing that the proprietor of the Golden Lion Hotel in King Street was the proprietor of Lennox's Hotel in Murray Place. Such a statement as that is ridiculous and incredible on the face of it.

LORD TRAYNER concurred.

LORD MONCREIFF.—I agree. The fact that the golden lion is the appellant's property, and the fact that he does not call the Station Hotel the Golden Lion Hotel, are not conclusive in the appellant's favour, because it is conceivable that he might so use the sign as to deceive the public, as, for instance, by placing the lion over the door, or printing the words "Station Hotel" in so small characters that they would not be readily deciphered. But the photograph shews that not only is the lion not placed immediately above the door, but the words "Station Hotel" are in quite legible letters, and, further, that the words "Lennox's Station Hotel" appear in large letters on the side of the house. I am, therefore, unable to see that anything which the appellant has done would lead anyone to suppose that in entering the Station Hotel he was entering the Golden Lion Hotel.

THE COURT sustained the appeal, recalled the interlocutor appealed against, refused the interdict craved, and dismissed the petition, with expenses in the Court of Session and in the inferior Court.

JAMES FORSYTH, S.S.C.—DUNCAN & BLACK, W.S.—Agents.

WILLIAM M'LACHLAN, Pursuer (Appellant).—*Orr.*
THE STEAMSHIP "PEVERIL" COMPANY, LIMITED, Defenders (Respondents).—*Ure—Younger.*
JAMES MACGREGOR & FERGUSON, Defenders (Respondents).—*Ure—D. Anderson.*

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M'Lachlan v. s.s. "Peveril" Co., Limited.

Reparation—Ship—Liability of shipowner to servant of stevedore for defect in ship's gear—Liability of stevedore to his servant for defect in ship's gear.—A labourer in the employment of stevedores brought actions for damages on account of personal injuries sustained by him through the fall of a stanchion when engaged in discharging the cargo of a ship (1) against the shipowners, and (2) against his own employers.

In the action against the shipowners the pursuer averred that the stanchion was supported mainly by bars of pig-lead being placed round it, its proper fastenings having become wholly insufficient, and that it had fallen down in consequence of having received "a slight concussion" through contact with a sling of ingots of lead which he was assisting to unload, and which was being dragged by a winch from under the combings of the hatch of the vessel in order to be raised out of the hold.

In the action against his employers, which was laid both at common law and under the Employers Liability Act, the pursuer made the same allegations regarding the condition of the stanchion, and averred that on the occasion in question he was working under the orders of the defenders' foreman, whose principal duty was one of supervision, and who was not ordinarily engaged in manual labour, and that the foreman knew, or ought to have known, that the stanchion was practically unfastened and unsupported, that it was the foreman's duty to have seen to the removal or to the proper fastening of the stanchion, and that he failed in this duty.

The defenders in each action pleaded that the action was irrelevant.

Held (1) that the action against the shipowners was relevant; but (2) (*diss.* Lord Young) that the action against the stevedores fell to be dismissed as irrelevant, in respect that the stevedores were under no duty of inspecting the vessel to see to its safety for their servants.

2D DIVISION. Sheriff of Lanarkshire.

IN February 1896 William M'Lachlan, quay-labourer, Glasgow, brought an action in the Sheriff Court at Glasgow against The Steamship "Peveril" Company, Limited, for damages on account of injuries sustained by him when engaged at the Queen's Dock, Glasgow, in the employment of Messrs James Macgregor & Ferguson, stevedores, in discharging the cargo of the "Peveril," belonging to the defenders.

The pursuer averred:—On 21st January 1896 the pursuer was engaged, as one of a squad of men in Messrs Macgregor & Ferguson's employment, in discharging ingots of lead in slings of about ten each at No. 2 hatch of the "Peveril." The pursuer's station was down in the hold near the square opening. At some distance under the combings of the hatch other men were engaged in fastening chains round the slings of ingots, and then attaching the fall of the winch to the chain in order that the sling might first be dragged along the floor of the hold until it was underneath the square of the hatch, and then hoisted up on to the deck. "The universal custom in discharging ingots of lead in the harbour of Glasgow is for the men to arrange the lead in slings in this way, and to have it dragged by the winch from whatever part of the hold it may have been slung to the square of the hatch, thereafter to have it slung on to the stage, and thereafter carried in trucks to the shore." (Cond. 3) While one

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of the slings "was proceeding along to the square of the hatch it slightly touched some lead near the stanchion of the vessel. Notwithstanding that the sling of lead only touched the lead near the stanchion in the very slightest way possible, the stanchion at once gave way and fell forward upon the pursuer, who was in front, striking him a full blow on the left leg and breaking it above the ankle. . . . It is explained that the said stanchion was surrounded, up to a certain height, by pieces of lead which kept it nearly upright, and, when this support was removed, it fell in the manner described, as there were no bolts in it to keep it in its place." (Cond. 4) "After the accident the pursuer's fellow-workmen at once examined the stanchion, and found that it had, when originally fixed, been secured by two bolts at the top and one at the bottom. Only one bolt was left in the stanchion in the hole next the keel, and after it fell this bolt was found in the hold. This bolt was old and worn, and had been cracked through the centre before the stanchion fell. The rust had eaten into it so thoroughly that all the strength had been taken out of it. The bolts at the top were evidently awanting, as they could not be discovered in the hold. At anyrate the nuts of the bolts were evidently not screwed on. It is explained that the stanchions of vessels are generally specially constructed of great strength to resist the concussion of cargo being moved and shifted about in the holds, and, if properly secured, they are quite strong enough to resist the force which can be put upon them by a winch of the description used in this vessel. It is explained that the full force of the aforesaid sling of lead did not come against the lead near the stanchion, and that it fell in a manner which shewed that it was not supported or secured in any reasonable way. Had it been so it could not have fallen with the slight concussion upon it which resulted from the contact between the sling of lead referred to and the lead near the stanchion, and, as a matter of fact, the sling of lead, when it stopped, had not gone past the place where the bottom of the stanchion was when it fell." (Cond. 5) "The pursuer has thus been injured through the gross and culpable negligence of the defenders or their servants, in respect of their having left the aforesaid stanchion in a dangerous and defective condition, and improperly secured both at the top and the bottom. It was the duty of the defenders, as the shipowners, to see that all the fittings, moveable and otherwise, of the vessel are properly and securely fixed, so as to enable the stevedores engaged to do their work in a safe and proper manner. It was also their duty, periodically, to examine and test the stanchion referred to, but they failed to do so, and the pursuer has become injured in consequence. . . ."

The pursuer pleaded, *inter alia*;—(1) The pursuer having been injured through the fault of the defenders in failing to keep and maintain the said fittings of their vessel in a condition of ordinary safety and security as above described, is entitled to decree as craved, with costs.

The defenders pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant. (4) Said accident having occurred through the dangerous manner in which the work was being done, and through the fault of the pursuer and his fellow-workmen, the defenders should be assoilzied, with expenses.

Thereafter, the pursuer brought an action against Messrs Macgregor & Ferguson, his employers at the time of the accident, in which

he prayed for damages at common law and under the Employers Liability Act on account of the same injuries.

The pursuer averred (cond. 2) that on the occasion in question he was working "under the orders and supervision of the defenders' foreman, John Cunningham, whose principal duty was one of supervision, and who was not ordinarily engaged in manual labour. The method adopted by the defenders' foreman for discharging the vessel was as follows." The pursuer then gave an account of the circumstances of the accident similar to that given in his former action, and further averred:—(Cond. 4) "It is believed and averred that it was the duty of the defenders and their foreman, in discharging the pig-lead above described, to see that such a system was adopted as would enable their men to work in safety. It was also the duty of the defenders' foreman to ascertain whether the stanchion above described was originally, and continued to be, properly and firmly secured during the progress of the discharge. . . . As a matter of fact, although the defenders' foreman knew, or ought to have known, that the stanchion above described was practically unfastened and unsupported, except by the pig-iron around it, which kept it in its place, and off the perpendicular, he took no steps either to inform the master or officers of the ship of the dangerous condition of the stanchion, or to have the stanchion removed from the place, or properly supported. He also failed to see that the loads being dragged from the hold were kept at sufficient distance from this unsupported stanchion, to prevent it or the pig-lead round it, from being touched. He gave no warning of any description to the pursuer or his fellow-workmen of the defective condition of the stanchion. It is further believed and averred that, if there was a danger of the stanchion being touched or injured by the loads being dragged out of the hold by the winch, it was the duty of the defenders and their foreman to have removed the stanchion from its place until the discharge had been completed. It is believed that this is customary amongst the stevedores of Glasgow. . . ." (Cond. 5) "The pursuer has thus been injured through the fault of the defenders and their foreman in failing to adopt the proper system of arranging the foresaid thwartship beam and hatches, so as to enable the cargo to be discharged in a safe way for the men, and also through the foreman's negligence in superintendence, through failure to ascertain and warn the captain of the defective condition of the aforesaid stanchion, or cause it to be properly supported himself. The defenders' foreman was also at fault in not causing the aforesaid defective stanchion to be altogether removed when he saw that there was danger of some of the loads coming near it so as to touch it, or the lead around it."

The pursuer pleaded, *inter alia*;—(1) The pursuer having been injured through the fault of a person in the service of the defenders, whose ordinary or principal duty was one of supervision, and who was not ordinarily engaged in manual labour, is entitled to decree as craved, with costs. (2) The pursuer having been injured as above described through the defenders' failure to supply good and sufficient ways and plant, is entitled to decree as craved, with costs. (3) Pursuer having been injured by reason of the aforesaid defective system adopted by the defenders in discharging said vessel, is entitled to decree as craved, with costs.

The defenders pleaded, *inter alia*;—(1) The action is irrelevant, and should be dismissed, with expenses to defenders. (4) The acci-

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dent having been caused through a defect in the ship, for which defenders are not responsible, they should be absolved, with expenses.

The actions were conjoined *ob contingentiam* on 24th March 1896.

On 31st March the Sheriff-substitute (Spens) allowed a proof before answer.*

The pursuer appealed for jury trial.

The defenders in each action objected to the relevancy of the action.

Argued for the "Peveril" Company;—It was not disputed that they were responsible for the ship and its fittings, in so far as properly used by the pursuer and his fellow-servants, who were on board for a legitimate purpose. But on the pursuer's own shewing the stanchion was subjected to usage for which it was never intended. The action against these defenders therefore was irrelevant.

Argued for Macgregor & Ferguson;—They were not liable, as they were under no duty to inspect the ship and its fittings in order to see to the safety of their workmen.[1] The case was not one of a defect so obvious that anyone must have seen it, and even if it were, the utmost that these defenders could have done, if they noticed the

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* "NOTE.—An action in the first place was raised by the pursuer against the owners of the steamship in which the accident happened. The defenders in that case lodged defences, *inter alia*, averring that the manner in which the discharge was carried on was reckless and obviously dangerous, and that the accident was due to this and the carelessness of pursuer and his fellow-workmen. This averment inferred fault on the part of the stevedore's foreman, and against the stevedore a second action was raised. The two actions were conjoined on the 24th March, and I have now heard a debate on the conjoined actions. I consider there is some misconception as to the effect of conjunction. It is simply in my opinion (and that of one of my colleagues with whom I spoke on the subject) entirely a matter which has to do with convenience as to procedure. If the actions are separately relevant, their relevancy is in no way affected by the fact that the actions have been conjoined, even although the statements in each are not consistent. The justification to pursuer for raising a supplementary action is found in the defenders' averments in the first case. I do not know that the averments in the second case are absolutely inconsistent with the averments in the first case, but even if they were, as I have already indicated, I do not think it affects the question *quoad* a case for proof.

"Substantially, on the case as presented, it pretty much comes to this—that it was the duty of the shipowners to see that the stanchions of the ship were in such a state that men employed in working in the hold should not be exposed to the risk of their falling from slight causes; and, in the second place, fault is averred against the stevedore's foreman in respect if he had taken the precaution of seeing that the stanchions were right, the one in question having patently something wrong with it, the accident would not have happened. Now, the agent for the shipowner argued that the proximate cause of the accident was the fault of the stevedore as averred. As I have already said, I think that each case must be taken by itself separately as regards relevancy. I am not, however, prepared to hold that shipowners could be absolved from blame as directly contributing to the accident, if it be proved that their stanchions were defective, and that it should have been known that they were defective if there had been proper supervision, merely because there should have been a further precaution taken by the stevedore or his foreman, which had been neglected. I think the proper course in this case is to have a proof before answer."

[1] Simpson v. Burrell & Son, March 12, 1896, *ante*, p. 590.

defect, would have been to complain to the shipowners. They would not have been entitled to remedy the defect at their own hands.

Argued for the pursuer;—According to the pursuer's averment the stanchion fell owing to its fastenings having become completely useless, which was a clear ground of action against the shipowners at the instance of the pursuer, who was on board on the invitation of the shipowners, and had not subjected the ship's fittings to any usage which they might not reasonably be expected to stand. The pursuer's own employers also were liable, as the defect was a patent defect, which they ought to have observed, and insisted on having removed for the safety of their workmen.

LORD JUSTICE-CLERK.—As regards the case against the owners of the "Peveril," as to which Mr Ure did not say anything in reply, I think it can hardly be maintained after what we have heard that there is not a case to go to proof. A stanchion which forms part of the supports of the deck near the hatchway is alleged to have been in such a condition that a very slight force coming against it would throw it down, and as there must be workmen working in the hold who have to pass that stanchion and be near it, time after time, in the course of the day, I think it cannot be held not to be a case for evidence, at least as to whether, that stanchion being in an utterly unsafe condition, the defenders are not to be held liable in respect of that unsafe condition, the result of a slight accident being that the stanchion gives way and injures one who is not in their employment, but who is on duty in the ship.

The case against the stevedore is quite different, and I must say that I am surprised, and I think it is a great pity, that a case against the stevedore was raised at all. I think the cases which have been cited shew that a stevedore is not called upon to look to the security of the fastenings on board a ship on which he has to work. Of course a stevedore who happened to notice anything which was seriously wrong should point it out, but he could not have any power in the management of the ship; and if the people on board the ship—the master or owner—to whom he made a complaint were to say to him, "Attend to your own business, we will attend to ours; we are quite satisfied with it," I do not think he could have refused to carry on his work to the best of his ability. It does not appear to me that there is any case stated against the stevedore different from what was stated in the other cases, in which it was held that there was no relevant case against the stevedore. My opinion is, therefore, that the case against the stevedore should be held to be irrelevant.

LORD YOUNG.—I have no doubt about the relevancy of the case against the shipowner, and it is probably matter of regret that, owing apparently—for I take the Sheriff's note as stating the truth—to the case maintained by the shipowners before him in debate, the second action was brought against the stevedore. I think it is probably unfortunate that that was done, although I take the Sheriff's explanation of it as quite intelligible, and really the explanation of why the pursuer, who is a labourer in the employment of the stevedore, brought the action.

What was maintained was that the stanchion was patently bad, so that any stevedore could see it, and he and his foreman, who was not a man

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engaged in manual labour, but a person employed to see that these things were all in order, ought certainly to have known of it and have seen to it, and that if he had done his duty there would have been no such accident as that which is the ground of action here, and therefore no claim of damages against the shipowners. That was the case maintained in argument by the agent for the ship. Then bringing this action against the stevedore the labourer in his employment says—(His Lordship read condescendence 4). Now, I think it very probable that this labourer may fail to establish that, but he has averred it, and I am not prepared to say that I think the Sheriff is wrong in the course which he has taken of sending the case against the stevedore also to proof before answer. He says, after stating that the agent for the shipowner argued that the proximate cause of the accident was the fault of the stevedore as averred (that is, in the averment which I have read)—"As I have already said, I think that each case must be taken by itself separately as regards relevancy. I am not, however, prepared to hold that the shipowners could be absolved from blame as directly contributing to the accident if it be proved that their stanchions were defective, and that it should have been known that they were defective if there had been proper supervision, merely because there should have been a further precaution taken by the stevedore or his foreman which had been neglected. I think the proper course in this case is to have a proof before answer." I think the Sheriff here indicates plainly enough that he reads the averments of the pursuer—and I am not disposed to differ from him—as amounting to this, that the things were defective, and that it must have been known to the stevedore. Indeed, he avers that it was known that they were defective, and certainly would have been known if there had been proper supervision.

Now, I am not aware of any authority for the proposition that a stevedore is not responsible for an accident to one of his men from a defect which he should have seen to, and would have discovered had he made proper supervision. I think there is authority to the effect that a very slight supervision will be sufficient on the part of the stevedore to exempt him from responsibility, and that he may assume that this, that, and the other thing are all right in a ship without making a special examination. But I cannot assent to the proposition that there would be no liability if things are wrong, which by proper supervision, without requiring anything out of the way on his part, he would have discovered so as to prevent his man going into that danger. If there is to be an inquiry before answer—a proof before answer—I think it is not judicious or in the legitimate interests of the parties that we should decide any question upon the relevancy here of the want of proper supervision on his part, whereby he would have discovered this defect before the risk was incurred or damage done. I should therefore, for my own part, be of opinion that the proper course is to affirm the judgment of the Sheriff, a jury trial not being insisted in, and send the case back to him that he may proceed with the proof before answer in both cases.

LORD TRAYNER.—The proximate cause of the injury for which damage is claimed in this case was insufficiency of one of the ship's stanchions. I

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think there is a case at least for inquiry as regards the liability of the shipowners upon that question. I think there is no relevant case stated for inquiry as against the stevedore. I think it is settled that a stevedore is not responsible for the insufficiency of the ship's fittings, and that he is not bound before he begins his duty of discharging or loading a ship to satisfy himself with regard to the ship's fittings whether they are sufficient or insufficient. I think, further, that if the pursuer has not averred a relevant case against the stevedore, it is the stevedore's right to ask that the action should be at once disposed of, and that he is not bound to wait the result of an inquiry *re* a claim against other persons with which he has no concern.

LORD MONCREIFF.—I think there is a case for inquiry as against the owners. I agree with your Lordship in the chair and Lord Trayner that no relevant case has been stated against the stevedore, because I am of opinion that there is no duty of inspection of a ship laid upon a stevedore, and that being so, I think the stevedore is entitled to absolvitor now.

THE COURT recalled the interlocutor of the Sheriff-substitute, dismissed the action against the stevedores Macgregor & Ferguson, and decerned; and in the action against the s.s. "Peveril" Company, Limited, allowed the parties a proof of their averments before answer.

GEORGE INGLIS & ORR, S.S.C.—J. & J. ROSS, W.S.—LEWIS BILTON, W.S.—Agents.

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ALEXANDER M'MULLEN, Pursuer (Appellant).—*Salvesen —A. S. D. Thomson.*
NEWHOUSE COAL COMPANY, Defenders (Respondents). *—C. J. Guthrie—A. Moncrieff.*

Reparation—Master and Servant—Mines and Minerals—Defect in road in mine—Knowledge of mine-owner—Liability at common law—Employers Liability Act, 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *subsec.* (1), *sec.* 2, *subsec.* (1), *and sec.* 8.—A miner was injured by the fall of two large stones from the roof of a roadway in the coal mine in which he was employed. In an action by him against his employers for damages, laid both at common law and under the Employers Liability Act, 1880, he averred that "the accident was caused through the fault and gross negligence of the defenders, their manager, oversman, and roadsman, in allowing said roof of said road to remain in such an exceedingly dangerous condition"; that "the road had not been properly inspected"; that "the wood supporting the roof and sides where the accident occurred was in a rotten state, and had been in this state for a considerable time before the accident, and contributed to the accident"; and that "this was well known to the defenders, their overseman and roadsman, but no steps were taken to have it remedied."

Held that these averments were relevant to infer liability under the Act, and further that the pursuer was entitled to an issue both at common law and under the Act.

2D DIVISION. Sheriff of Lanarkshire.

IN February 1896 Alexander M'Mullen, drawer, Forsyth's Land, Newarthill, brought an action in the Sheriff Court at Hamilton, against the Newhouse Coal Company, near Holytown, and Hugh Crichton there, the only known partner of that company, praying for damages for personal injury sustained by the pursuer when in the

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employment of the defenders. The action was laid at common law and under the Employers Liability Act, 1880.

The pursuer averred that when in the employment of the defenders as a drawer at Newhouse No. 1 pit, on 28th December 1895, as he was pushing a hutch along the main road of the pit from the lye to the face, he was injured by a fall of stone from the roof, one stone, weighing about three cwt., falling upon his back, and another falling upon his left hand. He further averred:—(Cond. 4) "The accident was caused through the fault and gross negligence of the defenders, their manager, oversman, and roadsman, in allowing said roof of said road to remain in such an exceedingly dangerous condition as to permit stones to fall down therefrom, to the peril and great danger of those workmen whose duty it was to pass up and down said main road during the entire day." (Cond. 5) "It was the duty of the defenders, and of their said manager, oversman, and roadsman, to have said road inspected regularly, and to have said roof so supported that no stones or other debris could fall therefrom, neither of which precautions were taken here. Said roof of said road had not been inspected for a considerable period prior to the date of said accident, and had been for a considerable time prior thereto in a very dilapidated and dangerous state, and was the cause of the accident. An ordinary inspection would have revealed the dangerous condition of the said roof of said road. The wood supporting the roof and sides where the accident occurred was in a rotten state, and had been in this state for a considerable time before the accident, and contributed to the accident. This was well known to the defenders, their oversman, and roadsman, but no steps were taken to have it remedied. Loose stones were hanging from the roof, and had been hanging for a considerable time in this dangerous state before the accident."*

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* The Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), enacts, sec. 1—"Where, after the commencement of this Act, personal injury is caused to a workman

"(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in, the business of the employer; or

"(2) By reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or

"(3) By reason," &c.

"The workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

Sec. 2 enacts—"A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say

"(1) Under subsection 1 of section 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

"(2) Under subsection 4 of section 1, unless," &c.

Sec. 8 enacts—"For the purposes of this Act, unless the context otherwise requires

"The expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

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The defenders pleaded;—(1) The pursuer's statements are irrelevant.

On 7th April 1896, the Sheriff-substitute (Davidson) sustained the first plea in law for the defenders, and assoilzied them from the conclusions of the action.*

The pursuer reclaimed, and argued;—(1) The pursuer's case under the Act was clear. He averred a defect in the condition of the road, which brought him within sec. 1, subsec. 1,[1] and he averred that this defective condition had not been remedied owing to the negligence of the defenders or of their oversman and roadsman, which took him out of the exception contained in sec. 2, subsec. 1. The Sheriff-substitute was in error in thinking that the definition in sec. 8 applied to subsec. 1 of sec. 2; it applied only to subsec. 2 of sec. 1. (2) The case was also relevant at common law, the pursuer's averment being that the defenders were themselves aware of the defective condition of the road. The argument that the compulsory employment of certificated managers, under the Coal Mines Regulation Act, 1887, took the case of coal mines out of the ordinary rules of responsibility had been rejected.[2] At all events the case being relevant under the Act, the pursuer's record was sufficient to entitle him to go to trial also at common law.

Argued for the defenders;—(1) The pursuer's case at common law was irrelevant. It was based entirely on the defenders' alleged personal knowledge of the defective condition of the road. Such knowledge was very improbable, and therefore, taking the case upon relevancy, the pursuer's averment ought to have been much more specific to entitle him to an issue at common law. The substance of the pursuer's averment was that the roof at the point in question had got into a bad condition. That was a defect of detail, and there was no averment that the defenders exercised any personal supervision over the working of the mine. The averment as to their knowledge therefore could mean only that they had knowledge in law through their servants. That was not sufficient at common law.[3] The cases of *Macdonald*[2] and *Gibson*[2] went to no more than this, that a mine-owner, in whose mine a defective system was in operation, was not relieved from responsibility for injuries resulting from that system, by the mere fact of there being a certificated manager; but the present case was not a case of defective system. The fault was the fault of the manager, who was a fellow-servant of the pursuer.[4] (2) No case

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* "NOTE.—In the pursuer's pleadings I find no case at all at common law. His case under the Employers Liability Act is that the roadsman or some official in the pit failed in his duty to inspect the roof which fell. Now, it is the roadsman's duty to do this, and there is no averment that he was a person entrusted with superintendence, or that he was not engaged in manual labour. There is no averment that the defenders failed to appoint a proper manager or roadsman, and it does not avail the pursuer, in my opinion, to insert in his condescendence that it was the duty of the manager and oversman to inspect the working-places, and then to explain that if the roadsman fails these persons are in fault, because it is their business to see that he does his duty."

[1] M'Monagle v. Baird & Co., Dec. 17, 1881, 9 R. 364.

[2] Gibson v. Nimmo & Co., March 15, 1895, 22 R. 491; Macdonald v. Udston Coal Co., Feb. 8, 1896, *ante*, p. 504.

[3] Wilson v. Merry & Cunningham, May 29, 1868, 6 Macph. (H. L.) 84.

[4] Howells v. Landore Steel Co., 1874, L. R. 10 Q. B. 62.

No. 150. had been stated under the Act, to which the Sheriff-substitute had given the sound construction.[1]

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LORD JUSTICE-CLERK.—The Sheriff-substitute has thrown out this action and held that the pursuer's averments are irrelevant. I am unable to concur in that result. As regards the case under the Employers Liability Act, the pursuer's averments amount to this, that the ways were in a dangerous and defective state. For that the Act gives the pursuer a remedy by section 1, subsection 1, unless the defender can bring himself within the exception stated in section 2, subsection 1, of the Act. I am of opinion that his averments are such as to entitle him to have his case sent to trial. It will be open to the defender at the trial to bring the case under the exception in section 2, subsection 1, of the Act.

The action is also laid at common law, and that raises a more difficult question. There is no doubt that an employer may be liable at common law for the defective condition of ways if he has personal knowledge that they are defective, and either fails or declines to have the defects remedied. Now, here we have an averment that "the wood supporting the roof and sides where the accident occurred was in a rotten state, and had been in this state for a considerable time before the accident, and contributed to the accident," and that "this was well known to the defenders." The pursuer undertakes to prove that, and whatever we may think about the probability of such a statement being proved, we cannot refuse to allow the case to go to trial at common law as well as under the statute.

LORD YOUNG.—I am of opinion that this case must be sent to trial. I think we could not do otherwise unless we were to hold that within the limits imposed by this record it would be impossible to establish facts inferring liability either at common law or under the Act. I consider the case first as laid under the Act. It is to be noted that the Act was passed for the purpose of modifying the hardship and injustice of the common law, which held that the workman should take the whole risk of the negligence of all his fellow-workmen. This Act was passed to modify that risk in certain special cases. One of these cases is "when personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer." That is averred to have been the case here. At common law if any such defect remained unknown owing to the fault of a collaborateur the workman had to take the consequences. The statute altered that and made the employer liable in such circumstances. The statute provides that in such a case the workman is to "have the same right of compensation and remedies against the employer as if he had not been a workman of, nor in the service of, the employer." It has been assumed throughout the argument that the subsection I have quoted applies to the condition of the roof in a mine. It is averred here that there was a defect in the roof. It is no answer under the statute that that defect was left unremedied or undiscovered through the fault of a collaborateur. But there is an exception to the exception introduced by the statute upon the common law rule—(His

[1] Moore v. Ross, May 24, 1890, 17 R. 796.

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Lordship read section 2, subsection 1). Now, that puts it upon the pursuer to shew that the condition prescribed by the statute was fulfilled. If he fails to prove that, or, much more, if the employer proves the reverse, then there will be no liability. But I think the case must go to trial.

As to the case at common law, I agree that there is more difficulty, but I am not prepared to say that the pursuer cannot prove under this record facts inferring liability at common law, and I do not think the legitimate interests of the defenders, which we are bound to consider, require that we should refuse to send the case to trial at common law when we are of opinion that there is clearly a case to go to trial under the Act.

The Judge at the trial will tell the jury whether the evidence adduced will in law justify a verdict for the pursuer at common law, and I think this a sufficient protection for him. I think the case must go to trial without our making any separation of it as regards liability at common law and under the statute.

LORD TRAYNER.—I agree that this case must go to trial, but I prefer at this stage to say nothing more than that I have great doubt as to the relevancy of the pursuer's averments in support of his claim at common law.

LORD MONCREIFF.—I think there is here clearly a case under the statute, but I have very great doubt whether there is a case at common law owing to the bareness of the averment as to the defenders' knowledge of the defective state in which the roof is alleged to have been. I think, however, that the case must go to trial both at common law and under the Act.

THE COURT approved an issue in common form for the trial of the cause by a jury, damages being claimed alternatively at common law and under the Employers Liability Act, 1880.

HUTTON & JACK, S.S.C.—DRUMMOND & REID, S.S.C.—Agents.

No. 151.
May 28, 1896.
Seaton v. Parish Council of Arbroath and St Vigeans.

HENRY GEORGE SEATON, Pursuer (Respondent).—*W. Campbell—A. Orr Deas.*

PARISH COUNCIL OF THE PARISH OF ARBROATH AND ST VIGEANS, Defenders (Appellants).—*Sol.-Gen. Dickson—Clyde.*

Poor—Inspector of Poor—Union of parishes—Transfer of existing officers—Right of new Parish Council to refuse to employ one of two inspectors of former parishes—Order by Secretary for Scotland—Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 51—*Local Government (Scotland) Act*, 1894 (57 *and* 58 *Vict. cap.* 58), *secs.* 46 *and* 51.—By the Local Government (Scotland) Act, 1889, sec. 51, the Secretary for Scotland may, by order, provide (*d*) for uniting several parishes into one parish, (*f*) for the proper adjustment and distribution of the powers, property, liabilities, debts, officers, and servants of any Local Authority, consequential on any consolidation.

By the Local Government (Scotland) Act, 1894, sec. 46, it is enacted,—"An order of the Secretary for Scotland under section 51 of the principal [1889] Act . . . for uniting several parishes or parts of parishes into one parish by the creation of a new parish or otherwise . . . shall have effect for all purposes whether County Council, justice, Sheriff, militia, parochial board, parish council," &c. Sec. 50 enacts,—"All persons who on 15th May 1895 hold office as inspector of the poor, &c., shall thereafter become the officers and servants of the Parish Council." Sec. 51 enacts,—

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(1) "The officers and servants of any authority who hold office at the passing of this Act, and who by or in pursuance of this Act become officers and servants of a Parish Council . . . shall hold their offices by the same tenure and upon the same terms and conditions as if this Act had not passed . . ."

By an order the Secretary for Scotland united the parishes of A. and V., and declared that the former parish councils should cease, and their whole powers, rights, duties, property, liabilities, debts, officers, and servants should be transferred to the parish council of the new parish.

The new Parish Council thereafter appointed Stuart, the former inspector of poor for V., to be inspector for the united parish, and refused to regard Seaton, the former inspector of A, as in their employment.

In an action against them at the instance of Seaton for payment of his salary as an inspector, they maintained (1) that the old parishes having been abolished, their officers had also ceased to exist; and (2) that the clause in the order transferring existing officers to the new Parish Council was invalid, in respect it did not provide for the adjustment and distribution of their duties. *Held* that the order was valid, and that the inspectors of the pre-existing parishes continued to hold office as servants of the new Parish Council.

1st Division. Sheriff of Forfarshire.

THIS was an action brought in the Sheriff Court of Forfarshire at Arbroath by Henry George Seaton against the Parish Council of the parish of Arbroath and St Vigeans, concluding for payment of £35, as past due salary.

The following facts were not in dispute between the parties:—

In July 1889 the pursuer was elected by the Arbroath Parochial Board to the offices of inspector of the poor and collector of poor and school rates.

On 11th July 1895 the Secretary for Scotland issued an order uniting the parish of Arbroath and the parish of St Vigeans into one parish, to be called the parish of Arbroath and St Vigeans.*

The order contained the following clause:—"(2) The Parish Council of Arbroath and the Parish Council of the now existing

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* The Local Government (Scotland) Act, 1889 (52 and 53 Vict. c. 50), enacts, sec. 51,—"On the representation of a County Council or of a Town-Council the Secretary for Scotland may . . . by order provide for all or any of the following things:—(*d*) for uniting several parishes or parts of parishes into one parish . . .

"(*f*) for the proper adjustment and distribution of the powers, property, liabilities, debts, officers, and servants of any Local Authority consequential on any consolidation or other act done in pursuance of this section; and

"(*g*) generally for doing any matter or thing whatever whether similar or not to those above mentioned, which may be required or be expedient for the proper carrying into effect the purposes of this Act, and the settlement of local differences."

The Local Government (Scotland) Act, 1894 (57 and 58 Vict. c. 58), enacts, sec. 46,—(as quoted in rubric).

Sec. 50.—"All persons who on 15th May 1895 hold office as inspector of the poor, &c., shall thereafter become the officers and servants of the Parish Council."

Sec. 51 (1).—"The officers and servants of any Authority who hold office at the passing of this Act, and who by or in pursuance of this Act become officers and servants of a Parish Council . . . shall hold their offices by the same tenure and upon the same terms and conditions as if this Act had not passed, and while performing the same duties shall receive not less salaries or remuneration, and be entitled to not less pensions (if any) than they would have received or been entitled to if this Act had not passed . . .

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parish of St Vigeans shall cease and determine, and their whole powers, rights, duties, property, liabilities, debts, officers, and servants shall be transferred to the Parish Council of the parish constituted by this order."

Thereafter the defenders intimated to the pursuer that they had appointed Robert Stuart, the former inspector of poor for St Vigeans to be inspector for the united parish, and that the pursuer would thus be necessarily deprived of his offices. The pursuer, in reply, maintained that he still held his offices. The defenders then intimated to him the following excerpt from a minute of a special committee of the united Parish Council:—"The committee unanimously resolved to recommend that Mr Seaton be allowed his salary in full up to the 15th day of August curt., both as inspector of poor and collector of poor rates, and that a sum of £250 be paid to him in addition, as in full of compensation and all other claims, whether legal or equitable."

The pursuer declined to accept the compensation offered, and raised the present action. He pleaded;—(1) The pursuer having, as at the 15th day of May 1895, held office as inspector of poor for the parish of Arbroath and collector of poor and school rates, became by operation of section 50 of the Local Government (Scotland) Act, 1894, an officer of the Parish Council of said parish. (2) Under section 51, subsection 1, the pursuer and others similarly placed are declared to hold their offices by the same tenure, and upon the same terms and conditions "as if this Act had not passed, and while performing the same duties shall receive not less salaries or remuneration, and be entitled to not less pensions (if any) than they would have received or been entitled to if this Act had not passed."

The defenders, *inter alia*, averred:—"The said order, which was duly published before coming into operation, had the effect of terminating the pursuer's contract of service, and of discontinuing the pursuer's appointment as inspector and collector for said parish of Arbroath, as also of terminating the said Robert Stuart's contract of service, and of discontinuing his appointment as inspector and collector for said parish of St Vigeans.

The defenders pleaded;—(3) The pursuer's claim, if he any has, against the defenders, being one for compensation and not salary, the defenders should be assoilzied. (5) The pursuer's contract of service having been terminated by the combined operation of the said order and the Poor-Law Act, no salary is due to the pursuer.

On 22d January 1896 the Sheriff-substitute (Robertson) found that the action of the Parish Council in depriving the pursuer of his office of inspector of poor of the parish of Arbroath was *ultra vires* and illegal, and decerned for the salary sued for.

The defenders appealed, and argued;—The order of the Secretary for Scotland under sec. 51, by creating a new parish, wiped out the two pre-existing parishes, and with them their respective offices. Sec. 51 (1) had no application to the substitution of one parish for two, but dealt only with the substitution of a parish council for a parochial board under the earlier Local Government Act. The order did not transfer the existing officers to the new council. It must be read in accordance with, and not as upsetting, the existing law, and that did not permit one parish to have two inspectors.[1] Besides, the

[1] Board of Supervision v. Glasgow Parochial Board, Feb. 1, 1850, 12 D. 627, 22 Scot. Jur. 228.

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clause transferring officers and servants was invalid. There was no warrant for it in the statute. It could not be said to be an adjustment and distribution of the offices, &c., and yet that was what the Secretary was authorised to do. But assuming that the effect of the order was to give the new Council two inspectors, they were quite entitled to dismiss one of them. That was practically what they had done. An inspector did not hold his office *ad vitam aut culpam*. The observations to the contrary in the *Old Monkland* case[1] were *obiter*, and not necessary for the decision of that case. Although the Board of Supervision had, under sec. 56 of the Poor-Law Act, 1845 (8 and 9 Vict. c. 83), power in certain circumstances to dismiss inspectors, there was nothing in the Act to disable the parochial board which made the appointment from dismissing. The view expressed by Lord Shand in *Clark's* case[2] was founded on the case of *Dull*,[3] but that case, when examined, was hardly an authority for what his Lordship said.

Counsel for the respondent was not called upon.

LORD PRESIDENT.—It seems to me that the true ground of judgment in this case is to be found in the order by the Secretary for Scotland uniting the parishes of Arbroath and St Vigeans. I do not doubt that all that was done under this order, so far as it relates to the present question, was validly done, and within the powers of the Secretary for Scotland. The second head of the order in plain terms declares that the whole powers, &c., of the two Parish Councils shall be transferred to the Parish Council of the new parish. Now, applying those general words to the case of the person in question, it is past doubt that this gentleman was an officer and servant of the old parish of Arbroath, and if so he is transferred to the new parish, and becomes one of their servants. What duties then has he to perform, and what rights has he in that quality? They can be none other than those he was performing and enjoying under his former master, and section 51 of the Act of 1894 seems to me directly to apply, because, speaking distinctly and solely of those officers who held office at the time of the passing of the Act, it says,—"Nothing done by this Act," or done in pursuance of this Act, "shall alter the rights and duties of those officers." Accordingly, the order of the Secretary for Scotland, not in so many words, but in effect, did distribute the duties of the inspectors who were transferred to the new parish, because by transferring them and declaring them to be servants of the new board, it defined their duties by the necessary statutory effect of that clause. It defined their duties as being those which had been done before. There is nothing at all repugnant to that conclusion, because it is manifestly entirely inappropriate to say that there is an illegality in a parochial board having two inspectors of poor. All that the decisions which we were referred to say is, that it would be illegal for a parochial board administering the Act of 1845 to appoint two inspectors, except under the limitations stated under section 55; but that never did, and never possibly

[1] Board of Supervision v. Parochial Board of Old Monkland, Jan. 17. 1880, 7 R. 469.

[2] Clark v. Board of Supervision, Dec. 10, 1873, 1 R. 261.

[3] Board of Supervision v. Parish of Dull, June 9, 1855, 17 D. 827, 27 Scot. Jur. 425.

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could, make it impossible for the Legislature to authorise a competent authority, charged with the duty of effecting a workable fusion of two parishes, to continue the services of two existing inspectors. That is what has been done here, and accordingly, in my opinion, the order of the Secretary for Scotland can be supported on the ground that it effects the distribution of the offices; but further, the very general words in the Act of 1889, which are incorporated and referred to in the subsequent statute, would support what has been done, apart from that precise definition of powers. Now, if I am right in this view, we are taken clean outside the question about the power of a parochial board to dismiss an inspector of poor on other grounds than his fault, and for this reason that we have not here any arrogation by the new board of such a power. They have not considered whether this person should be dismissed from the office he holds. On the contrary, they have assumed, contrary to the law of the case, that the office was abolished. All that they have done is to assume that the office he held had gone by the board, and that they were debarred from doing anything else than to appoint a sole inspector for the combined parishes. Therefore nothing which I have said can be founded upon as affecting one way or other the rights of a parochial board or a parish council in future in dealing with their inspectors of poor. I have no occasion to enter into the consideration of whether those officers hold office *ad vitam aut culpam*. The result is that the decision of the Sheriff should be affirmed.

LORD ADAM.—I agree.

LORD M'LAREN.—I am of the same opinion. I see no reason to doubt that the order of the Secretary for Scotland is entirely in terms of and within the powers devolved upon that high officer by Parliament. Standing the order, it seems perfectly clear that the inspectors of poor of the pre-existing separate parishes were transferred, *i.e.*, their contract of service was transferred to the united parish. It may be that it is within the power of the united parishes to effect some distribution of the services and duties of these officers. That may yet be arranged. I agree with your Lordship that there has been no attempt on the part of the new parish council to dismiss their officer. They do not claim to have dismissed him. In the record they express the opinion that his office had come to an end by force of the Act of Parliament in consequence of the union of the two parishes, and there could be no better proof that this was the view on which the Parish Council acted than this, that they made the pursuer an offer of £250 as compensation for the loss of his office. Such an offer would of course be an illegal application of the funds of the parish in the case of a person who had been lawfully dismissed. The case is really one of misapprehension of the true state of relations between the authorities of the new united parish and the officers of the pre-existing separate parishes.

LORD KINNEAR.—I concur.

THE COURT affirmed the interlocutor appealed against.

DUNCAN SMITH & MACLAREN, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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M'Killop v. North British Railway Co.

HENRY M'KILLOP, Pursuer (Appellant).—*Ure—Dewar.*
THE NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—*D.-F. Asher—Grierson.*

Reparation—Master and Servant—Railway—Responsibility of railway company for defective equipment of their line.—A railway company or other employer is not relieved, by the appointment of competent engineers and managers, from responsibility for injury arising to a servant from a defect in the construction of the works.

In an action for damages at common law and under the Employers Liability Act at the instance of the father of a railway servant, the pursuer averred that his son had been run over and killed by a train while acting as a flag-boy at a level crossing; that the train in question was being pushed by an engine behind on a line which formed a curve, close to the place of the accident, round a water-tank, and that the water-tank had been erected by the defenders in such a position as to make it impossible for those in charge of the engine to see whether the line was clear, or to receive signals. The defenders pleaded that there was no relevant case at common law, in respect that there was no averment that the engineers employed to lay out the station and to fix the site of the water-tank were not competent. *Held* that the pursuer was entitled to an issue at common law.

Observations (*per* Lord M'Laren) on the *Bartonshill Coal Company* v. *M'Guire*, June 17, 1858, 3 Macq. 300; *Wilson* v. *Merry & Cunningham*, May 31, 1867, 5 Macph. 807; and *Wallace* v. *Culter Paper Mills Company*, June 23, 1892, 19 R. 915.

1ST DIVISION. Sheriff of the Lothians and Peebles.

HENRY M'KILLOP, railway surfaceman, brought an action of damages in the Sheriff Court at Linlithgow against the North British Railway Company on account of the death of his son, William John M'Killop, while in the service of the defenders.

The action was laid both at common law and under the Employers Liability Act.

The pursuer averred that on 19th September 1895 his son, while acting as a "redcap" or flag-boy to a train approaching a level crossing at Bo'ness Dock, on the defenders' line, was run over by the train, and so severely injured that he died; that the train, consisting of twenty-nine loaded waggons, was being pushed by an engine behind from the east along the Bridgeness line; that the pursuer's son was informed that the train was to be shunted to a branch line B, the points being 56 feet east of a level crossing; that his son was sent forward to the level crossing to prevent obstruction; that a train of empty waggons was on an adjoining line C, waiting till the loaded train cleared the points so as to enable the empty train to proceed on the Bridgeness line; that his son, while standing on the C line facing this train was run over by the loaded train, which, by some defect in or mismanagement of the points, had come along the C line instead of the B line. "About 55 feet or thereby from the said points, and to the east thereof, there is an erection belonging to defenders known as the water-tank, round which the said Bridgeness line, on which the said train of waggons was being pushed, forms a curve. The said water-tank is a great source of danger to those whose duty necessitates their being upon the said line of rails at or about this point." (Cond. 7) "Neither the first guard nor second guard in charge of said loaded train were at their posts as they should have been, and the engineman in charge of said train proceeded without a signal or warrant to do so, and without blowing the

engine whistle, or giving any warning of his approach, as he should have done." (Cond. 8) "Owing to the erection of said water-tank it was utterly impossible for the engineman or fireman in charge of said loaded train to see if the line was clear, to receive signals from any one in front of their train, or to discover that their train was proceeding on a wrong line of rails. Looking to the dangerous character of this part of the line the defenders were at fault in having such an erection which is so much calculated to increase the dangers of this dangerous place. The defenders were aware previous to the accident to the pursuer's son that said water-tank was a source of danger, and it is believed and averred that previous to the accident, as also subsequent thereto, they were requested by the Board of Trade to have same removed from its present position, or recommended to do so. Such request or recommendation they have so far failed to comply with. Had the defenders, or those for whom they are responsible, exercised reasonable care the said accident could not have happened."

The pursuer pleaded, *inter alia;*—(1) The accident to the said William John M'Killop, from which he died, having been caused through the fault of the defenders as condescended upon, and the pursuer having in consequence suffered loss, injury, and damage, he is entitled to compensation.

The defenders pleaded, *inter alia;*—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of his petition. (4) The faults alleged by the pursuer being those of his deceased son's fellow-servants, the action is incompetent at common law.

On 31st January 1896 the Sheriff-substitute (Melville), before answer, allowed a proof.

The pursuer appealed to the First Division for jury trial, and proposed an issue in common form.

The defenders objected to the relevancy of the action as laid at common law. They argued;—It was not said that the defenders did not employ perfectly competent and qualified officials to select a position for and to erect the tank in question. If they did, and if they complied with all the requirements of these officials, and supplied them with all necessary materials—and it was not said that they had not—then in the absence of personal knowledge of the alleged defect and of direct interference with or control of the particular detail of the organisation, they should not be held responsible for what was a fault of construction or arrangement of ways and works.[1] It was not said here that the defenders were personally identified with the defect. The other fault alleged here was the neglect of a communication from the Board of Trade. Even assuming that the company might have been in fault if they had not passed on the communication to the proper official, it was not said that they had not duly considered it. Suppose—as no doubt was the case—they had remitted the matter to their engineer, and he had said it was impossible to remove the tank, then, if anyone were liable it would be the engineer. There was express provision made now for defective plant by the Employers Liability Act, and that shewed that there was no liability at common law. The cases cited for the pursuer shewed merely that

[1] Wilson v. Merry & Cunningham, May 31, 1867, 5 Macph. 807, 39 Scot. Jur. 426, May 29, 1868, 6 Macph. (H. L.) 84, 40 Scot. Jur. 486; Sneddon v. Mossend Iron Co., June 23, 1876, 3 R. 868.

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the point now made for the defenders might have been taken but was not. The cases, moreover, did not in their facts bear out the pursuer's contention, *e.g.*, in *Mackinnon*[1] the accident was due to the want of a bottomer, whom it was clearly the duty of the defenders to supply, and in *Sharp*[2] there was a breach of a statutory regulation.

Argued for the pursuer;—As regarded liability for fault, the case of a railway company was not different from that of any other employer. The employer might not be responsible when the fault had relation to temporary or transitory matters or details, or to a solitary instance of neglect of duty on the part of one of their servants, but everything connected with their system which was of a permanent or stationary and continuous nature fell within the range of their duty. In the latter case personal knowledge of the defect was not essential, and it did not free the employer from responsibility that he had delegated the duty of construction and supervision to a manager or official however competent and skilful. Here the danger arose directly from a defect in the permanent arrangements, viz., the misplacing of a tank so as to obstruct the view of engine-drivers at a critical part of the line. In such a case the responsibility of the employer to a servant was the same as to one of the public.[3] The earlier cases supported this view, that an employer was liable for a defective system, and they were expressly saved in the *Bartonshill* cases in the House of Lords.[4] The later cases were to the same effect, and it made no difference that the employers were not personally in fault.[5] The question, indeed, had in many cases not been discussed, the defenders not apparently disputing their liability on that head.

At advising,—

Lord M'Laren.—This is an action at the instance of the father of a railway servant who lost his life while engaged in the service of the company, and as the pursuer says through the company's fault. The defenders say that no relevant ground of liability is stated against them, and more generally they maintain the proposition that a railway company incorporated by Act of Parliament is indemnified against all responsibility under the common law for injury done to its servants by the mere fact of appointing a competent staff of officers and workmen, and giving them the necessary authority. I think that a very moderate study of the decisions might have

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[1] Murdoch v. Mackinnon, March 7, 1885, 12 R. 810.

[2] Sharp v. Pathhead Spinning Co., Jan. 30, 1885, 12 R. 574.

[3] Bartonshill Coal Co. v. Reid, June 17, 1858, 3 Macq. 266; Bartonshill Coal Co. v. M'Guire, June 17, 1858, 3 Macq. 300.

[4] *Vide* Bartonshill Coal Co. v. Reid, 3 Macq. 266, Lord Cranworth's opinion.

[5] Wilson v. Merry & Cunningham, 5 Macph. 807, Lord President at p. 811, 6 Macph. (H. L.) 84, Lord Cairns at p. 89; Sharp v. Pathhead Spinning Co., Jan. 30, 1885, 12 R. 574; Cairns v. Caledonian Railway Co., March 19, 1889, 16 R. 618; M'Guire v. Cairns & Co., Feb. 28, 1890, 17 R. 540; Murdoch v. Mackinnon, March 7, 1885, 12 R. 810; Henderson v. John Watson, Limited, July 2, 1892, 19 R. 954; Wallace v. Culter Paper Mills Co., Limited, June 23, 1892, 19 R. 915; Wright v. Dunlop & Co., Limited, Feb. 14, 1893, 20 R. 363; Macdonald v. Udston Coal Co., Feb. 8, 1896, *supra*, p. 504; Macleod v. Caledonian Railway Co., October 31, 1885, 23 S. L. R. 68; Gibson v. Nimmo & Co., March 15, 1895, 22 R. 491.

sufficed to satisfy counsel of the unsoundness of the proposed criterion of responsibility. It was pointed out by Lord Chelmsford in one of the earliest cases that came before the House of Lords, the case of the *Bartonshill Coal Company* v. *M'Guire*,[1] that the general rule is that employers are responsible for injuries done to their servants through fault or negligence in the same degree as they would be responsible to outside persons, and that the only exception to this rule is the case where the fault is attributable to a fellow-servant. Where the injury is attributable to defective machinery or apparatus, the liability to an employee and the liability to one of the public are identical. This ground of liability is recognised in the two *Bartonshill* cases[2] by the Lord Chancellor and Lord Chelmsford, who indeed treat the principle as incontestible, and make use of it to explain and vindicate previous decisions of their Lordships' House and of the Court of Session.

In *Wilson* v. *Merry & Cunningham*,[3] which was a case of injury to a miner due to defective construction of scaffolding in the shaft of a coal mine, Lord President Inglis states as his opinion that because the scaffolding was constructed by the defenders' servants under the direction of the manager, and there being no question of the sufficiency of the timber, the fault was the fault of fellow-servants; but his Lordship is careful to distinguish this from the case of machinery or apparatus purchased by the master and which is of faulty construction, because if injury results, this he says is the fault of the master, whose business it is to provide the apparatus. It would be easy to multiply citations on this subject, but I will only add that the liability of the master to provide fit and sufficient machinery and apparatus constituted the sole ground of judgment in the case of *Wallace* v. *Cutler Paper Mills, Limited*,[4] where this Court held an employer responsible for injury resulting from the unfenced condition of a paper machine, rejecting the defence that the workman must be held to have taken the risk because he knew that the machine was not properly fenced.

Again, I must dissent entirely from the notion that railway companies enjoy any special immunity from claims of this kind because they delegate the greater part of the work of an employer of labour to managers and engineers. We should not hold that a private company or partnership was able to displace the responsibility for providing sufficient machinery and plant by delegating the duty of selection to a manager. In this question I conceive that the directors of a railway company are in the same position as managing partners, and that they cannot relieve themselves of the responsibility which rests on the employer or his institor, by leaving everything to the judgment of a salaried officer. The provisions of the Employers Liability Act relating to this kind of liability are no doubt to be considered in all such cases; but I do not read these provisions as if they were intended to come in place of the rule of liability of the common law, but rather as supplementary to it. They may be very useful in ambiguous cases, but only, as I think, by way of obviating a defence which might be otherwise available under the principle of common employment.

In the present case one of the grounds of action is that near a railway

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[1] 3 Macqueen, 300.
[2] 3 Macqueen, 266 and 300.
[3] May 31, 1867, 5 Macph. 807.
[4] June 23, 1892, 19 R. 915.

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station where there are sidings and a level crossing and a dockyard, and where the sources of personal danger are such that it is necessary that the trains of waggons should be preceded by a flagman, a water-tank was placed in the bend of a curve so as to interrupt the view of the line by the guard and driver of the waggons. By this arrangement it is said the flagman was exposed to unnecessary, that is, to avoidable danger, in consequence whereof he, that is, the pursuer's son, lost his life.

We are not at present concerned with the truth of these allegations; it may be that, having regard to the requirements of the service at the station in question, no better position for the water-tank could be found. If this be so, a jury may justifiably come to the conclusion that the water-tank constituted an unavoidable danger; and that, as in other cases of hazardous employment, the risk was accepted by the company's servants. But if the allegations be true, I see no distinction in principle between the case alleged and the case of unfenced machinery. The water-tank is part of the permanent equipment of the station, and in the laying out of a station, just as in the construction and placing of stationary machinery, due regard must be had to the safety of those who are to be employed there on the business of the company, so that their lives may not be exposed to unnecessary and avoidable hazard. This, I think, is a duty incumbent on the employer whether he be an individual or a company acting through directors, and while the employer would of course be morally right in relying to a large extent on the judgment of engineers or practical men, he is not in my opinion relieved of his responsibility by the mere fact that he had appointed competent engineers and managers to whose judgment he trusts. I therefore think that the issue should be allowed.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Having heard parties upon the relevancy of the action, sustain the relevancy: Approve of the issue," &c.

SIMPSON & MARWICK, W.S.—JAMES WATSON, S.S.C.—Agents.

No. 153. May 29, 1896. Welch's Executors v. Edinburgh Life Assurance Co.

MRS MARY ANN EMSLIE WELCH AND OTHERS (Welch's Executors), Petitioners.—*Johnston—Cullen.*

THE EDINBURGH LIFE ASSURANCE COMPANY, Respondents.—*Dickson—Macfarlane.*

Succession—Right in Security—Limitation of heir's liability for ancestor's debts—Transmission to heir of personal obligation in heritable bond over heritage—Conveyancing and Land Transfer Act, 1874 (37 *and* 38 *Vict. cap.* 94), *secs.* 12 *and* 47.—Section 12 of the Conveyancing Act of 1874 enacts that "an heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds."

Section 47 enacts,—"Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of

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his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure."

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A, who was personally liable under bonds affecting his heritable estate for payment of the sums thereby secured, died leaving a disposition and settlement, whereby he disponed his whole estate, real and personal, to B, whom he appointed his executor and universal legatee. *Held* that under the enactments above quoted the personal obligation contained in the bonds transmitted against B, but that his liability for the debts of the deceased (including the bonds) was limited to the value of the estate to which he succeeded.

1ST DIVISION.

CHARLES WELCH TENNENT died in 1884 leaving a disposition and settlement in the following terms:—"I, Charles Welch Tennent, of Rumgally and Pool, dispone and assign to my brother Ralph Dalyell Welch, merchant in Liverpool, my whole estate, real and personal, wheresoever situated, and I appoint him my sole executor and universal legatee, . . . I recall all former wills and settlements, and declare this to be my last will and testament."

The estate left by Charles Welch Tennent included the lands of Rumgally, in the county of Fife. These lands were subject to two bonds and dispositions in security, each for £10,000, granted by the deceased, to which at the date of his death the Edinburgh Life Assurance Company had right. By these bonds the granter bound himself, his heirs, executors, and representatives whomsoever, to repay to the creditors the principal sums with interest and penalty.

After Charles Welch Tennent's death Ralph Dalyell Welch gave up an inventory of the moveable estate, and completed titles to the heritable estate, including the lands of Rumgally, by expeding notarial instruments in his favour in terms of the Titles to Land Consolidation Act of 1868. He also entered into possession of Rumgally, and continued to possess it until his death in 1895. He duly paid interest on the bonds as it fell due.

Ralph Dalyell Welch left a will in the English form, whereby he appointed his wife Mary Ann Emslie Welch and others his executors, and devised and bequeathed to them the whole residue of his real and personal estates upon the trusts therein declared.

In June 1895 the Edinburgh Life Assurance Company raised an action in the Court of Chancery of the County Palatine of Lancaster, on behalf of themselves and all other creditors of Ralph Dalyell Welch, against Mrs Welch and the other executors appointed by his will, praying for the administration of his estates.

The plaintiffs in this action contended that in the circumstances above stated Ralph Dalyell Welch had come under a personal obligation to pay them the sums due under the bonds, and that the defendants, as his executors, were liable to pay the same out of his estate. The defendants contended that Ralph Dalyell Welch had come under no personal obligation to pay any part of the sums due under the bonds.

As these contentions raised a question of Scots law, the Court of Chancery of the County Palatine of Lancaster, on the motion of the defendants, ordered that a case should be prepared for the opinion of the Court of Session. A case was accordingly prepared, setting forth the facts above narrated, and requesting the opinion of the Court of Session on the following question:—"Whether, in the events which have happened, as hereinbefore stated, the said Ralph Dalyell Welch became subject to the personal obligation to pay the principal moneys

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and interest secured by the said two bonds and dispositions in security, each for the sum of £10,000, or either of them, or any part thereof?"

The case was brought before the Court on the petition of the defendants under the Act 22 and 23 Vict. cap. 63.

Argued for the petitioners;—(1) Prior to 1874 Ralph Dalyell Welch would have been under no personal obligation to pay the amount of the bonds, as he had not granted bonds of corroboration. The extent of his liability now depended on the construction to be put upon the 47th section of the Conveyancing Act of 1874.[1] That section was not intended to increase the liability of a person taking under a *mortis causa* deed, but to do away with the necessity of bonds of corroboration. The disposition in Mr Welch's favour was a "conveyance" in the sense of the section, and the personal obligation of the granter accordingly did not transmit against him, as there was no agreement to that effect *in gremio* of the deed. "Conveyance" in the Act of 1874[2] had the meaning attached to it in sec. 3 of the Titles to Land Act of 1868, and as there interpreted it would include the disposition in question. The deed was not a "bequest" in the sense of section 47, that term being applicable to cases where a person did not take directly from the granter, but through the medium of trustees or executors. If, however, it were to be held that the disposition was a bequest, then the disponee was entitled to the limitation of liability provided for by section 12 of the Act of 1874. The benefit of that section extended to all persons taking by succession, and was not confined to heirs by law.

Argued for the respondents;—Section 47 dealt with two cases, (1) transmissions by lucrative title, "succession, gift, or bequest"; and (2) transmissions by onerous title, "conveyance."[3] Ralph Dalyell Welch took on a lucrative title, and the disposition in his favour was a "bequest" in the sense of the section, for the meaning of that term could not on a fair construction be confined to indirect gifts. It was open to him to have refused the bequest if he wished to be free from the burdens accompanying it, but on his taking it the personal obligations of the disponer under the bonds transmitted against him in terms of the section, and he was not entitled to the benefit of the limitation provided by section 12, that benefit being confined to "heirs," and the true meaning of "heir" being heir by law.[4]

THE COURT answered the question as follows:—"By the law of Scotland under the provisions of 37 and 38 Vict. cap. 94, sections 12 and 47, the said Ralph Dalyell Welch became subject to the personal obligation to pay the principal moneys and interest secured by the said two bonds and dispositions in security, each for the sum of £10,000, subject always to this limitation, that the said Ralph Dalyell Welch could not be made liable for the debts of the deceased Charles Welch Tennent (including the sums secured by the said bonds and dispositions in security) beyond the value of the estate to which he succeeded by virtue of the disposition and settlement of the said Charles Welch Tennent."

KINMONT & MAXWELL, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

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[1] Quoted in rubric.
[2] Sec. 3.
[3] Wright's Trustees v. M'Laren, May 23, 1891, 18 R. 841.
[4] Bell's Prin. sec. 1695.

ROBERT WHITTLE, Petitioner.—*Younger.*
JOSEPH CARRUTHERS, Respondent.—*Cullen.*

No. 154.

June 2, 1896.

Whittle v. Carruthers.

Trust—Removal of trustee—Tutor and Curator.—A petition at the instance of one of two testamentary trustees and executors, who were also tutors to the truster's pupil children, for the removal of the other trustee from these offices on the ground that his estates had been sequestrated, and that the trust had a claim against his estate, *granted.*

1st DIVISION.

JOHN WHITTLE, farmer, Dumfriesshire, died on 9th April 1896, leaving a trust-disposition and settlement dated 28th January 1890, by which he conveyed his whole estates to Robert Whittle and Joseph Carruthers, solicitor, then at Sanquhar, and afterwards at Moffat and Dumfries, as trustees.

The trustees were directed, after payment of debts, &c., to hold the residue of the trust-estate for behoof of the truster's widow in liferent, and after her death to divide the fee among his children equally.

The trustees were appointed executors, and also tutors and curators to any of the beneficiaries who might be in pupillarity or minority at the date of the truster's death.

The truster was survived by his widow, and by three children who were in pupillarity.

Mr Robert Whittle and Mr Carruthers accepted office as trustees.

On 12th May 1896 Mr Robert Whittle presented a petition to the Court praying for the removal of Mr Carruthers from the office of trustee and executor, and of tutor and curator, and for an order ordaining him to deliver up the trust-disposition and settlement, and all other papers belonging to the deceased.

The petitioner averred that Mr Carruthers had lately been in financial difficulties, that his estates were sequestrated on 21st April 1896, and that a claim had been lodged in the sequestration by the petitioner on behalf of the trust-estate for the sum of £117, 4s., in respect of transactions between Mr Carruthers and the deceased. The petitioner further averred that he had presented a petition in the Sheriff Court to issue confirmation in his favour as executor-nominate of the truster, and to ordain Mr Carruthers to deliver up the trust-disposition and other papers. This Mr Carruthers had refused to do.

The widow of the truster concurred in the petition.

Mr Carruthers lodged answers, in which he admitted that his estates had been sequestrated, and that a claim for £117, 4s. had been lodged in the sequestration, but he stated that the claim was greatly overstated, and that he had counter claims which more than balanced it. He further averred that he had been the law-agent of the truster for years before his death, and enjoyed his confidence.

Argued for the petitioner;—The effect of sequestration was to render a trustee unsuitable for the office,[1] more especially when the trust-estate had a claim against him. There was nothing to call for or justify the appointment of a judicial factor. The estate consisted chiefly of a farm. The trust was likely to endure for some time, and it would be a great hardship if it were burdened with the cost of judicial management.

[1] M'Dowall, 1789, M. 7453; Towart, May 14, 1823, 2 S. 305; Smith, May 15, 1832, 10 S. 531; M'Pherson v. A B, Dec. 19, 1840, 3 D. 315.

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Argued for the respondent;—The respondent was willing that the estate should be sequestrated and a factor appointed, but there was no occasion for an order of removal. No malversation or breach of duty was alleged against the respondent, and it was clear that the truster had confidence in him. Being sequestrated, the respondent had no personal interest in the claim against him. That was now entirely in the hands of his trustee.

LORD PRESIDENT.—I think there is enough to render necessary the removal of this trustee.

It is quite clear that his position as a sequestrated bankrupt, alleged to be indebted to the trust-estate, makes him a very unsuitable person to act as one of two trustees managing that estate. I think it is to be regretted that the respondent did not solve the difficulty by retiring; as, however, he declines to do so, it appears to me that our clear course is to remove him. No more censure of him is implied by our doing so than is involved in his having rendered this course necessary by not himself taking the proper step of retiring from the trust. It is out of the question that a person in the respondent's position should be allowed, in order to save his dignity, to insist upon the appointment of a judicial factor,—that is, to mulct the estate in the expenses of judicial management in place of the present gratuitous administration.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT removed the respondent from the office of trustee and executor, and of tutor and curator, and ordained him to deliver up to the petitioner the trust-disposition and settlement, and all other papers and documents belonging to the deceased John Whittle.

STEELE & JOHNSTONE, W.S.—ALEX. WYLIE, S.S.C.—Agents.

No. 155.
June 4, 1896.
Greenock Police Board v. Shaw Stewart.

THE BOARD OF POLICE OF GREENOCK, Petitioners (Respondents).—*W. Campbell—Graham Stewart.*
SIR MICHAEL ROBERT SHAW STEWART, Bart., Respondent (Appellant).—*Sol.-Gen. Dickson—D. Dundas.*
GEORGE DUNCAN PATERSON (Paterson's Trustees), Respondents.—*Salvesen—Crole.*

Burgh—Dean of Guild—Jurisdiction—Competition of heritable title.—In a petition by the Police Board of Greenock to the Dean of Guild under the Greenock Police Act, 1877, to recover the expense of repairing the retaining wall of a stream which bounded a street, the petitioners alleged that the wall was the property of the respondent. The respondent, who admitted that he was proprietor of the *solum* on which the wall rested, alleged that the wall was the retaining wall of the street and the property of the Police Board, and pleaded that a question of heritable right having been raised the Dean of Guild had no jurisdiction. The Dean of Guild allowed a proof.

In an appeal the Court *held* that there was no question of heritable right, and *repelled* the plea of no jurisdiction.

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2D DIVISION.

Dean of Guild of Greenock.

In November 1895 a retaining wall which adjoined Cartsburn Street, Greenock, and separated the street from the Cartsburn stream where the level of the street was five feet nine inches above the bed of the stream, gave way and became dangerous. The Master of Works of the burgh served notice, under section 318 of the Greenock Police Act, 1877 (40 and 41 Vict. c. cxciii.), to repair the wall (1) upon Sir Michael Robert Shaw Stewart of Greenock and Blackhall, Baronet, who was the owner of the *solum* on which stood the street and the wall, and whose property was bounded on the east by the *medium filum* of the Cartsburn stream, and (2) upon the trustees of the deceased Charles Paterson, tanner in Greenock, who were the owners of a tannery on the east side of the stream and whose property was bounded on the west by the *medium filum* of the stream.

As these notices were not attended to, the Board of Police and the Master of Works presented a petition under the Act against Sir Michael and Paterson's trustees to the Dean of Guild, craving him to grant warrant to the Board of Police and to authorise them to repair the wall at the expense of the respondents or such one of them as might be found by the Dean of Guild to be the owner or owners of the retaining wall and the adjoining stream.

The respondents objected to the competency of the petition, but these objections were repelled, and after a judicial inspection of the premises on 12th December by the Dean of Guild and his council, the Dean pronounced an interlocutor in which he authorised the petitioners, without prejudice to any of the parties, and under reservation of all questions of personal liability, to put the wall in proper repair.

The repairs were executed by the petitioners at a cost of £53, 13s. 9d.

On 30th January 1896 the Dean of Guild appointed a record to be made up to try the question as to who was liable for the cost of the repairs.

Sir Michael, while admitting that he was owner of the *solum*, denied that the wall was his. He averred that it belonged to the Board of Police, and had been constructed by their predecessors when the street was formed, and had been maintained by them as necessary for the proper support of the street.

The petitioners denied that the wall was erected by them. They averred that their only connection with the streets of the town was imposed upon them by statute, and while admitting that their predecessors had erected the parapet wall on the top of the retaining wall in order to prevent accidents, they explained that the latter was necessary to prevent the stream encroaching on the street and that it existed long prior to the erection of the parapet wall above it.

Paterson's trustees averred that they were owners neither of the wall nor of the ground upon which it was built.

Sir Michael Shaw Stewart pleaded;—(3) The Board of Police, being the owners of the retaining wall repaired by them, are bound to repair the same, and this action is unnecessary. (4) In any event the respondent the said Sir Michael Robert Shaw Stewart, not being the owner of said retaining wall, should be assoilzied, with expenses. (6) A question of disputed ownership and heritable title having arisen, no decision thereon can competently be pronounced by the Dean of Guild.

Paterson's trustees pleaded, *inter alia*;—(1) No jurisdiction.

On 15th April the Dean of Guild pronounced this interlocutor:—

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"Before answer allows the respondent Sir Michael Robert Shaw Stewart a proof of his averments on record that the retaining wall on the west side of Cartsburn stream, Greenock, is the property of the petitioners, the Board of Police of Greenock, and that they have erected and maintained the walls and fences along the whole course of the Cartsburn stream within the burgh, so far as these adjoin the public roads and streets, and to the petitioners conjunct probation."

Sir Michael Shaw Stewart appealed, and argued;—(1) It was clear from the pleadings in the cause that the question raised before the Dean of Guild was one of disputed heritable title, and his jurisdiction was therefore excluded. (2) Even if the case went to proof it lay upon the petitioners to prove their averments.

Argued for Paterson's trustees, who had lodged no separate appeal;—The Dean could have no jurisdiction as against them, for the petitioners' averment was that Sir Michael, and not they, was owner of the *solum* and the wall.

Argued for the petitioners;—The Dean of Guild had jurisdiction here. No question of heritable right was involved in the case.[1] A mere averment of disputed ownership was not a sufficient ground for recalling the Dean of Guild's interlocutor. Sir Michael admitted that he was owner of the *solum*, and the sole question was whether the wall belonged to him as the boundary of the street or whether it had been put up by the petitioners' predecessors, and had been maintained by them in the public interest for the proper support of the street. That question was one in which the Dean could competently take proof, and the appeal was incompetent against his interlocutor allowing it. Sir Michael being proprietor of the *solum*, the *onus* lay upon him to prove that he was not the owner of the wall built upon it.

Lord Young.—There is no question that Cartsburn Street, which is situated alongside of the Cartsburn stream, is one of the old streets of Greenock, and that Sir Michael Shaw Stewart is proprietor of the *solum* of the street. In November 1895 the retaining wall at the edge of the street gave way where it abuts on the burn, and the public authority, acting for the interest of the public in maintaining a public street, sent to Paterson's trustees and to Sir Michael a notice requiring them as owners of the wall and the adjoining portion of the bed of the stream to repair the wall. They did this under clause 318 of the Greenock Police Act, 1877, in the view that this was a "building, wall, or structure which was dangerous to the occupiers thereof or of the neighbouring buildings or lands, or to the passengers along the street." Neither Paterson's trustees nor Sir Michael having complied with the notice, the Board of Police presented a petition to the Dean of Guild to authorise them to repair the wall at the expense of Paterson's trustees and Sir Michael Shaw Stewart, or such one or other of them as should be found to be the owner of the wall. After inspection the Dean of Guild authorised the petitioners to repair the wall, and this was

[1] Smellie v. Thomson, July 9, 1868, 6 Macph. 1024, Lord Neaves, 1037, 40 Scot. Jur. 583; Pitman v. Burnett's Trustees, July 7, 1881, 8 R. 914. Maxwell v. Glasgow and South-Western Railway Company, Feb. 16, 1866, 4 Macph. 447, Lord Curriehill, 453, 38 Scot. Jur. 293.

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done at a cost of £53, 13s. 9d. The question now arises as to the party liable for this expense.

Sir Michael declines to pay upon the ground that he is not the proprietor of the wall which is supporting the street, and which is necessary for its support. In his averments he has raised the question whether the wall was put up by him as proprietor of the *solum* of the street to protect his own property, or whether it was put up by the police authority as the Solicitor-General suggested, under clause 363 of the Act of Parliament, or before the Act was passed, or by the proper Local Authority, in the interest of the public using the street.

Now, that raises between the parties a question of fact about which they are disagreed, viz., did the proprietor of the *solum* put up the wall to protect his property and to prevent the street falling into it, or is it a part of the street put up, in order to make the street a safe one, by the public authority as guardians of the interests of the public using the street?

If it should turn out that the wall was erected by Sir Michael or his predecessors in the property for their own interests, just as in the case figured by your Lordships where walls are put up to protect cellars of houses built at the side of the street, it would, I think, *prima facie*—though I express no decided opinion upon the matter—be his duty to put it into repair at his own expense. On the other hand, if it was part of the street put up, or reasonably to be maintained, by those who used the street, then the claim against Sir Michael would fail.

But that is a question which is dependent on inquiry, or at least upon which it is reasonable that there should be inquiry before any decision is pronounced, and the Dean of Guild has accordingly allowed a proof of Sir Michael's averments, and it is this interlocutor allowing proof which is here challenged.

Now, Sir Michael challenges the interlocutor by disputing the Dean of Guild's jurisdiction, upon the ground that the case raises a question of heritable right. Paterson's trustees, the other parties called, also dispute the jurisdiction, upon the ground that as they are not alleged to have erected this wall, or to be owners of the *solum* on which it is built, they ought not to have been made parties to this action as coming within the scope of section 318 of the Act.

The Dean of Guild has repelled both pleas. As regards Paterson's trustees, I think his judgment is wrong, and that he has no jurisdiction against them. I think he has rightly repelled Sir Michael's plea to jurisdiction, because there is no question of heritable right as to the proprietorship of the street raised here at all. The question which is raised is whether what has been done for the repairing of the street ought to be paid for by the proprietor of the *solum*, or by those having the charge of the street as guardians of the public interest. There being no question, then, of heritable right in the case, and the Dean of Guild having allowed proof, I think this appeal is incompetent as far as Sir Michael Shaw Stewart is concerned. We cannot interpose at this stage, and the case must remain in the Dean of Guild's Court till it is concluded.

Under the old law of advocation, which is preserved in the law of appeal, an appeal was allowed with reference to jurisdiction. An appeal is allowed

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wherever an advocation was formerly allowed, and it is conceded that this appeal on the matter of jurisdiction is competent, just as an advocation would formerly have been. Therefore, dealing with the matter of jurisdiction, I would suggest that we should recall the interlocutor of the Dean of Guild in so far as it repels the plea of Paterson's trustees as to jurisdiction, by holding that he has no jurisdiction as against Paterson's trustees, and that we should sustain it in so far as it repels the plea against his jurisdiction by Sir Michael Shaw Stewart on the ground that it raises a question of heritable right.

The question still remains—it is a serious one, and I would suggest that the town authorities had better give it a little more attention than it has hitherto received—whether it is incumbent upon Sir Michael Shaw Stewart or upon them to do what is necessary upon his property to support the street. The case is, upon the mere statement of it, very distinguishable from that of a party having cellars at the side of a street which he uses as an access to his property. It is quite different from that. It is a case in which the public have—I assume with the consent of the proprietor—taken possession of, and have had possession of for a very long period, the banks of this stream, and the public authority have turned it into a more commodious street. The question arises—Is it not for them, and not for the proprietor of the *solum*, to do what is necessary to keep the protecting wall standing up and in good condition? That is a question which I think might be considered and settled to the avoidance of further litigation.

In the meantime, I think the case must be disposed of in accordance with the views which I have expressed, the practical result of which is that we should find that the Dean has no jurisdiction against Paterson's trustees, and that as regards Sir Michael Shaw Stewart the case should be remitted back to the Dean of Guild to hear proof.

Lord Trayner, Lord Moncreiff, and the Lord Justice-Clerk concurred.

The Court pronounced this interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Sustain the first plea in law for the respondents the trustees of the deceased Charles Paterson, and dismiss the action so far as directed against them: Repel the sixth plea in law for the respondent Sir Michael Shaw Stewart, and remit the cause back to the said Dean of Guild to allow the petitioners and the respondent Sir Michael Michael Shaw Stewart a proof of their averments *habili modo*.

R. R. Simpson & Lawson, W.S.—Carment, Wedderburn, & Watson, W.S.—William B. Rainnie, S.S.C.—Agents.

No. 156.

June 9, 1896. Governors of Bell's Trust.

The Governors of Bell's Trust, Old Aberdeen, Petitioners.—*Abel.*

Process—Petition for amendment of scheme for administration of educational endowment—Consent of Scotch Education Department—Educational Endowments (Scotland) Act, 1882 (45 *and* 46 *Vict. c.* 59), *sec.* 20.—A petition for the amendment of a scheme framed for the administration of an educational endowment by the Educational Endowments Commissioners, bore to be presented with the consent of the Scotch Education Department, as required by section 20 of the Educational Endowments Act, 1882, but in point of fact the consent of the Department was not given until after the

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Governors of Bell's Trust.

date of an interlocutor appointing intimation and service. *Held* that although the presentation of the petition was a reprehensible irregularity, the consent given *pendente processu* entitled the Court to entertain the application.

Trust—Educational Endowment—Amendment of scheme—Proposed extension of benefits of fund to wider area—Educational Endowments Act 1882 (45 *and* 46 *Vict. cap.* 59), *sec.* 7.—Trustees of an educational endowment, who were bound by the scheme framed for the administration of the fund to maintain a primary school for the benefit of a particular district, applied to the Court to amend the scheme by providing for the application of the fund to the establishment of bursaries, to enable scholars to prosecute their studies at secondary schools. They proposed that the bursaries should be open to scholars from a wider area than that previously benefited.

The Court, while approving of the purpose to which it was proposed to apply the fund, *declined* to sanction the extension of its benefits to a wider area than that to which it had been destined by the testator.

1st Division.

THE GOVERNORS OF BELL'S TRUST, Old Aberdeen, on 23d September 1895 presented a petition bearing to be with consent and concurrence of the Scotch Education Department, praying the Court, *inter alia*, to amend a scheme framed by the Educational Endowment Commissioners in 1890 for the administration of the charity.

Under that scheme the petitioners were bound to continue to maintain the Bell School in the parish of Old Machar, and to provide accommodation for not less than 284 children, charging fees not less than those paid in the Board Schools of the parish.

The petitioners stated, *inter alia*:—By the Aberdeen Corporation Act, 1891, the greater part of the district served by the school, including Old Aberdeen, in which the school was situated, had been added to the city of Aberdeen, and the administration of the School Board of Aberdeen had subsequently been extended to the annexed district. The funds of the endowment were inadequate for the proper maintenance of the school even in its present condition. The school buildings were not at present, nor could they, from their character and the nature of the site, be put into such a condition as to meet the requirements of the Scotch Education Department. The School Board of Aberdeen were at an early date to provide a new school for Old Aberdeen, which would adequately meet the requirements of the district, and the benefits arising to the inhabitants of the district from the carrying on of the endowed school would then disappear. The benefits of a similar endowment founded by Dr Bell for the benefit of New Aberdeen had been extended to Old Aberdeen by the Act extending the boundaries of the city.

The petitioners therefore craved the Court, *inter alia*, to amend the scheme of 1890 by providing for the application of the funds of the endowment to the establishment of bursaries for higher education of a certain yearly value, to be awarded by competitive examination among pupils below a certain age attending public or State-aided schools in the district at present administered by the School Board of Old Machar, or within the extended boundaries of Aberdeen, whose parents should, in the opinion of the Governors, require aid in giving them higher education; and to be tenable for a certain period at the Grammar School of Aberdeen in the case of boys, and at the High School for Girls, in Aberdeen, in the case of girls.

The Court remitted to Mr Bremner P. Lee, Advocate, to report.

In his report Mr Lee called the attention of the Court to the fact that while the petition bore to have been presented with the consent and concurrence of the Scotch Education Department, that

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wherever an advocation was formerly allowed, and it is conceded that this appeal on the matter of jurisdiction is competent, just as an advocation would formerly have been. Therefore, dealing with the matter of jurisdiction, I would suggest that we should recall the interlocutor of the Dean of Guild in so far as it repels the plea of Paterson's trustees as to jurisdiction, by holding that he has no jurisdiction as against Paterson's trustees, and that we should sustain it in so far as it repels the plea against his jurisdiction by Sir Michael Shaw Stewart on the ground that it raises a question of heritable right.

The question still remains—it is a serious one, and I would suggest that the town authorities had better give it a little more attention than it has hitherto received—whether it is incumbent upon Sir Michael Shaw Stewart or upon them to do what is necessary upon his property to support the street. The case is, upon the mere statement of it, very distinguishable from that of a party having cellars at the side of a street which he uses as an access to his property. It is quite different from that. It is a case in which the public have—I assume with the consent of the proprietor—taken possession of, and have had possession of for a very long period, the banks of this stream, and the public authority have turned it into a more commodious street. The question arises—Is it not for them, and not for the proprietor of the *solum*, to do what is necessary to keep the protecting wall standing up and in good condition? That is a question which I think might be considered and settled to the avoidance of further litigation.

In the meantime, I think the case must be disposed of in accordance with the views which I have expressed, the practical result of which is that we should find that the Dean has no jurisdiction against Paterson's trustees, and that as regards Sir Michael Shaw Stewart the case should be remitted back to the Dean of Guild to hear proof.

LORD TRAYNER, LORD MONCREIFF, and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Sustain the first plea in law for the respondents the trustees of the deceased Charles Paterson, and dismiss the action so far as directed against them: Repel the sixth plea in law for the respondent Sir Michael Shaw Stewart, and remit the cause back to the said Dean of Guild to allow the petitioners and the respondent Sir Michael Michael Shaw Stewart a proof of their averments *habili modo*.

R. R. SIMPSON & LAWSON, W.S.—CARMENT, WEDDERBURN, & WATSON, W.S.—WILLIAM B. RAINNIE, S.S.C.—Agents.

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THE GOVERNORS OF BELL'S TRUST, Old Aberdeen, Petitioners.—*Abel.*

Process—Petition for amendment of scheme for administration of educational endowment—Consent of Scotch Education Department—Educational Endowments (Scotland) Act, 1882 (45 *and* 46 *Vict. c.* 59), *sec.* 20.—A petition for the amendment of a scheme framed for the administration of an educational endowment by the Educational Endowments Commissioners, bore to be presented with the consent of the Scotch Education Department, as required by section 20 of the Educational Endowments Act, 1882, but in point of fact the consent of the Department was not given until after the

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The Court, while approving of the purpose to which it was proposed to apply the fund, *declined* to sanction the extension of its benefits to a wider area than that to which it had been destined by the testator.

1ST DIVISION.

THE GOVERNORS OF BELL'S TRUST, Old Aberdeen, on 23d September 1895 presented a petition bearing to be with consent and concurrence of the Scotch Education Department, praying the Court, *inter alia*, to amend a scheme framed by the Educational Endowment Commissioners in 1890 for the administration of the charity.

Under that scheme the petitioners were bound to continue to maintain the Bell School in the parish of Old Machar, and to provide accommodation for not less than 284 children, charging fees not less than those paid in the Board Schools of the parish.

The petitioners stated, *inter alia*:—By the Aberdeen Corporation Act, 1891, the greater part of the district served by the school, including Old Aberdeen, in which the school was situated, had been added to the city of Aberdeen, and the administration of the School Board of Aberdeen had subsequently been extended to the annexed district. The funds of the endowment were inadequate for the proper maintenance of the school even in its present condition. The school buildings were not at present, nor could they, from their character and the nature of the site, be put into such a condition as to meet the requirements of the Scotch Education Department. The School Board of Aberdeen were at an early date to provide a new school for Old Aberdeen, which would adequately meet the requirements of the district, and the benefits arising to the inhabitants of the district from the carrying on of the endowed school would then disappear. The benefits of a similar endowment founded by Dr Bell for the benefit of New Aberdeen had been extended to Old Aberdeen by the Act extending the boundaries of the city.

The petitioners therefore craved the Court, *inter alia*, to amend the scheme of 1890 by providing for the application of the funds of the endowment to the establishment of bursaries for higher education of a certain yearly value, to be awarded by competitive examination among pupils below a certain age attending public or State-aided schools in the district at present administered by the School Board of Old Machar, or within the extended boundaries of Aberdeen, whose parents should, in the opinion of the Governors, require aid in giving them higher education; and to be tenable for a certain period at the Grammar School of Aberdeen in the case of boys, and at the High School for Girls, in Aberdeen, in the case of girls.

The Court remitted to Mr Bremner P. Lee, Advocate, to report.

In his report Mr Lee called the attention of the Court to the fact that while the petition bore to have been presented with the consent and concurrence of the Scotch Education Department, that

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consent had not been obtained until after the petition was in Court.* On the merits of the application Mr Lee reported in favour of the application of the funds of the endowment to the founding of bursaries, but expressed the view that the benefit of the bursaries should be restricted to children from the parish of Old Machar, to which the endowment belonged.†

At advising,—

LORD PRESIDENT.—Our attention has necessarily been called by the reporter to what is not only a grave difficulty in the way of granting the prayer of this petition, but also a reprehensible irregularity on the part of the petitioners. When this petition was presented, the petitioners had not obtained the consent of the Scotch Education Department to its presentation; and yet the petition purported to be presented with the consent of that Department, while, as if to emphasise the consent, the wholly inappropriate words "and concurrence" were added. No expectation of obtaining that consent could warrant the petitioners in making this statement. The consent of the Department is a pre-requisite to any such petition being presented; and we have occasion to know that the consent of the Scotch Education Department is not a formal, but a discriminating and highly intelligent act.

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* By letter, dated 30th December 1895, the Education Department consented to allow the petition to proceed, but expressed strong disapprobation of the course followed in presenting the petition without their consent, and intimated that in similar circumstances they would make no such allowance.

† "REPORT.— . . . Were the future of the endowment to be determined on the footing that Dr Bell's two endowments were in reality one for the benefit of the city of Aberdeen and the parish of Old Machar, the present proposal would be open to the criticism that, while a part of Old Machar is still without the sphere of the Aberdeen School Board, and therefore receives no advantage from Dr Bell's Aberdeen endowment, it is not proposed to give that part any preference to the benefits of the Old Machar fund. But any attempt in this process to compensate the city of Aberdeen for the benefits which its extension has conferred upon its neighbours seems to be precluded by the legal position of the endowment now alone before the Court. The scheme which your Lordships are asked to alter has full operation and effect in the same manner as if it had been enacted in the Educational Endowments (Scotland) Act of 1882 (section 32), and can only be altered in terms of the section of that Act under which this petition is presented (section 20), 'provided that such alteration shall not be contrary to anything contained in' the Act. Now section 7 provides, that 'subject to the provisions of this Act it shall be the duty of the commissioners, in reorganising as aforesaid educational endowments, to have special regard to making provision for secondary or higher or technical education in public schools or otherwise, in those localities to which the endowments severally belong, or in such manner as to secure to the inhabitants of those localities the benefit of such endowments. . . . Provided that nothing in this Act contained shall be taken to compel the commissioners to restrict any bursary, exhibition, scholarship, or other educational benefit attached to or tenable at any educational institution, to the children of persons resident in the locality where that institution exists.' There is nothing to suggest that the locality benefited by an endowment may be either extended or restricted by schemes framed under the Act,—the provision in this section apparently referring only to the case of bursaries already attached to a particular school, and allowing in such cases attendance instead of residence to remain the necessary qualification. . . ."

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It is with some difficulty that I have come to the conclusion that, now that the Department have, *pendente processu*, consented to the petition going on, we may treat this as entitling us to consider the application as if its origin had been more legitimate.

On the merits, I am entirely satisfied with the recommendations of the reporter. Agreeing with him, I consider that we should not be warranted in extending to New Aberdeen benefits which, according to the directions of the testator, were destined to a different area. The recent changes in the administrative boundaries of Aberdeen, and the circumstance that the same testator had made another bequest which, owing to those changes, might now be held to compensate for such an extension, do not furnish any valid reason for the step which the petitioners ask us to take.

I am therefore for remitting to Mr Lee to adjust the scheme in accordance with his report.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT remitted to the reporter to adjust the scheme in accordance with his report.

AULD & MACDONALD, W.S., Agents.

No. 157.
June 16, 1896.
Gladstone v. M'Callum.

ANDREW ALEXANDER GLADSTONE (Liquidator of the Scottish West Australian Land and Exploration Syndicate, Limited), Petitioner.—*Gunn.*

WILLIAM M'CALLUM, Respondent.—*Christie.*

Company—Voluntary winding-up—Petition for delivery of minute-book retained by secretary—Competency—Companies Act, 1862 (25 *and* 26 *Vict.* c. 89), *secs.* 100 *and* 138.—*Held* that a petition presented under sections 100 and 138 of the Companies Act, 1862, by the liquidator of a company which was being voluntarily wound up, to have the company's secretary ordained to deliver up its minute-book, was competent.

Retention—Lien—Minute-book of Company.—Held that a person who had been secretary of a company prior to its liquidation had no right of retention or lien over its minute-book for a debt due to him by the company.

1ST DIVISION.

ON 28th May 1896 Andrew Gladstone, who had been appointed liquidator in the voluntary winding-up of the Australian Land and Exploration Syndicate, Limited, presented a petition against William M'Callum, chartered accountant, Glasgow, and secretary of the company, under sections 100 and 138* of the Companies Act, 1862, craving the Court to ordain the respondent "to deliver forthwith to

* The Companies Act, 1862 (25 and 26 Vict. c. 89), enacted, sec. 100,—"The Court may at any time after making an order for winding up a company require any . . . agent or officer of the company to deliver . . . forthwith, or within such time as the Court directs, into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *prima facie* entitled." Sec. 138 empowers the liquidator or contributories of a company which is being voluntarily wound up to apply to the Court "to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court . . . if satisfied

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the petitioner as liquidator foresaid the minute-book" of the company, "without prejudice to any lien competent to him."

The respondent lodged answers, in which he averred that he had acted as secretary to the company till the petitioner was appointed liquidator, and that there remained due to him the sum of £17, 11s. for services rendered by him to the company while their secretary. He offered to give up the minute-book on receiving payment of this sum, maintaining that he was entitled to retain the book until paid.

Argued for the petitioner;—(1) The application was competent under the sections of the Act founded upon. It had been decided[1] that the Court might interfere for such a purpose as this in a voluntary as well as in an official winding-up. (2) The minute-book could not be the subject of a lien.[2]

Argued for the respondent;—(1) The petition was not warranted by the sections founded on. Section 138 did not give the Court jurisdiction in a merely voluntary liquidation, in which creditors were unrepresented, to interpose between the company and the common law right of creditors to enforce payment of their debts.[3] Section 100 only related to books or papers to which the company was *prima facie* entitled, and did not extend to a case like the present, where the respondent was *prima facie* entitled to retain the minute-book. In any view the Court must be satisfied that it would be "just and beneficial" to grant the application, and should only do so subject to the rights of the respondent. (2) The minute-book had come into the respondent's hands lawfully in the course of his employment, and he was entitled to retain it until he was repaid for the time and trouble expended by him under the contract of employment.[4]

LORD PRESIDENT.—I do not see any objection to the liquidator of this company proceeding under section 138 of the Companies Act, 1862, but he is met by the pretension of the respondent that he has a lien over the minute-book of the company.

Now, the validity of the claim *prima facie* is to be judged by the statement of the respondent in the answers to the petition; and I do not discover more in his averments than that he was the secretary of the company, and performed the duties of the secretary until the liquidation. Now, has any law been shewn in support of the proposition that the secretary of a company, who has been employed to write up the minutes, has a right of lien over the minute-books? There are well-known and well-recognised liens applicable to a different relationship of the parties and to a different

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that the determination of such question or the required exercise of power will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks fit."

[1] *In re* County Marine Insurance Co. (Rance's case), 1870, L. R., 6 Ch. App. 104.

[2] *In re* Capital Fire Insurance Association, 1883, L. R., 24 Ch. Div. 408: *In re* South Essex Estuary and Reclamation Company, 1869, L. R., 4 Ch. App. 215; Engel v. South Metropolitan Brewery and Bottling Co., 1892, L. R., 1 Ch. 442, *per* Kekewich J., 448; Anglo-Maltese Hydraulic Dock Co., Limited, 1885, 54 L. J. Ch. 730.

[3] Sdeuard v. Gardner, March 10, 1876, 3 R. 577; British Canadian Lumbering and Timber Co., Limited, Dec. 3, 1886, 14 R. 160.

[4] Meikle & Wilson v. Pollard, Nov. 6, 1880, 8 R. 69, *per* Lord Gifford, 71; Robertson v. Ross, Nov. 17, 1887, 15 R. 67.

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possession of the articles in dispute from what we find here; and we could not give judgment for the respondent unless we were to affirm—what has not as yet been decided—that every man who has been employed to write in the books in his master's office has a right of lien over the books until he has been paid for his services.

I therefore think that we must grant the prayer of the petition.

LORD ADAM concurred.

LORD M'LAREN.—I agree, and merely wish to add, that I think there is no foundation in the facts as stated for any claim either of retention or of lien. Retention, as I understand it, is the right of an owner of property to withhold delivery of it under an unexecuted contract of sale or agreement of a similar nature, until the price due to him has been paid, or the counter obligation fulfilled. Lien, again, is the right of a person who is not the owner of property but is in possession of it on a lawful title, and whose right of lien, if it is not a general one—of which class of liens there are not many examples—is a right to retain the property until he has been compensated for something which he has done to it. In this case there is no right of retention, because the books belong to the company, and there is no right of lien, because they are not in the possession of the respondent but of the company. Accordingly this case is in a different category from that of a claim by a writer who is lawfully in possession of his client's papers under a contract of agency.

LORD KINNEAR concurred.

THE COURT granted the prayer of the petition.

JOHN SCOTT, Solicitor—SIMPSON & MARWICK, W.S.—Agents.

No. 158.
June 16, 1896.
Macpherson v. Largue.

HELEN TAYLOR MACPHERSON, Pursuer (Respondent).—*W. Thomson.*
JAMES LARGUE, Defender (Appellant).—*M'Clure.*

Parent and Child—Bastard—Filiation—Proof—Effect of defender's false denial of material circumstances.—Evidence in an action of filiation which was *held* sufficient to establish that the defender was the father of the pursuer's child.

Observed that the denial by the defender in an action of filiation of material facts and circumstances (although not believed) does not corroborate the pursuer's statement, but that if the pursuer is corroborated as to material statements made by her, and as to which she is contradicted by the defender, the defender's denial, if proved false or not credited, may give a complexion to the whole evidence adverse to him.

2D DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

HELEN MACPHERSON, Muir of Turtory, Rothiemay, Banffshire, raised an action in the Sheriff Court at Banff against JAMES LARGUE, farm-servant, Lochagan, for aliment for a bastard child to which she gave birth on 31st August 1895, and of which she alleged the defender to be the father.

The pursuer averred that the defender had had carnal connection with her in or about the months of November and December 1894 at or near Turtory House.

The defender denied this averment, and averred that a man George Greig, who was a fellow-servant of the pursuer, was the father of her child.

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At the proof the following evidence was led :—

The pursuer deponed,—"I am twenty-five years of age. Before Martinmas 1894 I was a servant at Turtory House with Dr Smith, and continued there until I left the day before the child's birth. I knew the defender when we were children; we were at school together. For some years we never met after going into service. I met him first upon the road-way after our separation; he was with his brother. It was in the afternoon, about four o'clock on a Sunday, I think, in the month of November 1894. It was before the Martinmas term, but not very long before. He was a servant then at Brownside, somewhere between Aberchirder and Turriff. I do not know when he went there. Turtory House, where I was, was on his way from Brownside to his own brother's house. I had no conversation with him that time. We met on the road. I did not ask him to call. He did not say he would call. Soon after that he called. It was on a Sunday in November, before the Martinmas term. He was still in the same place. He knocked at the door between five and six o'clock. I went to the door; he did not come in. I went outside with him, and walked about the walks in the grounds. He said he had called to see me. I was not very long in his company that afternoon, probably about a quarter of an hour. No improprieties took place between us then, nor did he profess any affection for me. He said he would call again. He came back again on the first Sunday of December between five and six o'clock. He came to the door, and I went out with him after answering it. He did not come in to the house. I went out with him. We went out past the front door, round about the grounds, and down at the back of the laundry, where we sat down. He had connection with me there. He told me that he loved me, and professed affection, and spoke about marrying me. He was scarcely an hour in my company that afternoon, then he left. . . . Cross.—At the first meeting we just spoke about the weather on that occasion, and that was all. There were only myself, the defender, and his brother present. We were just a few minutes standing together. . . . The next meeting was also in November, and before the term. The term I spoke of is the servant's term—the 28th. I never met him on the public road near Turtory House. . . . The second meeting he came and called at the house for me. He asked me if I would be his, and I said 'Yes,' and he said we might do worse. . . . He was about a quarter of an hour in my company at that time. We walked about the grounds at that time, but it was not for very long. . . . The first Sunday in December was the only occasion on which the defender had connection with me. The connection took place outside on the grass at the back of the laundry. The laundry is not far from the house, on the top of a brae looking down on the water, not far from the kitchen—a pretty steep brae, but not very long down to the water. There are trees on that brae, between the laundry and the water and between the laundry and the bridge. There are bushes growing besides trees. . . ."

The defender deponed to meeting the pursuer with his brother on a road near his brother's house, to another meeting with the pursuer on the road opposite Turtory House, and to a visit he paid to the pursuer at Turtory House on a Sunday. "I visited her on another occasion at Turtory House, also on a Sunday, about five o'clock in the afternoon. I knocked at the kitchen door, and she was in. I did not go

inside, she came out to the door. She did not leave the house, and we stood talking at the door again. I was not ten minutes with her, and the whole time at the door. I did not tell the girl that I loved her on that occasion. I did not take her on my knee or kiss her at that time, nor did I give her a walk through the grounds at that time. I do not know where the laundry is situated at Turtory. I know where the milk-house is. I did not accompany her to the milk-house on that day. I did not sit down on the grass beside her at the laundry door. It was stormy. I never sat down with her there. I never sat down with her outside in the grounds of Turtory House. . . . I had not connection with her on any of these occasions, or ever had."

The defender led no evidence in support of his averment that George Greig was the father of the child, and Greig denied that any familiarities had ever passed between him and the pursuer.

Greig further deponed,—"The next time I saw him [the defender] near Turtory House was when he was standing about the laundry with the pursuer. That was also on a Sunday, about 1st December, five or six o'clock in the afternoon. I was upon the road and I chanced to be on the bridge, and I saw them. They were apparently sitting on a bank at the back of the laundry—the pursuer and defender. I just saw them, but I did not watch them."

It was proved that the child was born on the morning of 31st August 1895 at the house of the pursuer's grandfather, and that on that day the pursuer sent word to the defender to come to her, but it was not alleged or proved that she had informed him of her condition prior to that date. The defender went to see her at ten o'clock on the evening of the same day, accompanied by his cousin James D. Largue.

Alexander Macpherson, the pursuer's grandfather, deponed as to this visit, that the defender, his cousin, and the witness went into the room where the pursuer was lying. "The defender went to the pursuer's bed and asked what she wanted with him. She said, 'You know well enough what I am seeking you for.' He asked her then to swear that the child was his. I said nothing for a while, and then he was pressing her to swear, and said he would swear himself. I bade him stop that, knowing what state the house was in. I said she is not capable of taking your oath, and as little are you capable of taking hers; but if it come to that we will take it into a higher power. I said to the girl, if it is not James Largue say 'No,' and she did not speak to that; and if it be his all that you have to do is to say 'Aye,' and she said 'Yes.' He was for swearing again, and I would not allow any more of that. I said that was all that was to be required here. He told me that he could not think the child could be his, because he had not seen my granddaughter until a fortnight before the Whitsunday term. I told him that I knew that was a lie."

The pursuer deponed,—"Largue's first question when he came to my bedside on the day the child was born, was 'What did I want with him?' I told him at once it was the child. I spoke, I am sure, the very first time. The defender continued asking me to give him an answer, and I gave him an answer continually. I answered him every time he asked. My grandfather bade me answer him. It was not until the defender asked me to swear that my grandfather spoke. He said there was to be no swearing there. My grandfather told me

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to clear the man or charge him. That was after the bit about the swearing, but I had answered him before at the first.

The defender deponed,—"I said to the pursuer, 'What do you want with me?' she made no reply. I asked her several times what she wanted. When she refused to answer me I asked her if she charged me with being the father of her child, and again she made no reply. Her grandfather, when she would not reply, told me that the child was not mine; but that it did not look well. At last she spoke, and said to me, 'I dinna ken ony ither body.' That was an hour after I first asked her. I then said, 'Will you give your oath that the child was mine?' and she said, 'No, I am not seeking it'; she did not wish to make me the father. The grandfather interfered, and said that this was not the place for swearing. I agreed with him. The grandfather then asked the pursuer if she could not give me a better answer, and she never spoke. He asked her directly if I was the father of the child, and she gave no answer to that. I was more than an hour at the bedside. I did not get the child given to me then."

James D. Largue, the defender's cousin, gave evidence to the same effect as the defender.

On 11th February 1896 the Sheriff-substitute (Grant) found in fact that the defender was the father of the child, and in law that he was bound to contribute to its support, and decerned against the defender.*

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* "NOTE.—In this action of affiliation and aliment, the pursuer rests her whole case on a single act of connection on the first Sunday of December 1894.

"The criticisms of both parties at debate were mainly directed to diversities and discrepancies between the dates given in evidence on either side for the few meetings that undoubtedly took place between them.

"The exact dates are now matters of unaided memory, and do not strike me as material, with regard to credibility merely. It is of course incumbent on the pursuer to prove connection within the period specified on record.

"On consideration of the evidence, I am satisfied of the possibility of access during that period.

"The evidence that opportunity was taken advantage of is very meagre. We have the pursuer's oath to start with, of course, but there is no other evidence of indecent familiarity. In the circumstances, the defender's actings throw light on the probabilities of the case. In the first place, he makes a most unwarranted imputation on a married fellow-servant of the pursuer, which he is unable to support by any evidence whatever. That appears to me rather as if, having to manufacture a defence, he has fallen into the vulgar error of trying to make it more conclusive than he need.

"Then, again, we have the consistent action of the pursuer in immediately sending for the defender on the birth of her child. He came, but instead of accepting or denying the paternity outright, he remains by her bedside for about an hour striving to obtain an admission from the pursuer favourable to himself. I need hardly say that the admissions of a woman only a few hours delivered would not in any case have told hardly against her; but it appears to me, from the defender's own evidence, she told him not what he wanted certainly, but all he was entitled to, when she said that she had no one else to put the child to. . . .

"The pursuer's grandfather struck me as a truthful and honest witness, and his statement that the defender used expressions to imply that he had nothing to do with the pursuer until the May previous to the birth of the

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On appeal the Sheriff (Crawford), on 16th March, adhered.*

The defender appealed, and argued;—The pursuer rested her case on one single act of connection, and her story was not corroborated. There was no evidence of suspicious conduct or indecent familiarities between the parties.[1] She had not accused the defender until after the child was born. Greig's evidence, while it corroborated her statement partially, really led to no conclusion adverse to the defender, because according to Greig the pursuer and defender were sitting on the bank on the Sunday in question in a perfectly innocent position. The defender's denial of a fact held by the Court to be proved was not corroboration of anything.[2]

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child strongly corroborates the view that the defender was anxious to evade a just obligation, for that story of his is obviously untrue.

"On the whole, therefore, I think the pursuer has proved her case."

* "NOTE.—This is a somewhat narrow case, but in my opinion the pursuer is entitled to succeed. Mere opportunity would not by itself supply sufficient corroboration, but there was what may be described as a flirtation between the parties. They renewed an old friendship dating from childhood. The pursuer was knitting a pair of socks for the defender, and he began to pay her visits. It cannot well be believed that these were so short as he represents. The parties were on a footing which might be innocent enough, but it implied a certain degree of intimacy and of mutual attraction, and when it is followed by the birth of a child, and the pursuer's oath as to its paternity, it must be taken into account. The pursuer has fixed a particular day as the date of the sole act of connection, and the defender was entitled to argue that it does not tally with the evidence as to the dates of their previous meetings. I do not see that there is any inconsistency in the pursuer's own evidence, and with regard to that of the other witnesses I agree with the Sheriff-substitute's remarks on the subject, and I do not discover any material contradiction. It may be said that Greig, after the accusation made by the defender against him, which it would be natural for him to resent, cannot be taken as an impartial witness. If he were, his evidence affords exceedingly strong corroboration of that of the pursuer—probably conclusive in the face of the defender's denial. The Sheriff-substitute has said nothing against his credibility. The defender's observation about the period of sunset would have had more force if it had been put to the witness. . . . I do not, however, lay great stress on Greig's evidence.

"On the supposition of the defender's innocence, his conduct in old Macpherson's house after the birth of the child is not easy to account for. His being sent for at all was of course notice that the girl charged him with the paternity. It is not easy to see what his motive was in torturing her with questions for more than an hour in the condition she was in. It looks as if he hoped to extract from her a withdrawal of the charge. But it appears to me rather to point to some unknown circumstance, such as a promise by the girl not to father the child upon him but upon some one else. It does not, in my view, point to the defender's innocence, but the contrary. Further, it is difficult to disbelieve the evidence that he falsely stated on that occasion that he had not met the pursuer till the previous Whitsunday.

"The circumstance in the case which is most unfavourable to the pursuer is that there is no evidence, and it is not alleged, that she acquainted the defender with her condition and his responsibility till the birth of the child, but taken along with the other evidence, that is not sufficient to turn the scale against her."

[1] Scott v. Dawson, Feb. 2, 1884, 11 R. 518.

[2] M'Kinven v. M'Millan, Jan. 13, 1892, 19 R. 369; Young v. Nicol, June 8, 1893, 20 R. 768.

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Argued for the pursuer;—The Sheriffs had believed the pursuer's evidence, and it was corroborated by Greig as to material facts and circumstances. The defender's denial of these was false, and if the Court believed the pursuer and Greig were speaking the truth, then the defender's denial gave a complexion to his evidence which led to the inference that he was concealing something, and that the pursuer's statement as to the essential facts was true. This might be a narrow case, but *M'Bayne* v. *Davidson*[1] was narrower.

At advising,—

LORD JUSTICE-CLERK.—No one can read the evidence in this case without seeing that it is a very narrow case indeed. But in such a case as this I should have extreme difficulty in altering the judgment of the Judge who has seen and heard the witnesses. If the Sheriff-substitute had seen the least ground for doubting the truthfulness of the pursuer and the witness Greig that would have appeared from his note, but he, having seen and heard them, has believed that they were speaking the truth. The evidence of these witnesses proves that a meeting took place between the pursuer and the defender on a certain night in December, behind the laundry, and that the pursuer and defender were alone together, and were sitting side by side on a bank. The question is whether that meeting resulted in the defender having connection with the pursuer. It cannot be expected that there should be direct evidence of eyewitnesses to corroborate the pursuer's statement on this point, and, indeed, in cases where such evidence has been brought, it has been often regarded with considerable suspicion. But the defender gives evidence which contradicts statements of fact which are proved by the pursuer and Greig, witnesses whom the Sheriff-substitute heard and believed. I agree that no corroboration can be derived from evidence of the defender which shews he is not speaking the truth. If his evidence is not to be believed it must be taken out of the case altogether, and the case must be treated as if he had not been examined. In that view we have the evidence of the pursuer and of Greig that the pursuer and the defender were together on a certain occasion in circumstances which might not in themselves be sufficient to imply that carnal intercourse took place as an absolute certainty. But if these facts were capable of leading to a certain inference, and if the defender made no answer when that inference was suggested, it is then that that absence of explanation by the defender's evidence would come to be of importance, and in the same way his denial of these facts, which are held to be proved, is significant, as it gives a complexion to them which they might not otherwise bear if explained. I think we ought not to interfere with the judgments of the Sheriffs. I cannot say that there was not evidence before the Sheriff-substitute to entitle him to come to the conclusion at which he has arrived, and I am of opinion that that judgment, upheld as it was by the Sheriff, should not be altered by this Court.

LORD TRAYNER.—It is important in this case to observe that both the Sheriff-substitute and the Sheriff have decided in favour of the pursuer.

[1] M'Bayne v. Davidson, Feb. 10, 1860, 22 D. 738, 32 Scot. Jur. 296.

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That being so, we would not be justified in interfering with their judgments except upon clear and strong grounds. I agree that in this case there are not sufficient grounds for such a course. I adhere to all that I said in the case of *M'Kinven*,[1] but applying the rule which I laid down there, not on my own authority, but on the authority of the late Lord President, I think that that rule has been satisfied in this case. In cases of this kind you cannot as a rule have direct independent evidence (that is, evidence by witnesses other than the parties themselves) of the most material fact involved. But even in such cases the evidence of the pursuer by itself is not enough. It must be corroborated as regards one or more of the essential particulars of the case.

On the other hand, the denial by the defender of material facts or circumstances (although not believed) does not corroborate the pursuer's statement. A false statement, or a statement not believed, by whomsoever made, is not corroboration of anything else. But if the pursuer is corroborated as to material statements made by her, and as to which she is contradicted by the defender, his denial, if proved false, or not believed, may give a complexion to the whole evidence, adverse to the defender, different from what it would have borne had his denial not been disbelieved or shewn to be false. Now, I think the pursuer is corroborated in what she says as to certain material circumstances. She says that she and the defender on a certain occasion sat down behind the laundry, on a certain bank, at a place partly surrounded by bushes, and that connection then took place. The defender says he was never there, and never sat down beside the pursuer. But the witness Greig, whose evidence was believed by the Sheriff-substitute (and I see no reason for doubting it) says that he saw the pursuer and the defender sitting together on the bank about the time to which the pursuer speaks. Greig's evidence agrees entirely with that of the pursuer. Now, as I have said, the defender denies all that, and when that denial is believed to be false it tends to shew that there was something about that meeting which the defender wishes to conceal, and that something was done then which he does not want disclosed. But even if that element had been absent in this case I should have regarded the evidence of Greig as sufficient corroboration of the pursuer's statement. I admit that the case is a very narrow one, but nevertheless I am of opinion that we have no ground for altering the judgments appealed against.

LORD MONCREIFF.—I am of the same opinion. The Sheriff-substitute, who saw and heard the witnesses, believed the pursuer and the witness Greig, and did not believe the defender. I think we have sufficient corroboration of the pursuer's statements to warrant us in finding in her favour. I concur in the reasons for that decision which have been stated by your Lordships.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Affirm the interlocutors appealed against: Find that the pursuer has

[1] M'Kinven v. M'Millan, Jan. 13, 1892, 19 R. 369.

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proved that the defender is the father of her illegitimate child born on or about 31st August 1895: Therefore of new decern against him in terms of the prayer of the petition: Find the pursuer entitled to expenses in this Court."

CHARLES GEORGE, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

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June 16, 1896. Waldie v. Mungall.

JOHN WALDIE, Pursuer (Reclaimer).—*W. Campbell—M'Lennan.*
HENRY MUNGALL, Defender (Respondent).—*Johnston—Constable.*

Lease—Agricultural Holdings (Scotland) Act, 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 7—*Compensation for improvements—Notice—Determination of tenancy.*—The Agricultural Holdings (Scotland) Act, 1883, sec. 7, provides that "a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act."

A farm was let for a term of years "with entry at Martinmas 1885," subject to the condition that the tenant should only get possession of the threshing-mill "after the landlord shall have done with using the same in threshing out last year's crop." The conditions of lease provided that no turnips growing on the farm should be sold, but that the whole should be consumed and made down into dung and regularly applied to the lands. It was further provided that the tenant should have right to the barn, threshing-mill, and barnyard, till the "term of Whitsunday, after the termination of the lease, for the purpose of stacking and threshing his way-going crop."

Held (*aff.* judgment of Lord Low) that "the determination of the tenancy" was at Martinmas, although the tenant was entitled under the lease to remain in occupation of the land under turnips, and to a limited use of the barn and barnyard and threshing-mill after that date, and that notice of a claim for compensation fell to be given by the tenant four months before Martinmas.

Black v. *Clay*, June 22, 1894, 21 R. (H. L.) 72, *distinguished. In re Paul*, 1889, L. R., 24 Q. B. D. 247, *commented on.*

1st DIVISION. Lord Low.

THE farm of Gattonside Mains, part of the estate of Gattonside, in the county of Roxburgh, was let to John Waldie in 1885 for nineteen years.

The "conditions of lease" provided, "First, The lease of the farm to be for such number of years as may be agreed upon, with entry at Martinmas 1885. . . . Sixth, The rent which may be agreed on shall be paid in money to the proprietor and his heirs, half-yearly by equal portions at Whitsunday and Martinmas in each year, the first half-yearly payment to be made at Whitsunday 1886, and the second at Martinmas 1886, in full of the first year's rent for possession from Martinmas 1885 to Martinmas 1886. . . . Tenth, The whole lands shall be cultivated, and manured, and cropped in accordance with the rules of good husbandry, under a five-course shift or rotation of crops,—that is to say, he shall have in each year of the lease one-fifth of the lands in oats, after grass; one-fifth of bare fallow, turnips, or potatoes, after oats. . . . Further, no hay, straw, fodder, or turnips growing on the farm shall be sold, but the whole thereof shall be consumed and made down into dung and regularly applied to the lands; declaring, however, that the tenant shall have liberty to sell the rye-grass hay. . . . And the tenant shall be bound to leave to the landlord or incoming tenant the whole straw of his

waygoing crop as steelbow, and without payment therefor, the tenant having right to the barn, and threshing-mill, and barnyard till the term of Whitsunday after the termination of the lease for the purpose of stacking and threshing his crop; which crop shall be threshed out in such way, from time to time, as shall at all times afford a sufficient supply of fodder for the stocking of the next tenant. Eleventh, The tenant on getting possession of the threshing-mill, which shall not be until after the landlord shall have done with using the same in threshing out last year's crop, shall be bound to accept of the same as in good and sufficient going order and repair, and shall be bound constantly to keep and, at the expiration of the lease, to leave the same in the like good order and condition. . . . Thirteenth, The tenant and his foresaids shall be bound to flit and remove themselves, their servants, goods, and gear from the houses and lands at the termination of the lease, without any warning or process of removing to that effect."

It was agreed that there should be a break in the lease, on the part of either landlord or tenant, "at the term of Martinmas 1895," provided either party should give written notice to the other of their wish to take advantage of such break "on or before the term of Whitsunday 1895."

In 1887 the proprietor agreed to modify the conditions of the lease to the following effect:—"The tenant shall be at liberty, notwithstanding the conditions of the lease, to sell the turnips growing on the farm at the termination thereof, which turnips shall in the option of the tenant be consumed elsewhere than on the farm."

On 14th May 1895 John Waldie intimated in writing to Henry Mungall, then proprietor of Gattonside, that it was his intention to take advantage of the break at the term of Martinmas 1895. On 26th July Waldie gave notice in writing to Mungall that it was his intention to claim compensation for improvements under the Agricultural Holdings Act, 1883. Mungall repudiated the claim, on the ground that it had not been intimated four months before the determination of the tenancy, as required by section 7 of the Agricultural Holdings (Scotland) Act, 1883.

Waldie thereupon raised an action against Mungall, concluding, *inter alia*, for declarator (2) that the determination of his tenancy, within the meaning of the Agricultural Holdings Act, 1883, did not take place sooner than the separation from the ground of the turnip and other green crop, in due course of good husbandry, or otherwise sooner than the term of Candlemas 1896; and (3) that the notice given by him of his intention to claim compensation had been duly given four months at least before the determination of the tenancy, and was effectual.

The pursuer averred, *inter alia*;—"In accordance with the rules of husbandry observed on the Gattonside estate, and according to the practice on similar farms in the district where said farm is situated, the turnip crop of each year is not separated from the ground until a period subsequent to the term of Martinmas. In all cases where, as under the said conditions of lease, the turnip crop falls to be entirely consumed on the farm, the practice is to put sheep, which are being wintered, into the fields laid down with turnips when the turnips have reached maturity, subsequent to Martinmas, and to winter the sheep upon the turnips. Under this practice the consumption of the turnips on the farm extends at least until Candlemas (2d February)

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subsequent to the Martinmas term, and frequently continues as late as the month of April. Although under said conditions of lease the pursuer's entry to the farm was nominally at Martinmas 1885, the pursuer did not at that date obtain entry to or possession of the land under turnip crop. On 20th November 1885 the proprietors, who, as aforesaid, had at that time the farm in their natural possession, exposed, *inter alia*, part of the turnip crop to sale by auction, and the remainder of said crop was sold privately by the said proprietors to an adjoining farmer. The conditions of roup for said sale provided that 'the turnips must all be removed on or before the 1st day of February 1886.' This condition was inserted because, according to the rules of husbandry and practice above condescended on, the proprietors, as waygoing tenants, were entitled to retain possession of the land under turnips until Candlemas 1886, and were consequently entitled to transfer their right of occupancy of said land to the parties to whom they sold their turnip crop. These parties occupied the turnip fields during the whole period until Candlemas, and in the case of one field the turnips were not entirely consumed or removed by the purchasers until the end of March 1886, and it was not until that month that the pursuer obtained complete possession of the lands. The pursuer did not obtain possession of the barn, threshing-mill, and barnyard until Whitsunday 1886."

The pursuer pleaded;—(2) The determination of the pursuer's tenancy not being until Whitsunday 1896, or at least until Candlemas 1896, the pursuer is entitled to decree in terms of the other (i.e. 2d and 3d) declaratory conclusions. (3) In any view, by virtue of the Removal Terms (Scotland) Act, 1886, the pursuer's tenancy did not determine until 28th November 1895.

The defender pleaded;—(3) The notice of claim for compensation, under the Agricultural Holdings (Scotland) Act, 1883, given by the pursuer to the defender not having been timeous . . . the defender should be assoilzied from the other conclusions of the summons.

On 20th February 1896 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the pursuer's notice in writing given to the defender, and dated 26th July 1895, of his, the pursuer's, intention to make a claim for compensation under the Agricultural Holdings (Scotland) Act of 1883, referred to in the third conclusion of the summons, was not timeously given, in terms of the said Agricultural Holdings Act, and therefore dismisses the action, and decerns: Finds the defender entitled to expenses," &c.*

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* "OPINION.—The question in this case is whether, where there is only one ish in the lease of a farm for all the subjects let, the right of the outgoing tenant at common law to reap the crop on the ground after the termination of the lease is to be regarded as a right to possession of the holding as tenant, to the effect of rendering a claim for compensation for improvements under the Agricultural Holdings Act timeous, although it is not given four months prior to the ish.

"In the pursuer's lease there was only one term of entry, namely, Martinmas, and therefore only one ish. It was argued that there was a separate ish as regarded the barn, barnyard, and threshing-mill, but that is not the case. The right or privilege which the tenant was given to use the barn, barnyard, and threshing-mill is expressed to be 'after the termination of the lease.'

"This case therefore is clearly distinguished from *Clay* v. *Black* (21 R. 41, H. L. 72), where three separate periods of entry were specified, and the

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The pursuer reclaimed, and argued;—By section 7 of the Agricultural Holdings Act notice of an intention to claim compensation required to be given four months before the "determination of the tenancy," and that expression was interpreted by section 42 to mean the termination of the lease by reason of the effluxion of time, or any other cause. The question was, When did this lease terminate? According to the criterion adopted by Lord Watson in *Black* v. *Clay*,[1] a lease terminated when a tenant finally gave up possession of the subjects which the statute described as his holding. Now, at the beginning of the lease, the pursuer did not obtain possession of the land under turnips until Candlemas 1886, and his right of occupation as regarded the land under turnips in the last year of the lease continued until the crop was consumed. His right was more than a limited privilege to enter on the ground for the purpose of removing the crop, for he could introduce stock to consume the crop on the land, and was entitled to use the land in every way as he had used the land under turnips in the previous years of the lease. For the purposes of the present question Candlemas might be taken as the

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lease was for nineteen years 'from these periods respectively.' The lease here is also different from that which was construed in *Wight* v. *Earl of Hopetoun* (1 Macph. 1097, 2 Macph. (H. L.) 35), which was for nineteen years from the entry, which was 'declared to have been begun as to the grass and houses att Whitsunday 1747, and to the arable land att the separation of the current crop 1747 from the ground.'

"In the latter case a certain notice which had to be given 'at least twelve months before the expiry of the above term of nineteen years,' was held to be too late when given in the month of August preceding the Whitsunday at which the tenant fell to remove from the grass and houses. The true ground of judgment in that case must now be taken (in view of the observations upon it in *Clay* v. *Black*) to have been that the terms of the lease when read in the light of the purpose for which the notice was to be given shewed that the parties must have had the earlier term of removal in view in stipulating that twelve months' previous notice must be given. But the majority of the Judges in the Court of Session (led by Lord Justice-Clerk Inglis), and at all events Lord Chancellor Westbury in the House of Lords held it to be a sufficient ground of judgment, that the stipulation that the entry to the arable lands (and consequently the ish) should be at the separation of the crop was no more than a statement of the common law right of an outgoing tenant to reap the crop which he had sown, and that therefore the entry and ish as to all the lands was at Whitsunday, the outgoing tenant having only a limited right of entry and occupation of the land under crop for the purpose of reaping it.

"The soundness of that view was more than doubted by the House of Lords in the case of *Clay* v. *Black*. The view taken by the noble and learned Lords in the latter case appears to me to have been this. If a lease bears to be for a period of years from Whitsunday as to grass and houses, and from separation of the crop as to the arable lands, the tenant continues, after the expiry of the lease as regards grass and houses, to possess the arable lands as tenant under the lease, and not merely as the sower of the crop who has a limited right or privilege of entry upon the lands after they have been leased to another for the purpose of reaping the crop.

"The judgment in *Clay* v. *Black* was that, in a lease with entries at Whitsunday and separation, the tenant does not require to give notice of a claim under the Agricultural Holdings Act four months before Whitsunday,

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[1] 21 R. (H. L.) 77.

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period at which this right expired, just as in *Black* v. *Clay* Martinmas was held to be equivalent to "separation of the crop."[1] The pursuer had right also to another and important part of his holding up to Whitsunday 1896, namely, the barn, barnyard, and threshing-mill. His rights were in fact greater than those of the tenant in *Black* v. *Clay*,[1] and fully satisfied the test applied by Lord Watson in that case. Until they ceased the tenancy could not be held to have terminated. The English case of *Paul*[2] was closely analogous to the present, and the observations of the learned Judges in that case were in point. *Wight's*[3] case was totally irrelevant in a question of the construction of the statute, for it decided only the construction of a particular clause in a particular contract, and further the views expressed in that case by Lord Justice-Clerk Inglis and Lord Westbury as to the character of the right of an outgoing tenant to reap the crop which he had sown could no longer be considered as sound.

Argued for the defender;—The case was quite distinct from *Black* v. *Clay*.[1] There the lease specified three separate terms of entry, and ran "from these periods respectively." Here there was only one term

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but is in time if he gives the notice four months before Martinmas, which was held to be the term contemplated by the phrase 'separation of the crop.'

"But what of the case of there being only a Whitsunday entry? In that case also the outgoing tenant would be entitled to reap the crop which he had sown. But would he be entitled to reap the crop as tenant? He would not be so if the view taken by the Judges of the Court of Session, and by Lord Westbury, in *Wight's* case, as to the nature of the right of an outgoing tenant at common law to a waygoing crop is sound. And I do not understand that the soundness of that view was challenged in *Clay* v. *Black*. What was challenged was the view that there was no difference between the case of a lease with entry to houses and grass only at Whitsunday, and to the arable lands at separation, and a lease which gives entry to the whole lands at Whitsunday, and leaves the outgoing tenant's right to a waygoing crop to be regulated by the common law. The difference between these two cases I take to be that in the first, the tenant, after removing from the grass and houses, continues in possession of the arable lands, and reaps the crop, under and by virtue of the lease and as tenant; while, in the second case, the lease terminates at Whitsunday, and after that term the outgoing tenant has no possession under the lease or as tenant, but has only a right to reap the crop which he has sown, in accordance with the maxim *messis sementem sequitur*.

"The case of *Clay* v. *Black* did not determine that in the case of a lease, in which there is only one term of entry to all the subjects, a notice by the tenant may be good although it is not given four months prior to that term, and that is a question which must be decided upon a construction of the provisions of the Agricultural Holdings Act, when read in the light of the right of an outgoing tenant at common law to reap the waygoing crop.

"The 7th section of the Agricultural Holdings Act enacts that a tenant shall not be entitled to compensation unless four months 'before the determination of the tenancy' he gives notice to the landlord. The phrase 'determination of the tenancy' is defined to mean 'the termination of the lease by reason of effluxion of time, or from any other cause.'

"Now, if the view taken in the case of *Wight* as to the nature of the right of a tenant to reap a crop after the ish of the lease is sound, I think that it

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[1] Black v. Clay, Nov. 7, 1893, 21 R. 41; June 22, 1894, 21 R. (H. L.) 72.

[2] *In re* Paul, 1889, L. R., 24 Q. B. D. 247.

[3] Earl of Hopetoun v. Wight, July 10, 1863, 1 Macph. 1074, 35 Scot. Jur. 623, May 27, 1864, 2 Macph. (H. L.) 35, 36 Scot. Jur. 542.

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of entry, Martinmas 1885, and therefore only one date of expiration, Martinmas 1895. The rights of the pursuer after that date to consume the turnips on the land, and to use the barn, barnyard, and threshing-mill, were mere limited rights of occupation not inconsistent with the tenancy terminating at Martinmas.[1] The former right, which was the most important, was merely an application of the common law rule *messis sementem sequitur*. The soundness of the opinions expressed by Lord Justice-Clerk Inglis and Lord Westbury in *Wight*[1] as to the character of such a right, after the expiry of a lease, was not questioned in *Black* v. *Clay*.[2] Further, in *Black's*[2] case the tenant continued in possession for the purpose of reaping the corn crop, which was a more important right than that of consuming the turnip crop. Lastly, a lease must have a definite ish. This condition was satisfied in *Black's*[2] case, for there was authority for the view there adopted that "separation of the crop" signified Martinmas; but there was no authority for holding that the period for consuming the turnip crop expired at Candlemas. The case of *Paul*[3] was rightly distinguished by the Lord Ordinary.

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is plain that where there is only a Whitsunday ish, the lease terminates at that term, which is also the date of the determination of the tenancy. I say that that is the result if the views in *Wight's* case are sound, because it was argued on the authority of the English case *In re Paul* (24 Q. B. D. 247) that the common law right of a tenant to reap a waygoing crop must be read into and held as part of the lease. That, however, would not avail, if, as was held in *Wight's* case, the outgoing tenant's right to reap the crop is only (to use Lord Westbury's words) 'a limited right of entry and occupation for that purpose . . . which is perfectly consistent with the lease commencing as to all the lands at Whitsunday.'

"Further, in the case of a tenant who has only the common law right to enter upon the lands for the purpose of reaping his crop, it seems to me that if the Whitsunday term is disregarded, it is impossible to fix any *punctum temporis* with reference to which the four months are to be calculated. Where, by express stipulation, the tenant is entitled to possess the arable land until the separation of the crop, that is held to be equivalent to a continuation of the lease until Martinmas, but there is no reason in my opinion for holding that the common law right of an outgoing tenant to reap his crop is practically an extension of his tenancy until Martinmas. Apart from stipulation in the lease, an outgoing tenant has, in my opinion, only such right of entry and possession as is necessary to enable him to ingather his crop. After the crop is ingathered in ordinary course, he has no right whatever in or upon the lands.

"There are two sentences in Lord Watson's judgment in *Clay* v. *Black* upon which the pursuer founded as being in his favour. His Lordship said,—'I have come to the conclusion that the "determination of a tenancy," as the expression occurs in sections 2 and 7 of the statute, refers to the time when the tenant finally gives up possession of the subjects which in the statute are described as his "holding." Section 2 is framed upon the assumption that his quittance of his holding, and the determination of his tenancy, are to be in point of time coincident.'

"The pursuer argued that a tenant who has a crop on the ground at the end of the lease does not give up possession until he has reaped the crop,

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[1] Gatherer v. Cumming's Executors, January 11, 1870, 8 Macph. 379, *per* Lord President Inglis, p. 381, 42 Scot. Jur. 175; Earl of Hopetoun v. Wight, July 10, 1863, 1 Macph. 1074, 35 Scot. Jur. 623, May 27, 1864, 2 Macph. (H. L.) 35, 36 Scot. Jur. 542.

[2] 21 R. (H. L.) 72.

[3] L. R. 24 Q. B. D. 247.

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LORD M'LAREN.—This case raises a question as to the sufficiency of a notice of a claim for improvements under the Agricultural Holdings Act, but under conditions which distinguish the case from *Clay* v. *Black*.[1]

The pursuer is tenant of the farm of Gattonside Mains under an informal lease for the period of nineteen years, afterwards reduced to ten years. The missives bear reference to a statement of conditions issued by the proprietor, and the first of these conditions is that the lease shall be for such number of years as may be agreed on, with entry at Martinmas 1885. Unless it can be shewn that this condition is altered or extended by the effect of other conditions agreed on, it would follow that as there is only one term of entry to the farm, there is also one ish, or period of "determination of the tenancy," and that notice of claim ought to be given four months before Martinmas of the last year of possession.

Under the sixth condition the rent is made payable, as is usual in such holdings, in equal moieties at Whitsunday and Martinmas. The tenth con-

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and that until he has done so, there is, according to Lord Watson's view, no determination of the tenancy.

"Now, what Lord Watson says is, that there is no determination of the tenancy until the tenant gives up possession of his 'holding.' But the word 'holding,' which Lord Watson quotes from the statute, is defined as 'any piece of land held by a tenant.' There is, therefore, no 'holding' in the sense of the statute, unless the person claiming compensation holds a piece of land as tenant. According to the opinions in *Wight's* case, however, the right of an outgoing tenant to reap a waygoing crop after the ish is not a right to hold a piece of land as tenant, but a right to enter for the sole purpose of reaping a crop upon land which is held by another person as tenant.

"I am therefore of opinion that where a lease comes to an end as regards the whole subjects at Whitsunday, the outgoing tenant must give notice of a claim under the Act at least four months before that term, even although he will have right to enter upon the farm after that term for the purpose of reaping the crop.

"I have been dealing with the case of a Whitsunday ish and the right of an outgoing tenant to reap the corn crop thereafter. I have done so because a Whitsunday ish was the one considered in the leading cases to which I have referred, and also because when the Court have dealt with a tenant's right to reap a crop after the ish it has always been in regard to a corn crop.

"In this case the ish was at Martinmas, and the crop was the turnip crop. I do not, however, think that that makes any difference in the principle applicable. The lease contains the quite common clause prohibiting the sale of turnips off the farm. That clause was altered by the letter of the landlord's agents of 12th May 1887, quoted in the condescendence, by which the pursuer was given the option of selling the turnips off the farm at the termination of the lease. The pursuer, however, was not bound to sell the turnips, but was entitled to exercise his rights in regard to that crop.

"The pursuer avers that the practice in such cases is for the outgoing tenant to consume the turnips upon the land after Martinmas, the understanding being that he has at least until Candlemas to do so. I assume for the purposes of this case that the practice is correctly stated by the pur-

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[1] 21 R. (H. L.) 72.

dition contains a provision on which the pursuer founds, viz., that no hay, straw, fodder, or turnips growing on the farm shall be sold, but the whole thereof shall be consumed and made into dung, and regularly applied to the lands. It is not disputed that this provision makes necessary the continued occupation of so much of the farm as was under turnip crop during the last year of the lease, in order that the turnips should be consumed on the farm during the winter months following Martinmas 1885. It is proper to notice that during the currency of the lease the proprietor gave written permission to the tenant to do certain things, and, *inter alia*, to sell the turnips which should be growing on the farm at the termination of the lease, which turnips should, in the option of the tenant, be consumed elsewhere than on the farm. But this was only a permission, and a mere permission to dispose of the turnips would, of course, not affect the tenant's right to consume the turnips on the land if he pleased.

An argument was also founded on the concluding part of the 10th condition taken in connection with the 11th condition, where it is provided, first, that the outgoing tenant shall have right to the barn and threshing-

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suer. But it amounts to no more than this, that by custom a tenant under a lease with a Martinmas ish is recognised to have the same right to reap his turnip crop after the ish which a tenant leaving a farm at Whitsunday has to reap his corn crop after that term. The only difference is that, as it is usual to prohibit the sale of turnips off the farm, the only way of reaping the crop (if it is not sold to the incoming tenant) is to eat it with sheep upon the ground. That, however, is a matter of detail, and does not, in my opinion, alter the character of the outgoing tenant's right. He reaps the turnip crop just as a tenant with a Whitsunday ish reaps the corn crop, because he has sown the crop and not because he continues to be tenant under the expired lease.

"Further, in this case, as in the case of a corn crop, the difficulty is to find a *punctum temporis* prior to which the notice must be given. The pursuer says that Candlemas should be taken. But, upon his own shewing, I do not think that any warrant for fixing upon that term can be found in the statute. The custom which he avers is that 'the consumption of the turnips upon the farm extends at least until Candlemas (2d February) subsequent to the Martinmas term, and frequently continues as late as the month of April.' The custom upon which the pursuer relies, therefore, is for the outgoing tenant to continue possession for a period varying according to circumstances. He is entitled to possess 'at least' until Candlemas, but he may continue until April.

"The English case (*In re Paul*) to which I have referred was strongly founded on by the pursuer. There a lease expired on the 11th October, but by a custom of the country the tenant was entitled to hold over the possession of the meadow land until the 11th day of the following February. The Court held that the determination of the tenancy did not occur until the latter date. The ground of judgment as stated by Lord Coleridge, C. J., was that the custom must be held to have been incorporated into the lease, and he referred to the custom as one 'by virtue of which the termination of the tenancy might be postponed for a period after the expiration of the notices to quit.'

"Now, if the result of reading the custom into the lease was that the tenant continued to possess a substantial part of his holding as tenant under the lease until a definite and fixed date, the ground of judgment is very clear. But if I am right in the view which I have taken as to the nature of a Scottish tenant's right to reap his crop after the ish, he has, after that

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mill and barnyard till the term of Whitsunday after the termination of the lease for the purpose of stacking and threshing his crop, and also (art. 11) that the tenant, *i.e.*, the pursuer, shall only get possession of the threshing-mill "after the landlord shall have done with using the same in threshing out last year's crop."

The 13th condition is to the effect that the tenant shall be bound to remove "from the houses and lands" at the termination of the lease without warning or process of removing.

Now, the pursuer has claimed the right of feeding stock on the turnip-fields during the winter months following Martinmas, and it is conceded that if his tenancy was not determined until the turnips were eaten, the notice is sufficient in point of time. And of course if the tenancy is to be taken as prolonged to Whitsunday 1896, when the tenant's right to the use of the barn, threshing-mill, and barnyard came to an end, the notice would be sufficient. But, again, if we are to take it that the tenant obtained entry to the entire and undivided subject at Martinmas 1885, it would follow that his tenancy came to an end at Martinmas 1895, because the lease was only for ten complete years. On this point it is not unimportant to notice that in the letter reducing the duration of the lease to ten years, the expression used is "I agree to there being a break on the part of landlord and tenant in the lease of Gattonside Mains at the term of Martinmas 1895."

We know that where a farm is in part pastoral and in part arable the lease usually specifies two terms of entry, applicable to the respective subjects. In *Clay* v. *Black*,[1] where the lease gave entry to the houses and grass lands at Whitsunday, and to the arable lands at the separation of the crop from the ground, your Lordships decided that notice under the Act of Parliament was to be reckoned with reference to the later term of entry and ish, and this decision was affirmed on appeal. In some cases, especially where the farm is chiefly pastoral, the term of entry is Whitsunday, and in such cases it is recognised that as the outgoing tenant is entitled to reap his crop, he has a qualified right of entry on the lands for the purpose. But I am not aware that in such a case it ever has been held that the right of removing the crop has the effect of extending the period of the tenancy until Martinmas. On the contrary, I apprehend that the real right of the incoming tenant with a Whitsunday entry is perfected and completed as to the entire farm when he takes such possession at Whitsunday as the nature

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date, no possession as tenant; and, according to the pursuer's own averment there is no fixed period within which the reaping or consumption of the crop must be completed. The ground of judgment therefore in *Paul's* case is not applicable.

"The pursuer also founded upon the Removal Terms (Scotland) Act, 1886. Under that Act, when the term of a tenant's removal is Martinmas, he does not remove from the dwelling-house on the farm until the 28th of November. The date of the term as regards the lands, however, is not altered, and I am of opinion that the fact that under the Act the pursuer was entitled to hold the farmhouse until 28th November did not prevent his tenancy of his holding, within the meaning of the Agricultural Holdings Act, coming to an end at the ordinary date."

[1] 21 R. 41, 21 R. (H. L.) 72.

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of the subjects admits of. The outgoing tenant has access to the fields which he has sown for all necessary agricultural operations, but if he entered for any other purpose he would be a trespasser. This, I think, is the import of the judgment of the Court in the case of *Gatherer* v. *Cumming's Executors*,[1] and is clearly expressed in the opinion of the Lord President, 8 Macph. 381. I grant that there may not be much practical difference between the use which the outgoing tenant has in such a case as proprietor of the growing crop and the use which a tenant of similar lands may have under his real right where there is a double entry entitling the tenant to retain possession of the fields until Martinmas. But in such cases I think form is substance, and where landlord and tenant have agreed on a certain term of entry with a correlative ish, I know of no legal principle that should persuade a Court of law to prescribe a period of determination of the tenancy different from the period which the parties have prescribed for themselves, or to hold that the limited right of occupation to which I have referred is equivalent to a prolongation of the real right.

Passing from the case which I have used for illustration to the actual case, I see still greater difficulty in accepting the pursuer's proposition that his tenancy was in existence after the term of Martinmas. A lease must come to an end at a definite time, and I do not see how a use of feeding stock on the turnip fields can be taken as a measure of time. The turnips might be consumed within a few weeks after Martinmas, and then the right of occupation would cease, or the feeding might extend to the end of the year, or as suggested in argument until Candlemas. The use of the barn, barnyard for stacking, and threshing-mill is equally indefinite in point of time, with this difference, that Whitsunday is given as the extreme limit of the right of occupation. Then one is impressed with the argument that these are rights of very secondary importance in comparison with the general right of a tenant of arable lands to have his crop retained on the lands until it is ripe for removal, and I do not think that the existence of such limited uses can displace the plain condition of the lease, which provides that the entry shall be at Martinmas.

I have thus been led to adopt the conclusions and the reasoning of the Lord Ordinary, and were it not that our decision may regulate the matter of giving notice under other leases where the term of entry is the same, I should not have thought it necessary to consider the question so minutely. There is one other topic referred to by his Lordship which I must notice—I mean the bearing on this case of the English case of *Paul*.[2] I agree in the Lord Ordinary's interpretation of that decision that it proceeded on the ground that by custom a tenant might continue to hold a substantial part of his holding for a definite and fixed period after the expiration of the notice to quit. But it is never very safe in a question of real property law to rely on precedents established with reference to a different system of law. I doubt whether we should be able to give such an effect to custom under our law of landlord and tenant even if the custom were proved, because in Scotland the real right of the tenant is measured by the terms of his lease. But if we apply to these conditions the principle that was applied to the

[1] 8 Macph. 379.

[2] L. R., 24 Q. B. D. 247.

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local custom in the case of *Paul*,[1] then I think the pursuer's case fails, because there is no postponement of possession to a definite time. I am for adhering to the Lord Ordinary's interlocutor.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT adhered.

CHARLES WALDIE, Solicitor—CARMICHAEL & MILLER, W.S.—Agents.

No. 160. June 16, 1896. Ross v. Ross.

SIR CHARLES HENRY AUGUSTUS FREDERICK LOCKHART ROSS, Pursuer (Respondent).—*W. Campbell—Pitman.*

DAME REBECCA SOPHIA BARNES OR ROSS, Defender (Reclaimer).—*Clyde.*

Parent and Child—Legitim—Interest.—Where a son raised an action for payment of legitim thirteen years after his father's death, and election could not, owing to the son's minority, have been made at an earlier date, the Court (*diss.* Lord Adam) *held* that the father's executrix was only liable in interest on the son's legitim at the rate which the money would have earned under prudent administration, and found her liable in interest at the rate of 4 per cent, that being the rate which the estate was admitted to have earned.

Bishop's Trustees v. *Bishop*, March 17, 1894, 21 R. 728, and *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048, *commented on.*

Opinion reserved by Lord M'Laren as to the rate of interest chargeable where the right of legitim can be immediately determined, but where the claim is allowed to lie over without fault on either side.

Observed by Lord M'Laren,—"There is at present no statutory rate of legal interest; 5 per cent was only a maximum rate, and there is no statutory rule obliging the Court to award 5 per cent in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country."

1ST DIVISION. LdStormonth-Darling.

ON 15th January 1894 Sir Charles Ross, of Balnagown, who had attained majority in the preceding April, brought an action against his mother, Lady Ross, as sole executrix and universal intromitter with the moveable estate of his father, for payment of the amount due to him as legitim, with legal interest from 26th July 1883, the date of his father's death.

The parties by joint minute concurred in admitting that the nett value of the personal estate left by the late Sir Charles Ross was £32,537, and the only question in dispute between them was as to the rate of interest to which the pursuer was entitled on the legitim due to him. The facts bearing on that question are stated by Lord M'Laren in the second paragraph of his opinion (*infra*, p. 804).

On 19th November 1895, the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Decerns against the defender for payment to the pursuer of the sum of £16,268 sterling, in full of the petitory conclusion of the summons, with interest thereon as concluded for: Finds the pursuer entitled to expenses," &c.*

[1] L. R., 24 Q. B. D. 247.

* "NOTE.—I feel bound by practice and decision to give decree for interest at 5 per cent from the date of death, but my own view is very strongly in favour of reducing the rate of interest in cases like this where it is impossible that anything approaching 5 per cent can have been earned, and where the facts do not raise a plea of *mora*. Such a departure from practice, however, is rather for the Inner than for the Outer-House."

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The defender reclaimed, and argued;—It was admitted that legitim was a claim of debt, and that interest was due upon it. *Ex lege* there was an implied obligation to pay interest on money received in loan,[1] and the foundation of the claim for interest in the present case was the same as in loan. There was, however, no fixed rule that interest at the rate of 5 per cent was due either on claims of legitim or on other debts. The last case in regard to legitim was that of *Bishop's Trustees*,[2] in which 5 per cent was allowed, but in that case the question of interest was of little importance, as the claim was made soon after the father's death, and the Court proceeded entirely upon the supposed authority of the case of *M'Murray*.[3] In *M'Murray*[3] there was no reference to the rate of interest, except in the interlocutor where the phrase "legal interest" was used, the question of the rate of interest was not discussed, and the fund had been invested in trade, and had earned more than 5 per cent. The only other decision in regard to a claim for legitim was a decision by Lord Fraser,[4] who allowed interest at the rate of 5 per cent, but on the express ground that there had been delay in making payment. In analogous cases the rate of interest allowed varied. Thus in claims by a wife's representatives for a share of the goods in communion 5 per cent from the wife's death had been allowed in one case,[5] while in another interest had only been allowed from the date when the claim was made.[6] Again in the case of a claim for *jus relictæ* only interest at the rate earned had been given.[7] So also in the case of legacies there was no fixed rule that 5 per cent must be allowed.[8] Nor was interest at that rate necessarily given in all cases of debt.[9] Indeed, in some cases no interest was due until a claim was made.[10] The cases in regard to claims analogous to claims for legitim shewed that when there had been no delay in making payment only such rate would be allowed as had actually been earned. In the present case every consideration of equity was in favour of not mulcting the executrix in a larger amount of interest than the funds had earned in her hands. She was willing that the rate of interest so earned should be taken to be 4 per cent, although that rate exceeded the actual return. Assuming that there had in the past been a rule to the effect that 5 per cent interest was exigible on claims of legitim, it was within the power of the Court to take into account the great fall which had taken place in the general rate of interest, and to alter the rule so as to bring it into conformity with the changed circumstances of the present day.

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[1] Cuninghame v. Boswell, May 29, 1868, 6 Macph. 890, 40 Scot. Jur. 495; Thomson v. Geekie, March 6, 1861, 23 D. 693, 33 Scot. Jur. 340.

[2] Bishop's Trustees v. Bishop, March 17, 1894, 21 R. 728.

[3] M'Murray v. M'Murray's Trustees, July 17, 1852, 14 D. 1048, 24 Scot. Jur. 639.

[4] Gilchrist v. Gilchrist's Trustees, July 19, 1889, 16 R. 1118, *per* Lord Fraser, p. 1120; *cf.* Fraser on Husband and Wife, pp. 984 and 999.

[5] Smith v. Barlas, Jan 15, 1857, 19 D. 267, 29 Scot. Jur. 135.

[6] Hardie v. Cauvin, Feb. 12, 1823, 2 S. 187.

[7] M'Intyre v. M'Intyre's Trustees, July 9, 1865, 3 Macph. 1074, 37 Scot. Jur. 562.

[8] Inglis' Trustees v. Breen, Feb. 6, 1891, 18 R. 487.

[9] Baird's Trustees v. Duncanson, July 19, 1892, 19 R. 1045; Greig v. Magistrates of Edinburgh, March 12, 1879, 6 R. 801.

[10] Blair's Trustees v. Payne, Nov. 8, 1884, 12 R. 104, *per* Lord Fraser, p. 109.

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Argued for the pursuer;—Legitim was a claim of debt, and there was a fixed rule, from which the Court would not depart, that interest at the rate of 5 per cent was due upon such a claim from the date when it became due, the funds having in the meantime been used, and, it might be, put in peril by the debtor.[1] There were no particular circumstances to take this case out of the general rule, If the executrix had set apart and earmarked her son's legitim, perhaps the case would have been different.

At advising,—

LORD M'LAREN.—In this action the pursuer claims legitim with the legal interest thereof from 26th July 1883, being the date of his father's death. I am not sure whether this is an irrevocable election on his part to take legitim in preference to the heritable estate; but in any view it is proper that the value of the legitim should be judicially ascertained, so that the pursuer may be in a position to consider his course, if it is still open to him to do so. The Lord Ordinary has decerned in his favour for the principal sum of £16,268, 18s. 9d., with interest at the rate of five per cent as concluded for—that is for a period of nearly thirteen years reckoned from the father's death. This interest would amount to about sixty-five per cent, or very nearly two-thirds of the principal sum sued for. His Lordship, in a brief note, gives the weight of his opinion in favour of applying a lower rate of interest to such cases, but states that, sitting alone, he feels bound by practice to allow interest at five per cent.

The facts which raise this question may be stated in a sentence. Sir Charles Ross's father left his unentailed lands to his son, burdened with a liferent in favour of his widow, and he left all his personal estate to his widow, who was also, in the events which happened, sole trustee and guardian of her pupil son. It could not be known at the time of the father's death whether after the son should come of age it would be more for his advantage to take the heritable estate or the legitim. The result might depend on whether Lady Ross was alive at her son's majority, and on her expectation of life at that time. Even if a good actuarial estimate could have been made, Lady Ross had not the power to elect for her son, and the son had not the power to elect for himself effectually until he became of full age, because the election to take legitim involved the alienation of the heritable estate, and such an election might have been reduced on the ground of minority and lesion.

In such circumstances all that could be done by Lady Ross for the conservation of her son's rights was to keep the personal estate, or at least one moiety of it, safely invested for his benefit should he choose to claim it at the proper time. This has been done, and on the mere statement of the facts it is evident that Lady Ross was in the position of a depositary of this fund, having no duty in relation to it except that of the safe keeping of the principal sum, and of such interest as it might produce when safely invested If it could be shewn that the fruits of the personal estate amounted to five

[1] Bishop's Trustees v. Bishop, March 17, 1894, 21 R. 728; M'Murray v M'Murray's Trustees, July 17, 1852, 14 D. 1048, *per* Lord Ivory, p. 1054, 24 Scot. Jur. 639; Smith v. Barlas, Jan. 15, 1857, 19 D. 267, *per* Lord Cowan, p. 270, 29 Scot. Jur. 135.

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per cent per annum, or sixty-five per cent in the period of thirteen years, I see no reason to doubt that the pursuer would be entitled to what he claims. But his case is that he is entitled to receive five per cent as on a debt, while Lady Ross contends that she is only liable for such interest as the legitim fund, if safely invested, could produce. It is assumed that four per cent may be taken as representing on a fair estimate the actual income or produce of the fund.

Now, it is undoubtedly the fact that interest at five per cent has been generally allowed on claims of legitim and on claims by a wife's representatives to a share of goods in communion under a law which is now repealed. The case of a claim by a wife's representatives for a share of goods in communion could not raise a question of election, and is not very much in point. But when the decisions are examined with reference to interest on legitim claims, it will be found that they are no more conclusive than cases of the other class, because, with the exception of the recent case of *Bishop's Trustees* v. *Bishop*,[1] they are all cases where there was either no election or where the election might have been made at the opening of the succession.

Now, it may very well be that if a son or daughter is disinherited and has no claim except under the law of legitim, the testamentary representatives ought to be treated as *in mora* for not immediately settling the claim. In such a case interest would be due as in any other case of the withholding payment of a just debt. The same principle may be held, but I think with less reason, to apply to a case where there is an election between legal and testamentary provisions, but the claimant is of age and may be called on to declare his election.

In the case of *Bishop*,[1] the vesting of the rights under the father's will was suspended for the period of one year after the father's death, and the action was heard in Court in the following year. The question of the rate of interest was very unimportant, because it was only the interest of one year, and the Court simply followed the case of *M'Murray*,[2] without, as far as we can judge from the report, having its attention drawn to the peculiarity of the case, where the action of the trustees is suspended and the election cannot be immediately made. But in *M'Murray's*[2] case the question was whether the child claiming legitim was entitled to profits which it was assumed would exceed five per cent per annum. The question was not raised whether the liability of the persons administering the legitim fund might be limited to the interest obtained from a safe investment, and this question could not well be raised, because the facts were that the money had been invested in trade and had produced more than five per cent. It therefore appears to me that we are in a position to consider the question I have stated without being bound by authorities, although of course the decisions referred to may be very good authority for giving five per cent in a case where legitim is withheld from a child who is entitled to it.

It has often been said, and I think it is a rule of law, that interest is only due where there is either a contract to pay interest or a duty to invest, or in respect of *morata solutio*. The present case in my opinion falls under the second category, and the defender is only accountable for such interest or

[1] 21 R. 78. [2] 14 D. 1048.

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income as the money would have produced if safely invested. I should also wish to reserve my opinion as to the rate of interest chargeable where the right to legitim can be immediately determined but where the claim is allowed to lie over without fault on either side. After all, there is at present no statutory rate of legal interest; five per cent was only a maximum rate, and there is no statutory rule obliging the Court to award five per cent in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country.

LORD ADAM.—It is admitted in this case that legitim is one of that class of debts which bears interest, and the only question before us is, what is the amount of interest which should be allowed. For myself I am of opinion that we ought to adhere to what is the customary rate of interest for a debt. I do not think that it is relevant to inquire in such a case what the party who is debtor has done, or might have done, with the same. I therefore differ in opinion from Lord M'Laren, and think that we ought to adhere to the customary amount of interest payable on this debt—that being 5 per cent.

LORD KINNEAR.—I have come to the same conclusion as Lord M'Laren, and for substantially the same reasons. I do not dispute that legitim is a debt which bears interest, and that an executor therefore is not exactly in the position of a trustee holding money of the child, but is liable in the deceased's place to satisfy the child's claim for legitim. But then it does not appear to me that any question of interest can be safely or equitably decided without reference to the circumstances in which it is raised. It appears in this case that the executrix has been for thirteen years in the possession of the entire personal estate of the deceased, and that she has had every reason to believe it her own, if not from the first, at least for many years. The son has nevertheless the right to make the claim now, and the executrix is bound to have funds to meet it. But the debt was not payable until the pursuer had made his election between his legal rights and his rights under the will. The executrix therefore was not *in mora*, and it is not suggested that in the reasonable administration, I do not say of a trust-estate, but of her own affairs, she would have earned 5 per cent interest, and therefore a decision which should have the result, as Lord M'Laren has said, of compelling her to pay a sum equal to two-thirds of the entire sum claimed in addition to the amount of the claim itself, would, in my opinion, be in the highest degree inequitable. It would really be imposing a penalty upon her for an administration of the estate which she had no power to prevent. She had no power to accelerate the election, or in the meantime to earn interest at the rate of 5 per cent, and I see no reason why the pursuer should benefit at the expense of the executrix by reason of his own delay. It is enough that he should not be prejudiced. I think it would not be according to justice to compel her to pay in name of interest a larger sum than she might reasonably have obtained from a prudent administration of the estate.

I agree with Lord Adam that we should not, in matters of this kind, depart from the fixed rules of practice, but I also agree, from the examina-

tion of the cases which Lord M'Laren has made, that there is no fixed rule as to the interest due on claims of legitim to prevent us from giving effect to equitable considerations in exceptional circumstances. No. 160. June 16, 1896. Ross v. Ross.

The LORD PRESIDENT concurred with LORD M'LAREN and LORD KINNEAR.

THE COURT altered the interlocutor of the Lord Ordinary, and found the defender liable in interest at the rate of 4 per cent.

J. & F. ANDERSON, W.S.—KEITH R. MAITLAND, W.S.—Agents.

MRS ELIZABETH TAYLOR CREE OR SHIRREFS, Pursuer (Reclaimer).—*Ure—Crabb Watt.*
JOHN GORDON LUMSDEN SHIRREFS, Defender (Respondent).—*A. O. M. Mackenzie.*

No. 161. June 16, 1896.* Shirrefs v. Shirrefs.

Husband and Wife—Aliment—Process—Competency of decerning for aliment in pending action of separation and aliment after decree of divorce at instance of wife.—A wife, after obtaining an interim award of aliment in an action of separation and aliment against her husband, raised an action of divorce against him, and obtained decree therein. She then, in the action of separation and aliment, moved for decree for a further sum in name of aliment. Except the sum paid under the interim award she had received nothing from her husband in name of aliment pending the actions, and she alleged that she had been alimented by third parties.

The Court *refused* the motion as incompetent, in respect that there could be no decerniture for aliment in an action of separation and aliment after the parties had been divorced, an action of separation and aliment proceeding on the assumption that the parties were husband and wife.

ON 29th November 1895 Mrs Elizabeth Taylor Cree or Shirrefs raised an action of separation and aliment against her husband, John Gordon Lumsden Shirrefs, of Knowsie, Aberdeenshire. 2D DIVISION. Lord Kincairney.

In this action, on 7th January 1896, the Lord Ordinary (Kincairney) decerned against the defender for payment of £20 in name of aliment, and of £20 in name of expenses.

Thereafter Mrs Shirrefs raised an action for divorce against her husband, and on 27th February 1896 the diet of proof in the action of separation was discharged.

On 24th March 1896 decree of divorce was pronounced.

On 12th May Mrs Shirrefs moved in the action of separation and aliment for decree for payment of a further sum in name of aliment. There had been no decree for aliment in her favour, either in the action of separation and aliment or in the action of divorce, since the decree of 7th January, and no procedure had taken place in the former action since the interlocutor of 27th February discharging the diet of proof.

On the same day the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Having heard counsel on the pursuer's motion for payment of an additional sum in name of aliment, refuses the motion, and in respect of the decree of divorce in the action between the parties, dismisses this action, and decerns: Finds the pursuer entitled to expenses, under deduction of the expenses already allowed," &c.

The pursuer reclaimed, and argued;—The defender's obligation to aliment his wife during the dependence of the actions was clear, and it was equally clear that payment of £20 was not complete imple-

* Decided June 9, 1896.

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ment of that obligation. The action of divorce was now at an end, and no further step consequently could be taken in it; but the action of separation and aliment was still in Court, and although decree of separation would now be inept—decree of divorce having been pronounced—there was nothing incompetent in granting decree for a further sum in name of aliment. The decree of divorce had been pronounced in vacation, and the pursuer had taken the earliest opportunity thereafter of moving for decree for aliment. This was not a demand for arrears of aliment, as was the case in *Macmillan* v. *Macmillan*,[1] nor was it an attempt to continue the husband's liability for aliment after decree of divorce had been pronounced as in *Donald* v. *Donald*.[2] The pursuer having been alimented by third parties, the defender was liable in repayment in some form of process, and it avoided multiplicity of action to proceed in the action of separation and aliment.

Argued for the defender;—On the decree of divorce being pronounced the pursuer's right to payment of aliment from the defender terminated. The present motion would have been plainly out of the question in the action of divorce, that action being at an end. Technically the action of separation and aliment was still in Court, but decree of separation could not now be pronounced, the parties having been divorced, and that being so, the conclusion for aliment fell equally, being ancillary to the conclusion for separation. If the defender was liable to third parties for sums advanced on account of the aliment of the pursuer, it was for these parties to bring forward their claims.

LORD JUSTICE-CLERK.—This case is in rather a curious position. The pursuer raised an action of separation against the defender. While she was pursuing that action, she discovered that she had grounds for an action of divorce. Accordingly she brought an action of divorce, and in that action she has obtained decree against the defender, and the action is now finally disposed of, and is out of Court. But she now appears in the action of separation to ask for aliment. In the course of that action, on 7th January 1896, she obtained a decree for £20 in name of aliment. But since that date she has got no further decree for aliment, either in this action or in the action of divorce. Having given the case the best consideration I can, I have come to the conclusion that there is no ground for altering the Lord Ordinary's judgment. If, as we are informed, this lady received any necessary supplies during the litigation, the persons who supplied her necessities have means for recovering their outlay from the defender. But such persons are not entitled to be aided in recovering their advances by decree in an action which assumes, as the essential condition of its competency, that the pursuer and defender are married persons, at a time when they have ceased to be married to one another.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

THE COURT adhered.

DOVE, LOCKHART, & SMART, S.S.C.—JOHN MACKAY, S.S.C.—Agents.

[1] Macmillan v. Macmillan, July 20, 1871, 9 Macph. 1067, 43 Scot. Jur. 598.

[2] Donald v. Donald, March 11, 1864, 2 Macph. 843, 36 Scot. Jur. 421.

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Moubray's Trustees v. Moubray.

WILLIAM HENRY HALLOWELL CAREW MOUBRAY AND OTHERS (Robert Moubray's Trustees), Pursuers and Real Raisers.—*R. E. M. Smith.*
ARTHUR MOUBRAY, Claimant (Reclaimer).—*D. Dundas—J. H. Millar.*
WILLIAM HENRY HALLOWELL CAREW MOUBRAY, Claimant (Respondent).—*D.-F. Asher—C. K. Mackenzie.*

Entail—Direction to entail—Succession—Condition—Direction to entail "on my heirs so long as the estate of C. is theirs"—Clause of devolution.—Robert Moubray died in 1875, leaving a holograph will, by which he directed his trustees to accumulate the income of his estate until it reached £41,000, and with the accumulated sum to purchase lands "as near to the estate of Cockairnie as possible, and as strictly as the law of Scotland will allow to entail such lands purchased as above on my heirs direct or collateral so long as the estate of Cockairnie is theirs."

At the date of this will the estate of Cockairnie belonged in fee-simple to William Moubray, the immediate younger brother of the testator.

William Moubray died in 1885, leaving a trust-disposition and settlement dated in 1879, by which he directed his trustees to hold the estate of Cockairnie for the use and behoof of Captain Moubray, his eldest son, and the heirs of Captain Moubray's body, whom failing of his second and other sons in their order respectively, and the heirs of their bodies respectively, subject to the condition, *inter alia*, that in respect that he, William Moubray, was next heir to the estates of Upwood and Woodwalton in England, and that it was his wish that the heir who should succeed after him to these estates should not also take the estate of Cockairnie, his trustees were to convey Cockairnie to the child who might be entitled thereto other than the heir who should succeed to Upwood and Woodwalton.

At the adjustment of a deed of entail after the £41,000 had been accumulated, the younger brother of Captain Moubray, and the first substitute under the Cockairnie trust, contended that—having regard (1) to Robert Moubray's clearly expressed intention that the lands to be purchased should be possessed along with the lands of Cockairnie, and (2) to the fact that Cockairnie was held upon a title which provided for a devolution of that estate from the heir in possession to the next heir in the event of the former succeeding to the estates of Upwood and Woodwalton—the trustees in framing a deed of entail of the estates to be purchased were bound to insert a clause of devolution to the same effect to secure that the lands to be purchased should be possessed along with Cockairnie. *Held* that no clause of devolution fell to be inserted.

Res Judicata—Opinion of Court on point not debated or determined by interlocutor.—The opinion of the Court, expressed at advising, on a question not argued by the parties, and not referred to in the interlocutor of the Court, *held* not to foreclose the parties from subsequently raising the question for judgment.

(SEE *ante, Moubray's Trustees* v. *Moubray*, June 26, 1895, 22 R. 801.)

2D DIVISION. Lord Kincairney.

Robert Frederick North Bickerton Moubray, who resided at Cockairnie, Fife, an estate belonging to his younger brother, William Hobson Moubray, of Otterston and Cockairnie, died without issue, on 31st March 1875, leaving certain testamentary writings.

By the first of these writings, which bore date 10th June 1867, Mr Moubray, *inter alia*, directed his estate to be accumulated until it amounted to £40,000, when the trustees were directed to "buy lands in Fife in the western district, or as near the estate of Cockairny as may be, and entail said lands on my nearest of kin in the strictest way admissible by the law of Scotland."

Another writing bore dates 18th November 1867 and 18th November 1868, and was in these terms:—"Should the estate of Cockairny be no longer in the possession of my relatives by blood in regular

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succession when the forty or forty-five thousand pounds have accumulated, I desire that sum may be devoted to the purchase of land as near to the estate of Upwood, Hunts, as may be, and such lands to be strictly entailed on the possessor of the lands of Upwood and Wood Walton in the same manner according to the law of England, as correspondingly it would have been if invested in lands adjacent to Cockairny, Fife, as above."

A third writing was dated 30th April 1868, and ran thus:—"This is my last will and testament. I beg Messrs Coutts & Co., London, will continue to reinvest twice a-year any balance in their hands on the conditions if necessary of keeping ten pounds at the disposal of my trustees in their hands; and when the sum invested, always investing in the security on which the dividend is about to be paid, shall be sufficient to realise forty-one thousand pounds, my trustees shall have power to realise through Messrs Coutts & Co. that sum, and to take a present opportunity of investing that sum in lands in the county of Fife, as near to the estate of Cockairny as possible, and as strictly as the law of Scotland will allow to entail such lands purchased as above on my heirs direct or collateral, so long as the estate of Cockairny is theirs. When it is not any longer in the possession of the Moubrays, the estate, purchased as above, may become the hereditament of the Hussey family of Woodwalton, Herts, always provided the family of Moubray of Cockairny no longer exists in Scotland, having become extinct, and the name in this latter case to be adopted by Hussey shall as regards the lands to be acquired as above be 'Hussey Moubray.' My trustees shall be my three nearest relatives, the youngest to be umpire. I name my nearest male relative my heir, and bequeath to him as heirlooms the gold chain given by my grandfather," &c.

The testator left moveable estate amounting to about £20,000, but no heritage.

On 14th February 1894 an action of multiplepoinding, which had been raised by the trustees under the foregoing settlement for the determination of conflicting claims to the estate, but which had been allowed to fall asleep in consequence of an interlocutor of the Lord Ordinary (M'Laren) to the effect that it was premature to determine the questions raised until the expiration of twenty-one years from the death of the testator, or until the accumulated fund amounted to £41,000, was wakened, the sum of £41,637 having been accumulated, and condescendences and claims were lodged of new, the fund *in medio* being the sum of £41,637, with interest thereafter accruing.

The leading question raised was whether the testamentary papers above quoted contained an effectual direction to entail.

From a joint minute of admissions lodged in the Inner-House after the Lord Ordinary's interlocutor of 30th October 1894 after mentioned, the following facts appeared bearing on that question and on the subsequent question now reported:—

"The lands of Cockairnie in the west of Fife form the ancient family estate of the Moubrays of Cockairnie. They were possessed at the commencement of this century by Sir Robert Moubray, who in 1814 acquired the adjacent lands of Otterston, and thereafter possessed Cockairnie and Otterston as one estate. There is a mansion-house upon each. He died on 10th October 1848.

"Sir Robert's younger brother, Richard Hussey Moubray succeeded to the lands of Upwood and Woodwalton, in the county of Hunting-

don, and took the name of Hussey Hussey, and as Sir Richard Hussey Hussey he possessed them under an English entail until his death in 1842, when he was succeeded by his son Richard Hussey Hussey, now the heir in possession. The present proprietor of the English estates was thus the nephew of Sir Robert Moubray and first cousin of the testator Robert Frederick North Bickerton Moubray (who was Sir Robert's eldest son), and he was in possession of Upwood and Woodwalton when the testator wrote his testamentary deeds. Under the English entail it is understood that, failing issue of Mr Richard Hussey Hussey (who is unmarried, and is believed to be about eighty years of age), the testator would have succeeded to the English estates if he had survived.

"On the death of Sir Robert Moubray in 1848, it was found that he had left the estate of Cockairnie and Otterston, which he held in fee-simple, to trustees, with directions to secure to his wife, and after her death to his unmarried daughters, the liferent of the mansion-house of Cockairnie, and to convey his estates (passing over his eldest son, the testator, for whom he provided otherwise) to his second son, William Hobson Moubray, and the lawful issue of his body; whom failing, to his youngest son and daughters in their order. He directed that, in the event of the estate of Woodwalton devolving upon his son William Hobson Moubray, his lands of Cockairnie and Otterston should go to his youngest son, it being his wish that his estates in Fife should not be united with the estate of Woodwalton. His trustees in 1851 conveyed the estates to his son William Hobson Moubray accordingly with this destination and direction. In 1867 William Hobson Moubray conveyed the estates to himself, and his heirs and assignees whomsoever, free of any condition relating to the devolution of the estates. He was thus fee-simple proprietor of the Scotch estate when the testator (his elder brother) wrote his testamentary deeds.

"William Hobson Moubray was in possession of the estates when the present action was raised, and died in 1885, leaving a trust-disposition and settlement," dated 4th July 1879. "In terms of article 7 thereof his trustees now hold the estates of Otterston and Cockairnie for the use and behoof of his eldest son, Captain William Henry Hallowell Carew Moubray, and the heirs-male of his body, whom failing, of his second or other sons in their order respectively, and the heirs-male of their bodies respectively, subject to the liferent use by the sole surviving daughter of Sir Robert Moubray of the mansion-house of Cockairnie, and to the liferent use by the widow of William Hobson Moubray of the mansion-house of Otterston, and also subject to the condition that in respect that William Hobson Moubray was the next heir to the estates of Upwood and Woodwalton, and that it was his wish that the heir who should succeed after him to these estates should not also take the estates of Otterston and Cockairnie, his trustees are to convey Otterston and Cockairnie to the child who may be entitled thereto, other than the heir who shall succeed to Upwood and Woodwalton."

Captain William H. H. C. Moubray "is married. There are six younger sons of William Hobson Moubray surviving.

"William Hobson Moubray would, it is understood, have succeeded to the English estates had he survived Mr Richard Hussey Hussey, his first cousin, and" Captain William H. H. C. Moubray "is now believed to be the next heir entitled to succeed."

Captain William H. H. C. Moubray lodged a claim in which he

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maintained that the testamentary papers now in question contained no effectual direction to entail, and as heir-at-law of the testator he claimed payment of the fund *in medio*.

Arthur Moubray, William Hobson Moubray's second surviving son, on the other hand, maintained *primo loco* that the direction to entail was valid and effectual, and claimed "that the fund *in medio* shall be invested by the trustees in the purchase of lands as directed by the truster's settlement, and that the said lands should be settled by deed of entail at the sight of the Court upon Captain William Henry Hallowell Carew Moubray and the heirs of his body, whom failing, the present claimant and the heirs of his body, whom failing, the nearest in kindred of the truster, in terms of the directions of the truster, or at all events that the said lands should be so settled as to be beyond the disposal of the said Captain William Henry Hallowell Carew Moubray."

On 30th October 1894 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Having considered the cause, finds (1) that the late Robert Frederick North Bickerton Moubray by his testamentary writings, whereof No. 13 of process is an official copy or extract, directed that his funds should be accumulated until they reached the sum of £41,000, and that the accumulated sum should be invested in the purchase of lands in the county of Fife, as near the estate of Cockairnie as possible, and that such lands should be entailed: (2) That the said funds have now reached the said sum, and that the time for purchasing said lands and executing said entail has arrived: (3) That the said testamentary writings import a direction to entail the lands when purchased on the heirs in heritage of the testator, being the heirs of his blood in the order of heritable succession: (4) That the destination so directed is a valid and effectual tailzied destination: (5) That the deed of entail falls to be executed in favour of the claimant Captain William Henry Hallowell Carew Moubray, as institute, and the heirs of his body, whom failing, in favour of the claimant Arthur Moubray, and the heirs of his body, whom failing as may be hereafter determined: Therefore repels (1) the claim for the said Captain William Henry Hallowell Carew Moubray," and certain other claims: "Sustains the principal claim for the said Arthur Moubray, No. 28 of process, so far as consistent with the foresaid findings: Appoints the cause to be enrolled for further procedure: Grants leave to reclaim."

In his opinion the Lord Ordinary expressed the view that in the deed of entail to be executed there should be no clause of devolution founded on the words "so long as the estate of Cockairnie is theirs" in the paper of 30th April 1868.

Captain Moubray reclaimed.

On 26th June 1895 the Court pronounced an interlocutor, which simply refused the reclaiming note, adhered to the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to proceed therein as accorded; but the opinion of Lord Rutherfurd Clark, which (in his Lordship's absence) was read by the Lord Justice-Clerk as the opinion of the Court, concluded with the following paragraph:—"Of course the entail will contain a clause of devolution, by which, in the event of the heir in possession succeeding to the English estates, the estate shall devolve on the next heir who takes the estate of Cockairny."

Thereafter the trustees lodged a draft of a proposed deed of entail

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containing, *inter alia*, the following clause:—"But providing and declaring always that whereas it was the wish and intention of the said Robert Frederick North Bickerton Moubray that the lands directed by him to be purchased and entailed as aforesaid should be permanently held and enjoyed along with the estate of Cockairnie in the county of Fife so long as the latter estate should be in the possession of any member of the Moubray family. And whereas the said deceased William Hobson Moubray was the last heir in possession of the said estate of Cockairnie, and the same is now held by the trustees acting under his settlement for behoof of his eldest son and the heirs-male of his body, whom failing of his second or other sons in their order respectively, and the heirs-male of their bodies respectively, but subject to this direction, that upon the succession opening to the estates of Upwood and Woodwalton, in the county of Huntingdon, to which he, the said William Hobson Moubray, was the next heir of entail, his trustees should convey his estates of Otterston and Cockairnie to the child who should be entitled thereto under the destination contained in his said settlement, and above narrated, other than the heir who should succeed to the said estates of Upwood and Woodwalton, and to the heirs and assignees whomsoever of such child. *Therefore in case the institute or any one of the heirs of entail called to the succession of the lands and estate hereby conveyed by virtue hereof shall succeed to the said lands and estates of Upwood and Woodwalton upon the failure of Richard Hussey Hussey, the present proprietor thereof, and any son or sons he may leave, then and in that case the said lands and estate hereby conveyed shall immediately descend to and devolve upon the person who being an heir called to succeed thereto under the destination before written shall also be the person to whom the said estates of Otterston and Cockairnie are to be conveyed under the settlement of the said William Hobson Moubray, and the institute or heir of entail so succeeding to the lands and estates of Upwood and Woodwalton shall be bound immediately upon so succeeding to denude and divest himself or herself of the said lands and estates hereby conveyed in favour of the person entitled thereto as above mentioned. But the said institute or heir of entail shall have the same power or right of election (if any) between the said estates of Upwood and Woodwalton and the lands and estate hereby conveyed as may be competent to him with regard to the said estates of Otterston and Cockairnie.*"

Captain Moubray objected to any clause of devolution being inserted.

Arthur Moubray maintained that for the words printed in italics the following should be substituted:—"Therefore in terms of the direction contained in the testamentary writings of the said Robert Frederick North Bickerton Moubray, and his intention that the lands and estate above disponed shall be held along with the estate of Cockairnie and Otterston, it is hereby provided and declared that in case the institute or any one of the heirs of entail called to the succession of the lands and estate hereby conveyed by virtue of these presents, who would have been the heir entitled to a conveyance of the said estates of Cockairnie and Otterston from the trustees of the said William Hobson Moubray, shall succeed to the said lands of Upwood and Woodwalton and be thereby debarred from demanding a conveyance of the said estates of Cockairnie and Otterston, then and in that case the heir so succeeding shall, for himself and the heirs of his body, forfeit all right to the lands hereby conveyed, and the said lands and estate hereby conveyed shall immediately descend to

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and devolve upon the person who being an heir called to succeed thereto under the destination before written shall also be the person to whom the said estates of Cockairnie and Otterston shall fall to be conveyed, in the same manner as if the heir succeeding to Upwood and Woodwalton as aforesaid, and the heirs of his body, had all deceased, and the institute or heir of entail so succeeding to the said lands and estate of Upwood and Woodwalton shall be bound immediately upon so succeeding to denude and divest himself or herself of the said lands and estate hereby conveyed in favour of the heir of entail of the lands and estate hereby disponed, who shall then be entitled to receive the conveyance of the said estates of Cockairnie and Otterston from the trustees of the said William Hobson Moubray."

On 4th December 1895 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"Having considered the arguments for the parties in the Procedure-roll with reference to the terms of the proposed deed of entail No. 44 of process, submitted by the pursuers, and of which No. 45 of process is a print, and the alterations suggested by Captain Moubray and by Arthur Moubray respectively, as shewn on No. 46 of process, finds (1) that the clause of devolution inserted in said form falls to be deleted," as also certain other clauses, "and, subject to these corrections, approves of said form as the form of the deed to be executed by the pursuers in fulfilment of the direction given by the deceased Robert Frederick North Bickerton Moubray in his testamentary writing dated 30th April 1868, and referred to in the interlocutors pronounced in the cause of dates 30th October 1894 and 26th June 1895: Appoints the cause to be enrolled for further procedure: Grants leave to reclaim." *

* "OPINION.—In this case, by interlocutor of 30th October 1894, I found that Robert Moubray, who resided at Cockairny, Fifeshire, and who died on 31st March 1875, had directed that certain funds should be invested in the purchase of lands as near the estate of Cockairny as possible, and that his testamentary writings imported a direction to entail the lands when purchased 'on the heirs in heritage of the testator, being the heirs of his blood in the order of heritable succession.' I reached the conclusion that that was the destination directed on a construction of the whole of Mr Moubray's testamentary writings, all of which had, by a previous interlocutor pronounced by Lord M'Laren on 13th July 1883, been decided to be his 'testamentary acts.'

"My interlocutor was taken to review, and the opinion of the Court was delivered by Lord Rutherfurd Clark, who reached the same conclusion, but proceeded on only one of the testamentary writings, that dated 30th April 1868, which his Lordship conceived to be 'the only existing will.' But Lord M'Laren's judgment was not altered, and my interlocutor was affirmed *simpliciter*.

"The case has been enrolled for the adjustment of the deed of entail to be executed by Mr Robert Moubray's trustees. No estate has been purchased, and it is possible that no suitable estate may be in the market for some time—it may be for some years. But it was represented that the terms of the deed of entail directed ought now to be adjusted, because of the provisions of the 27th section of the Entail Amendment Act, 1848, to the effect that money vested in trust for the purchase of land to be entailed may be disentailed. The institute, Captain Moubray, maintains that he is entitled to be put in a position which will, he says, enable him, if he thinks proper, to acquire the money, or part of it, in fee-simple, and that he cannot do so until the terms of the deed of entail to be granted, and in particular of the destination, are adjusted. It appears to me that the contention

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Arthur Moubray reclaimed, and argued;—The question was practically settled by the judgment of the Court of 26th June 1895, although technically it might not be *res judicata*. But even considering the question *de novo* the result was the same. What the testator intended was that the lands which he directed to be purchased and entailed should belong to Moubray of Cockairnie in perpetuity so long as there was a Moubray of Cockairnie; and a clause of devolution was necessary to secure that result. The testator had not in terms directed that such a clause should be inserted, but if his intention was clear the trustees were entitled and bound to insert the necessary clauses.

Argued for Captain Moubray;—Notwithstanding the former judgment of the Court, the Lord Ordinary had rightly regarded the question as still open; and further, his interlocutor now before the Court was well founded. If the words "so long as the estate of Cockairnie is theirs" imported a continuing condition at all, they meant that if Cockairnie ceased to belong to the Moubray family through any cause, the estate was to pass to the family of Hussey of Woodwalton.

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thus stated by Captain Moubray is well founded, and that it is proper that the deed be now adjusted, notwithstanding that no lands have been purchased to which it can be applied.

"The trustees have lodged a draft of the deed which they suggest. Since the debate that draft deed has been printed, and I have also been furnished by the parties with a print of it, on which are shewn the modifications suggested on the one part by Captain Moubray, the institute, and on the other part by Arthur Moubray, who is at present the first substitute. The parties have not expressed a desire to be reheard on these prints, and, as the deed must doubtless be ultimately adjusted in the Inner-House, I think it unnecessary to order such a rehearing.

"The main question relates to a suggested clause of devolution. By the testamentary writing dated 30th April 1868 Mr Robert Moubray directed his trustees to execute a deed of entail of the lands to be purchased on his heirs, direct or collateral, 'so long as the estate of Cockairny is theirs'; and when the case was debated before me at first the question was raised, whether, in order to give effect to that qualification a clause of devolution or other conditional clause should be inserted. There appeared to me to be great difficulty in inserting such a clause. I came to think that the clause ought to be read as referring to the point of time when the deed fell to be executed, and as practically meaning—if the estate of Cockairny is theirs. I thought that construction justified by the testamentary writings read together, and I therefore expressed the opinion that the deed of entail should not contain any clause of devolution. But the interlocutor which was affirmed does not decide that point. Lord Rutherfurd Clark, however, at the close of his opinion, says,—'Of course the entail will contain a clause of devolution, by which, in the event of the heir in possession succeeding to the English estates, the estate shall devolve on the next heir who takes the estate of Cockairny.'

"The trustees now represent that in the draft deed submitted by them they have inserted a clause of devolution in accordance with this opinion. But it is contended on behalf of Captain Moubray, the institute, that there should be no clause of devolution, and this is the main question now between the parties. Its practical importance as between Captain Moubray and Arthur Moubray is great, because of the advanced age of the proprietor of the English estates alluded to.

"I was informed that at the debate in the Inner-House a clause of devolution was not so much as alluded to, and it was maintained that it is still competent to decide that there should be no such clause, and that against

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But that construction, which plainly would not help the reclaimer, was not the construction for which he contended. The effect of the clause of devolution which he proposed would be that in the event of the respondent succeeding to Upwood and Woodwalton, and thus under William Hobson Moubray's trust ceasing to have any interest in Cockairnie, the estate to be entailed would pass to the reclaimer. That was virtually to read into Robert Moubray's will the provisions of a deed which did not come into existence until ten years after his death. The sound construction of Robert Moubray's will was that if at the time when the entail came to be executed Cockairnie should no longer belong to the Moubrays, the entail should be executed in favour of the Husseys of Woodwalton. There was nothing in Robert Moubray's will to shew that he objected to Cockairnie, the new estate, and the English estates belonging to the same person, or that he wished virtually to entail Cockairnie by making it an accessory of the new estate.

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such a decision there is no judgment of the Court, but only an opinion on a question which was never debated at the bar, although an opinion no doubt of great weight and importance, but yet an opinion for which no reasons are assigned. In that position of matters I apprehend that I cannot with propriety avoid the duty of deciding the question according to my own opinion, and I remain of opinion—although, of course, with no confidence—that there should be no clause of devolution, and that the contention of Captain Moubray to that effect should be sustained.

"I suppose that the ground and reason for such a clause must be found in the testamentary writings of Robert Moubray, and in the testamentary writing dated 30th April 1868, if that be held (as was the opinion of the Court) to be Mr Robert Moubray's 'sole testamentary deed.' There are no words in that writing which suggest such a clause, except the words, 'so long as the estate of Cockairny is theirs.' Now, if these words import the desire of Mr Robert Moubray that there should be a clause of devolution in the deed of entail, it must be a clause expressing that whenever the heir in possession of the lands directed to be entailed shall cease to be proprietor of the lands of Cockairny, he shall forfeit the lands directed to be entailed. The words do not indicate the person on whom these entailed lands shall in that event devolve. Now, the lands of Cockairny might cease to belong to their owner in more ways than one. They might be adjudged by his creditors, or he might sell them, seeing they are not entailed, or he might forfeit them by succession to the English estates, or they might descend to different persons by reason of the difference in the destinations of Cockairny and of the lands to be entailed. Such a clause of forfeiture might be at once extinguished by anyone who came to be the uncontrolled proprietor of Cockairny, and I do not consider that such a clause was contemplated.

"Nobody has contended that there should be a clause of devolution to that effect. Lord Rutherfurd Clark's opinion indicates a clause of a totally different character. It indicates a clause forfeiting the estates to be entailed on the succession of any heir of entail in possession to the English estates,—that is to say, Upwood and Woodwalton,—and in that event only, and a devolution to the heir next in the tailzied destination if he should be the heir (as might or might not be) to the estate of Cockairny. The clause suggested does not appear to indicate one single forfeiture to occur on the first opening of the succession to the English estates, but a clause qualifying the right of all the heirs of entail so long as the entail should endure.

"Captain Moubray submits that there is no suggestion of such a clause as this in Robert Moubray's testamentary writings, and I cannot find any such suggestion. It is maintained that, in order to find any warrant for such a clause of devolution, it is necessary to go to the title-deeds of

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The LORD JUSTICE-CLERK read the following as the opinion of the Court, consisting of himself, LORD YOUNG, and LORD TRAYNER.—We think that consideration of the question raised by the present reclaiming note is not foreclosed by the judgment pronounced in this case on 27th June last, nor by the sentence in the opinion then delivered which the Lord Ordinary quotes. Having considered that question with the argument addressed to us thereon, we are of opinion that the judgment of the Lord Ordinary is right and should be affirmed.

LORD RUTHERFURD CLARK was not present when the case was heard on 16th January.

THE COURT adhered.

GILLESPIE & PATERSON, W.S.—MELVILLE & LINDESAY, W.S.—Agents.

Cockairny, and Captain Moubray maintains that it is illegitimate to refer to these title-deeds in order to construe Robert Moubray's testamentary writings. I confess I am somewhat at a loss to know what the deed is in which the suggestion is to be sought for. It can hardly be the trust-disposition of William Hobson Moubray, who was proprietor of Cockairny, although Robert Moubray resided there, and that for the apparently unanswerable reason that Robert Moubray was dead before that deed was executed. It is apparently necessary to go back to the trust-disposition of Sir Robert Moubray, which has not been printed or produced, but is described in the joint minute of admissions. I understand it to be averred that he there expressed his wish that his estates in Fife should not be united with the estate of Woodwalton. But in the same minute of admissions it is stated that in 1867 William Hobson Moubray conveyed the estates to himself free of any condition relating to the devolution of his estates. In these circumstances I confess that I find it impossible—whether it be legitimate or not—to interpret Mr Robert Moubray's testamentary writings by a reference to any other title-deeds.

"I may only further notice (although perhaps this may hardly be relevant) that it appears to me that William Hobson Moubray did not by his trust-disposition and settlement declare that there should be any recurring forfeiture of Cockairny by reason of succession to Upwood and Woodwalton, but only directed his trustees to hold the estate of Cockairny until the succession to Woodwalton should open, and then to convey it to the heir next in the destination of Cockairny to whom the English estates did not descend. But of course it is impossible that this condition—imposed after Robert Moubray's death—could have any bearing on his testamentary writings, or on the entail directed by him. It may have been the wish of Robert Moubray that the estate of Cockairny and the estates to be purchased and entailed should always belong to the same proprietor, but I think he has taken no adequate means to secure that object.

"On the whole, I feel compelled to adhere to my original opinion, and to adjust the deed of entail in the manner for which the institute, Captain Moubray, contends,—that is, by deleting the clause of devolution. . . ."

No. 163. THE BURGH OF GALASHIELS, Pursuers (Respondents).—*Balfour—W. Campbell.*

June 18, 1896. Corporation of Galashiels v. County Council of Selkirk. COUNTY COUNCIL OF THE COUNTY OF SELKIRK, Defenders (Reclaimers).—*D.-F. Asher—James Reid.*

Statute—Construction—Assessment—County Council—Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 11, 26, *and* 27.—The Local Government (Scotland) Act, 1889, sec. 11, enacts, that "subject to the provisions of this Act there shall be transferred to and vested in the council of each county," *inter alia*, "the whole powers and duties of the commissioners of supply," and that "the provisions of any Act of Parliament conferring, imposing, or regulating the powers and duties by this Act transferred, or regulating the proceedings under any such Act, shall remain in full force and effect, except in so far as they are repealed by or are inconsistent with the provisions of this Act."

Secs. 26 and 27 empower county councils to impose rates within the county to meet the deficiency in the county fund in respect of each branch of expenditure, declaring that "the rate in respect of each branch of expenditure for which provision is made under an Act of Parliament in force at the passing of this Act shall be deemed to be imposed under the powers and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act," the sum of such rates to be the "consolidated rates."

Sec. 105 defines "county," where not inconsistent with the context, to mean county exclusive of any burgh, and "burgh" to mean any royal or parliamentary burgh.

In an action brought by a parliamentary burgh against a county council for declarator that the defenders were not entitled to assess the pursuers' lands within the burgh for county general assessment under the County General Assessment Act, 1868, *held* (1) that by secs. 26 and 27 of the Local Government Act, 1889, the whole assessing powers derived by a county council from prior Acts were merged in the power given to assess for consolidated rates, and that a county council had no other power to assess; and (2) that a county council's power to assess being limited to lands and heritages within the county as defined by the Act, they were not entitled to assess lands or heritages within a royal or parliamentary burgh.

Police Commissioners of Oban v. *County Council of Argyllshire*, March 9, 1894, 21 R. 644, *commented on.*

1st DIVISION. Lord Kincairney. ON 18th November 1895 the Corporation of the Burgh of Galashiels raised this action against the County Council of the County of Selkirk, of which the leading conclusion was for declarator "that the defenders are not entitled to levy county general assessment on lands and heritages belonging to the pursuers lying within the boundaries of the said burgh of Galashiels."

The pursuers averred, and it was admitted, that the burgh of Galashiels had in October 1850 adopted the Police Improvement (Scotland) Act, 1850 (13 and 14 Vict. c. 33), and become a burgh for police purposes, maintaining an establishment of police under the provisions of the Act. It became in 1868 a parliamentary burgh, and had a population of 18,000.

The pursuers' case was (1) that the power to assess given to county councils by section 27 of the Local Government Act, 1889, did not extend to parliamentary burghs; and (2) that if the County Council had under section 11 * the power formerly possessed by the Commis-

* The Local Government (Scotland) Act, 1889 (52 and 53 Vict. c. 50), enacts:—

Section 11.—"Subject to the provisions of this Act, there shall be

sioners of Supply to impose assessments under the County General Assessment Act, 1868, the burgh of Galashiels was not subject to assessment under that Act.

The pursuers pleaded;—In respect the lands and heritages belonging to the pursuers within the burgh of Galashiels do not form part of the assessable area from which the defenders are empowered to levy county general assessment, the pursuers are entitled to decree of declarator as concluded for.

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transferred to and vested in the council of each county, on and after the appointed day, or at such times as are in this Act in that behalf respectively specified:—(1) The whole powers and duties of the commissioners of supply save as hereinafter mentioned. . . . The provisions of any Act of Parliament conferring, imposing, or regulating the powers and duties by this Act transferred, or regulating the proceedings under any such Act, shall remain in full force and effect, except in so far as they are repealed by, or are inconsistent with, the provisions of this Act."

Section 26, subsection 4.—"If the county fund is insufficient to meet the expenditure, rates (in this Act referred to as the owner's consolidated rate, and the occupier's consolidated rate, and together as the consolidated rates) may be levied to meet such deficiency for general county purposes upon all rateable property in the county, or, in the case of expenditure for the management and maintenance of highways, the administration of the laws relating to public health, or other special purpose as hereinbefore mentioned, upon all rateable property within the several districts or parishes of the county as the case may be, in the manner and subject to the conditions in this Act provided."

Section 27, subsection 1,—"The County Council shall annually fix the rate in the pound of the rateable property which will be necessary to meet the deficiency in the county fund in respect of each branch of expenditure subject to its control, or for which it is responsible in whole or in part, and such rate shall be imposed upon all lands and heritages within the county, except that the rate for the management and maintenance of highways, the administration of the laws relating to public health, and any other special purpose as hereinbefore mentioned, shall be imposed upon all lands and heritages within each division, or district, or parish, as the case may be. The rate in respect of each branch of expenditure, for which provision is made under an Act of Parliament in force at the passing of this Act, shall be deemed to be imposed under the powers, and subject to the provisions of that Act, except in so far as these are inconsistent with the provisions of this Act. The rate necessary in respect of any branch or branches of expenditure for which no provision is made, as last mentioned, shall be imposed as a general purposes rate under this Act. (2) Subject to the provisions hereinafter contained, the rates shall be equally divided between owners and occupiers, and the sum of all the rates so fixed and divided shall, as affecting owners and occupiers respectively, constitute the owner's consolidated rate and the occupier's consolidated rate, as the case may be, in respect of the lands and heritages situated therein; . . . (4) Where, at the passing of this Act, any rate leviable by the commissioners of supply in respect of any such branch of expenditure is payable by owners only without relief to the extent of one-half against the occupiers, the following provisions shall have effect, —that is to say,—1. [Sheriff to fix average rate.] . . . 3. [Where rate fixed to meet deficiency does not exceed average rate, rate to be included in the owner's consolidated rate. But where, &c.]."

Section 105.—"In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them, —that is to say, the expression 'county' means a county exclusive of any burgh wholly or partly situate therein, and does not include a county of a city. The expression 'burgh' means any royal or parliamentary burgh."

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The defenders stated,—"Explained that by section 11 of said Act, the whole powers and duties of the Commissioners of Supply of each county are transferred to and vested in the county council of each county, and under said section it is also enacted 'that the provisions of any Act of Parliament conferring, imposing, or regulating the powers and duties by this Act conferred, or regulating the proceedings under any such Act, shall remain in full force and effect, except in so far as they are repealed by or are inconsistent with the provisions of this Act.' By section 12, subsection (1) of said Act, it is further provided that 'the County General Assessment (Scotland) Act, 1868, shall be repealed after the words "such assessment is imposed" in the 4th section thereof to the end of section 9 of the Act.' The assessment clauses of the County General Assessment Act are, however, not repealed. Explained also that the average rate affecting owners in the county of Selkirk was fixed in terms of subsection 4 of section 27 of said Local Government (Scotland) Act, 1889, on the basis of the continuation of liability for said assessment by the burgh of Galashiels, and without objection by the burgh of Galashiels. The present assessment is the exact amount of the said average rate."

On 11th March 1896 the Lord Ordinary (Kincairney) granted decree in terms of the conclusions of the summons.*

* "OPINION.—This is an action by the Corporation of the Burgh of Galashiels against the County Council of the County of Selkirk, in which Galashiels is situated, and the question raised is whether the County Council is entitled to levy the tax known as county general assessment on lands within the burgh; this particular case relating of course directly only to subjects belonging to the burgh.

"The question has already been decided in favour of Galashiels in an action raised before Lord Low. Lord Low's judgment is dated 23d February 1892. It was not taken to review, and is not reported in the ordinary reports. I was furnished with a print of his judgment, and referred to a report of the case in the Poor-Law Magazine for 1892, p. 204.

"A similar question has since been raised between the Police Commissioners of Oban and the County Council of Argyllshire, in a case also called before Lord Low, who decided that the county general assessment for Argyllshire was not leviable on lands in the burgh of Oban. But that interlocutor was recalled by the Second Division, and the case was decided in favour of the County Council—reported 9th March 1894, 21 R. 644, and more fully in 31 S. L. R. 510. I am bound to follow that judgment, and to hold it as correcting Lord Low's interlocutor in the *Oban* case. It has been maintained by the County Council of Selkirk that that judgment overrules the judgment of Lord Low in the action between the present parties; and that, in respect of it, judgment should be given in favour of the defenders, the County Council of Selkirk. *Res judicata* is not pleaded.

"It is certainly true that Lord Low's grounds of judgment in the *Galashiels* case were, to a certain extent, the same as his grounds of judgment in the *Oban* case, with which the Second Division did not concur. Such grounds of judgment were no doubt applicable to both cases. And, as I am precluded from founding on those grounds of judgment which were common to both cases, the argument was stated on the footing that these grounds for a judgment in favour of Galashiels could not be re-opened before me, and they were not argued; the pursuers of course reserving right to re-open them, if the case should go further.

"I am, however, of opinion that the case of *Oban* differs in an essential particular from this case, a difference clearly expressed in the judgment in the Inner-House; and that Lord Low's judgment in the previous case was well founded, and may be supported in complete consistency with the judgment

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The defenders reclaimed, and argued;—The Lord Ordinary did not deal with the Local Government Act, 1889, because he rightly interpreted the judgment in the *Oban*[1] case as deciding the present question. The Local Government Act, 1889, was not intended to relieve, and did not relieve, burghs of county general assessment. In 1868 the Commissioners of Supply were bound to levy county general assessment, which came in place of rogue money, on lands and heritages within the whole county. The 11th section of the Local Government Act, 1889, transferred their powers and duties to the County Council, and by that transference the pursuers became bound to levy the assessment. There was no section in the Act of 1889 which expressly exempted burghs from the assessment, and the Court would be slow to recognise an exemption by implication. The 27th section imposed certain rates upon the whole county, and these, in the words of the section, were "to be deemed to be imposed" under the older Act. The assessable area was not limited by the definition clause (section 105) of the Act, for the definition was to apply only "if not inconsistent with the context."

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in the *Oban* case. That essential difference is, that Galashiels is a police burgh under a Police Act, which maintains a police of its own out of a burgh police assessment, which was not the case with Oban. The facts that the population of Galashiels is above 7000 and of Oban under 7000 are of importance in regard to certain provisions in the Local Government Act. The ground on which I reach a conclusion in favour of Galashiels may be narrow, but I think the point reasonably clear.

"The powers of assessment of the County Council depend, of course, primarily on the Local Government Act, 1889, 52 and 53 Vict. cap. 50. By section 27 of that Act, the County Council is empowered to fix the rate of assessment in respect of each branch of expenditure, and to impose the rate upon 'all lands and heritages within the county,' with certain exceptions which do not affect this case. By section 105, the expression county is defined to mean 'a county exclusive of any burgh,' and the term burgh is defined to mean any royal or parliamentary burgh, which interpretation of the word 'burgh' comprehends Galashiels, being a police burgh. Hence it appears to be clear enough that section 27 of the Local Government Act does not authorise the assessment in question on property within the burgh of Galashiels. I do not pursue this point further, because I did not understand that the defenders maintained that they could rest their power to assess on that section, or on any new powers of assessment conferred by the Local Government Act. They rested their case on section 11 of the Act, whereby the powers of the Commissioners of Supply are transferred to the County Council, and whereby it is declared that 'the provisions of any Act of Parliament conferring, imposing, or regulating the powers and duties transferred shall remain in full force and effect so far as not repealed by or inconsistent with' the Act.

"That clause they say carries the question back to the County General Assessment Act, 1868, 31 and 32 Vict. cap. 82, whereby the Commissioners of Supply are empowered to impose the county general assessment, which is the assessment now in question. That statute is in part repealed by section 12 of the Local Government Act, but the assessing clauses are not repealed. The defenders therefore, as I understand, maintain that the question depends on the County General Assessment Act; and in any case I am of opinion that it does.

"That statute abolishes 'rogue money,' and imposes the county general

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[1] Police Commissioners of Oban v. County Council of Argyllshire, March 9, 1894, 21 R. 644.

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Argued for the pursuers;—The Lord Ordinary was right in holding that in 1868 the Commissioners of Supply had no power to levy county general assessment in a burgh like Galashiels which was a burgh for police purposes under the Police and Improvement (Scotland) Act, 1850, and that consequently the defenders as coming in their place were not entitled to levy the assessment. But further, having regard to the clear and express terms of the Local Government (Scotland) Act, 1889, the same conclusion must be reached; and it was impossible to believe that the assessing clauses of that Act were brought before the notice of the Second Division when the Court pronounced judgment in the *Oban* case. The sole assessing clauses in the Act were sections 26, subsection 4, section 27, subsection 1, and these fell to be read along with the interpretation clause, section 105. It was clear that under them the County Council were authorised to levy a consolidated rate upon all rateable property in the county excluding royal and parliamentary burghs. They were not entitled to break up the rate as they proposed to do, and levy one portion upon the county and another upon the burgh.

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assessment 'in lieu thereof,' and it provides (section 10) that 'nothing herein contained shall confer on the commissioners of supply of any county the right to levy assessments under this Act on any lands or heritages upon which it is not now competent for the commissioners of supply to levy rogue money.'

"It is therefore perfectly plain that if in 1868 the Commissioners of Supply were not entitled to levy rogue money on lands within the burgh of Galashiels, then they were not empowered, and are not now entitled, to levy county general assessment on lands within the burgh; and the converse is also obvious, that if they were entitled to levy rogue money on the lands in the burgh, then they were authorised to levy county general assessment. I do not know that the pursuers would admit that, even if that power was conferred on the Commissioners of Supply, it is now resident in the County Council. My impression is that it would be; but I do not require to determine that question, because I am of opinion that in 1868 the Commissioners of Supply were not entitled to levy rogue money within the burgh.

"Liability to be assessed for rogue money thus becomes the test of liability for the general county assessment, and it is therefore necessary to consider the statute in regard to rogue money.

"Rogue money was first imposed by the Disarming Act, 11 George I., cap. 26, by which the freeholders of 'every shire, county, or district,' were empowered to assess the several shires and stewartries, where their estates lay, in sums to be applied in defraying the charges attending the apprehension, subsistence, and prosecution of criminals. I do not know when this assessment first received the name of rogue money, but the power to levy it was transferred under that name from the freeholders to the commissioners of supply in 1832, by the Reform Act, 2 and 3 Wm. IV. cap. 65, sec. 44.

"The first General Police Act for burghs was 3 and 4 Wm. IV. cap. 46, 1833, but it contains no reference to rogue money or county police assessment.

"The Act 2 and 3 Vict. cap. 65, 1839, proceeds on a narrative of the Disarming Act, 11 George I. cap. 26, and of the Reform Act, and sets forth that the rogue money had hitherto been raised by assessment on the valued rent, and that it was expedient to authorise the commissioners of supply, if they thought fit, to extend the purposes of that assessment, and to adopt other modes of assessment. The Act therefore empowered the commissioners of supply to make an additional assessment 'for establishing and

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LORD PRESIDENT.—The question in this case is whether the County Council of Selkirk are entitled to levy certain rates on lands and heritages situated within the burgh of Galashiels. The first plea for the pursuers is as follows:—"In respect the lands and heritages belonging to the pursuers within the burgh of Galashiels do not form part of the assessable area from which the defenders are empowered to levy county general assessment, the pursuers are entitled to decree of declarator as concluded for." And the decree of declarator sought is "that the defenders are not entitled to levy county general assessment on lands and heritages belonging to the pursuers lying within the boundaries of the said burgh of Galashiels."

Now, the question is thus of the right of this County Council to levy assessment within the burgh of Galashiels; and primarily, that question undoubtedly must be determined by a reference to the assessing powers of the County Council. Now, those are contained in the Local Government Act of 1889, and in particular in sections 26 and 27. Up to this point in that statute your Lordships will have observed that what has in the main

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maintaining an efficient constabulary and police force,' and for other purposes; and the Act declared that this additional assessment should be deemed and taken to be and should be levied and collected as part of the rogue money. It was further provided that 'the rogue money and additional assessments to be so assessed and collected shall be applied for the purposes of the said herein recited Act of His Majesty King George the First, and of this Act, and to no other purposes.' It is to be noticed that the Act does not only provide that the additional assessment should be levied and collected with the rogue money, but that it should be taken to be part of the rogue money, and that the rogue money and additional assessment—or rather the whole rogue money—should be applied to the same purposes; and these, if not wholly, yet in part, were undoubtedly police purposes. There were not two taxes levied under this Act, but only one, namely, the augmented rogue money, which thus became the county police assessment.

"It was provided by section 3 that 'the said Commissioners shall not be entitled, for the purposes of this Act, to assess any lands, houses, or other heritages situated within the boundaries of any royal burgh, or to assess any lands, houses, or other heritages within the boundaries of any burgh or town which either has a Police Act, or which has taken the benefit of' the Act 3 and 4 Wm. IV. cap. 46.

"The General Police Act, 1850, 13 and 14 Vict. cap. 33, section 376, provides 'that no burgh in which a police is maintained by assessment upon such burgh under the provisions of this Act shall be liable for any assessment for the police purposes of the county in which such burgh is situated, anything in any Act or Acts of Parliament to the contrary notwithstanding.'

"Now it is averred and admitted that in 1850 Galashiels adopted this Police Act, and has since maintained a police within the burgh.

"At that time Galashiels was situated partly in Selkirk and partly in Roxburgh; and it is clear that at that date it became exempt from any assessment for the police purposes of either of these counties. What then was the assessment for police purposes in counties at that date? It could be nothing but the augmented rogue money. It is not said that there was any other county police assessment, or any county police assessment which was not rogue money. If that be true, the important conclusion is reached, by inferences, which seem otherwise inevitable, that no rogue money was leviable on land in the burgh of Galashiels, after it had adopted the Police Act of 1850, and undertaken the provision of its own police.

"By the County Police Act of 1857, 20 and 21 Vict. cap. 72, the Act 2

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been done is that the powers and duties generally of the various county bodies are now gathered together and placed in the sole hands of the county council, and the county council in the appropriately ample terms of transference have a title fortified by the assertion that they are to enjoy all the rights and be subject to all the duties of their predecessors.

Had matters rested upon these words of the transfer, conjecture might have arisen as to the mode in which the massed powers of assessment would be exercised. The Legislature, however, leaves in no haze or doubt what the powers of assessment are to be, because in the 26th section and in subsection 4, they state expressly what, and what alone, is to be legal:—"If the county fund is insufficient to meet the expenditure, rates (in this Act referred to as the owner's consolidated rate and the occupier's consolidated rate, and together as the consolidated rates) may be levied to meet such deficiency for general county purposes upon all rateable property in the county." Then in the more executive clause, section 27, it is provided that "the county council shall annually fix the rate in the pound of the rateable property which will be necessary to meet the deficiency"; "and such rate shall be imposed upon all lands and heritages within the county." There are various provisions made as to the mode and form in which this is to be done, but those sections constitute the sole right of the County Council to levy rates at all.

Now, you have observed that there is an express provision not merely as to the rate which is to be levied, but also as to the assessable area. The property to be rated is all lands and heritages within the county. When we turn to section 105 we find, in perfectly unambiguous terms, the interpreta-

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and 3 Vict. cap. 65, was repealed, and, as a consequence, the additional assessment thereby authorised necessarily fell. But the whole of the rogue money was not thereby abolished, but only a part of it. The rest of it—that is to say the original rogue money—remained, as is clear, could there be any doubt about it, from section 32. It may be that thereafter the rogue money could only be applied to the purposes specified in the Disarming Act, but there certainly is nothing in this County Police Act which can be supposed to reimpose it on a police burgh with a police of its own. The 29th section authorises an assessment on heritages within a county. But it appears from the interpretation clause that a burgh such as Galashiels was certainly not included in the word 'county' as used in the County Police Act.

"The Police Act of 1850 was repealed by the Act 25 and 26 Vict. cap. 101, section 1; but burghs which had adopted the Act were excepted from the operation of this repeal. That Act, so far as regarded Galashiels, stood operative and unrepealed in 1868, when the General County Assessment Act was passed, and therefore at that date rogue money was not leviable out of land in the burgh of Galashiels; and therefore the general county assessment was not imposed on it.

"Other arguments were stated on behalf of the burgh of Galashiels; such as, that, as it was not represented in the County Council, it was presumably not subject to their power of assessment; and that the opposite view involved a double assessment of the lands in the burgh. It appears to me, however, simpler and safer to proceed on the plain words of the various statutes than on presumptions and inferential arguments; and, so far as I am able to see, they determine the question very clearly in favour of the pursuers. I am therefore of opinion that decree must be pronounced as concluded for."

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tion of the word "county." "The expression 'county' means a county exclusive of any burgh wholly or partly situate therein." And the next interpretation is—"The expression 'burgh' means any royal or parliamentary burgh." Now, putting these two things together, it seems to me as clear as anything can be that the County Council of Selkirk has a power of levying a consolidated rate upon all the county, excluding the parliamentary burgh of Galashiels. If you put the two things together there is no escape from that conclusion; and accordingly I asked—"How can this assessment be justified? Is it not open to the objection that it is an assessment upon lands and heritages which do not form part of the assessable area?"

The argument in support of this power is presented in a somewhat singular form. If you turn to those sections authorising assessments you find that all that the County Council can do is to impose a consolidated rate. They are, it is true, to inform their constituents, the ratepayers, of the details of the purposes which require that aggregate amount, and that is to be set out in the notice paper. But not the less for that is the assessing power to be found in the 26th and 27th sections of the Act of 1889, and not in the assessing clauses of the old statutes which gave the transferred powers to the predecessors of the County Council.

A sharp test of the validity of the defenders' contention is afforded by this question—"What rate do you propose to impose upon the lands and heritages within the burgh of Galashiels?" They could not face up to the proposition that they were going to impose all their county rates upon the burgh of Galashiels in the form of the consolidated rate; and if not, that must mean that they are going to lay a part upon it.

I find from the frame of the summons and the expression of the plea, that the threat which is made by the defenders in this action is to impose a county general assessment. In their resolution I see they resolve, having regard to a certain judgment to which I shall presently refer, that "a county general assessment" be levied from the burgh of Galashiels as part of the county. That means that they are going to exercise, not their own powers of assessment, but the powers of assessment which existed in their deceased predecessors. In short, they are going to revive a power which existed in certain persons who exercised some of their powers, and they are going—under pretence, observe, of their authority as a county council—to levy a rate which is entirely unsupported by any clause of the Local Government Act.

Now, that threat or resolution seems to have governed the expression of the summons, and accordingly the proposition we are asked to affirm is that the defenders are not entitled to levy county general assessments on lands and heritages belonging to the pursuers lying within the burgh of Galashiels. I am quite prepared to affirm that proposition. But I would have gone further, because I would have been prepared to affirm that they are not entitled to levy any assessment on lands and heritages within the burgh of Galashiels. But the limitation in the summons brings to light one of the salient fallacies of the defenders' position, and discloses the double illegality of the proposed rate—it would be levied outwith the assessable area, and the rate itself would be illegal even within it.

I have treated the matter upon one ground, and one only. I am prepared

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to sustain the definite and sharp rule of law which is put forward in the first plea of the pursuers, that they are not within the assessable area.

But we have been told that to adopt that ground of judgment would be to go against a decision by the Second Division of this Court in the case of *Oban*.[1] It is quite true that in that case the Second Division held that lands within the burgh of Oban were liable to the assessments of the County Council. But when that case is cited it must be as an authority on the proposition of law on which we were asked to give judgment. Now, I cannot find in the reported opinions of the learned Judges any reference at all to the assessing sections (26 and 27) of the Local Government Act, 1889, or to a comparison with them of the interpretation of the word "county" contained in section 105. A number of other topics are discussed, none of which seem to me to be necessary for our present decision, and accordingly on the expressed opinions of the Judges I am saying nothing which is in the least degree adverse to them. It is true that the Lord Justice-Clerk remarks that he has been unable to find in the Local Government Act anything to alter the situation from what it was under the Act of 1868; but then I do not think that his Lordship is considering this salient and preliminary question upon which my judgment is based, because if it had been under his observation he would most certainly have discussed and disposed of it. Therefore while feeling myself entirely free from authority upon this subject, and considering the question to be a very sharp and very plain one, I am in favour of affirming the interlocutor of the Lord Ordinary.

I desire to express no opinion at all on any of the grounds of judgment which his Lordship has adopted, but I may remark that I think he has been led into those circuitous methods of dealing with the case by some apprehension as to how far he was bound by the decision in the *Oban* case.

LORD ADAM.—I concur. For my part I think this case is quite clear upon the point of law on which your Lordship proposes to decide it. I think it is clear from the Act of 1889 that the area within which alone this assessment can be levied is the county excluding the burgh of Galashiels. The next point I think is equally clear, that the only assessment is for consolidated rate and for nothing else. There is no authority that I can see to assess for anything but the whole consolidated rate, and that is not what is proposed to be done. The County Council here are seeking to impose a special assessment upon the burgh of Galashiels. I agree with your Lordship that the Lord Ordinary's interlocutor should be affirmed.

LORD M'LAREN.—I think it is demonstratively clear that the county councils constituted by the Local Government Act of 1889 have no authority to impose assessments or rates within any royal or parliamentary burgh in Scotland.

Were it not that there has been some contrariety of opinion in the construction of these assessing clauses, I should have been content to express my concurrence in the grounds of judgment expressed by your Lordships. I do not know that I can add anything, but my opinion is rested mainly on

[1] Police Commissioners of Oban v. County Council of Argyllshire, March 9, 1894, 21 R. 644.

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this, that I hold that all the powers of assessment which were vested in the county authorities prior to 1889 came to an end on the passing of the Local Government Act of that year. The powers have necessarily ceased because the assessing authorities no longer exist; and it follows that rates authorised to be levied by Act of Parliament previous to 1889 only exist in so far as the rating powers are continued or are incorporated by reference under the provisions of the Local Government Act. Now, the most important provision as to rating is the 27th section, which authorises the imposition of a consolidated rate upon owners and a consolidated rate on occupiers. In giving this power reference is made to previous legislation on the subject of county finance as the measure of the powers of the county council in regard to all partial rates or elements of the consolidated rate which are not specially regulated by the Local Government Act itself. The county council at the same time is empowered to include in the consolidated rate an allowance for general purposes. Now, it appears to me that no authority is given to a county council for levying anything but a consolidated rate, and that rate must be the same rate for every part of the county, except in so far as district taxation is authorised by Act of Parliament.

As regards those subjects of county taxation which apply equally to all parts of the county, this part of the consolidated rate would, of course, be the same throughout the county. But it is recognised that, with reference to roads and public health and other purposes of a more local character, the consolidated rate may vary for different districts of the county, because it is to include such assessments for those more limited purposes as were authorised by existing legislation.

When we come to consider what is the area of taxation, the answer is given by the 26th section, that the rate is limited in amount to what is necessary to make up the deficiency in the county fund, and is limited geographically to rateable property within the county. As your Lordship has pointed out, the word "county" is clearly and sharply defined in the definition clause, and it is perfectly clear that the Legislature did not include the area of any royal or parliamentary burgh within the area of county taxation, because such burghs are excluded from the conception of a county as existing for the purposes of this Act.

Having regard to views that have been expressed elsewhere, I do not wish to express a definite opinion as to whether the county general assessment was ever properly chargeable within the areas of royal and parliamentary burghs. If it was so charged, the case is an exception to the policy of modern legislation, which has been to recognise the autonomy of municipal corporations in regard to local taxation. If such anomalies did exist, they have been removed by the Local Government Act of 1889, which provides with regard to the more important class of burghs—those which either had an ancient constitution, or, on account of their importance, had been allowed a separate representation in Parliament—that they are not to be subject to the government or the assessing powers of the county councils.

On another ground I think that the defence to this action of declarator must fail, because there is no authority in the Local Government Act for laying on a "county general assessment" in contradistinction to a consolidated rate. The only way in which burghs could be made liable to the

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"county general assessment" (which came in place of rogue money) would be by laying on the burghs so much of the entire consolidated county rate as is universally applicable to owners within the county. But it was not contended that royal and parliamentary burghs were universally liable to county taxation, and on this ground also my opinion is that the pursuers are entitled to decree of declarator.

I concur with your Lordships in thinking that the attention of the Judges who decided the *Oban*[1] case had not been prominently called to the new departure in regard to financial powers which is taken in the Local Government Act of 1889, because the discussion of the subject which we find in the opinions of the Lord Justice-Clerk and Lord Trayner is chiefly directed to the argument upon the older statutes.

I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR.—I am of the same opinion. I think the burgh of Galashiels is not within the assessable area over which the powers of the County Council to levy rates extend. The 26th section, when it is read along with the interpretation clause, defines the assessable area in language that seems to me to be too clear to raise any question of construction, because it authorises the County Council to levy a consolidated rate or consolidated rates upon all rateable property in the county excluding royal and parliamentary burghs. I agree, therefore, with the main ground of judgment upon which your Lordships proceed; and I agree also with the second ground, that the County Council being authorised to levy a consolidated rate, is not entitled to break up the rate for the purpose of levying an assessment for one particular purpose upon a parliamentary burgh which for the purpose of all other assessments is beyond the assessable area. I think the statute authorises a county council to levy a consolidated rate within a definite area and no other rate.

THE COURT adhered.

RICHARD LEES, Solicitor—MYLNE & CAMPBELL, W.S.—Agents.

No. 164. June 18, 1896. Adams' Trustees v. Carrick.

DAVID PEEBLES SCOTT AND OTHERS (William Adams' Trustees), of the First Part.—*Sym.*
MARGARET FINLAY CARRICK, of the Second Part.—*D. Dundas—W. Thomson.*
JAMES CARRICK, of the Third Part.—*Craigie.*
WILLIAM ADAMS AND OTHERS, of the Fourth Part.—*Kennedy—Constable.*
DAVID PEEBLES SCOTT AND OTHERS (Eliza Adams' Trustees), of the Fifth Part.—*Kennedy—Constable.*

Succession—Vesting—Direction to trustees to pay at postponed period—Whether "children" includes "grandchildren."—A testator directed his trustees to pay the free income of the trust-estate to his widow, and after her death or second marriage to "pay to or apply for behoof of my children until the youngest attain the age of twenty-one years complete the free income of my said estates." The testator further directed his trustees,—"So soon as convenient after my youngest child attains the age of twenty-one years com-

[1] 21 R. 644.

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plete, and after the interest of my said spouse has ceased by her decease or having entered into another marriage, my said trustees shall either convey or pay over the whole of the free residue of my estates to my children equally, the issue of any child who may have predeceased leaving issue coming in place of and taking the share which would have been taken by the predeceasing parent if in life."

In a special case presented after the widow's death, *held* (1) that vesting of the residue was postponed until the youngest child attained twenty-one years of age; and (2) that from the date of the widow's death till the time when the youngest child attained twenty-one years of age the income fell to be divided among the testator's surviving children, and that the issue of children who had died were not entitled to participate therein.

1ST DIVISION.

WILLIAM ADAMS died on 6th August 1890, leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees for certain purposes.

By the fourth purpose the trustees were directed to pay the free income of the trust-estate to the truster's widow,—"And my trustees after the death or second marriage of my said spouse shall pay to or apply for behoof of my children, until the youngest attain the age of twenty-one years complete, the free income of my said estates, and that at such times, in such proportions, and in such way and manner as my trustees, to whom I commit the fullest discretionary power, may think proper, with special power also to my trustees to make such payment from the capital of my estate to or for behoof of my said spouse or children as my trustees, in the exercise of discretionary power hereby conferred on them, may hold to be necessary, in any special circumstances which may emerge, they keeping in view, however, that it is my wish that as much of the capital as possible shall be preserved for division amongst my children."

The fifth purpose was as follows:—"So soon as convenient after my youngest child attains the age of twenty-one years complete, and after the interest of my said spouse has ceased by her decease or having entered into another marriage, my said trustees shall either convey or pay over the whole of the free residue of my estates to my children equally, the issue of any child who may have predeceased leaving issue coming in place of and taking the share which would have been taken by the predeceasing parent if in life."

Mr Adams was survived by his wife, and by seven children, the youngest of whom had not, at the date of the after-mentioned special case, attained twenty-one.

The testator's widow died on 16th August 1893.

Of the children Mrs Jessie Adams or Carrick died intestate on 23d June 1895, domiciled in Ireland, and survived by her husband James Carrick and an only child Margaret Finlay Carrick, and Eliza Adams died on 10th January 1896, leaving a trust-disposition and settlement by which she conveyed her whole estate to trustees for certain purposes.

In consequence of the deaths of these children questions arose as to the parties entitled to share in the trust-estate of Mr Adams, and as to their respective rights thereto, to determine which this special case was presented by Mr Adams' trustees, of the first part; Margaret Finlay Carrick, of the second part; James Carrick, of the third part; the surviving children of Mr Adams, of the fourth part; and the trustees of Miss Eliza Adams, of the fifth part.

The second party maintained (1) that the share of income which would have belonged to her mother Mrs Carrick, if in life, now fell to

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her because, *inter alia*, the word "children" in the settlement included "grandchildren"; (2) that a share of the capital did not vest in her mother; and (3) that assuming the trustees had no power to pay presently to the second party the proportion of the income which they would have paid to her mother, they were nevertheless entitled to set apart and accumulate such proportion—the accumulation falling to be paid to her at the period of division.

The third party maintained that one-seventh of the capital vested in his late wife before her death, and now fell to him by Irish law, and that the share of income belonging to his late wife now fell to him. The fifth parties maintained that one-seventh of the capital vested in Miss Eliza Adams before her death, and that the share of income belonging to her now fell to them.

The fourth parties maintained that vesting was postponed until the testator's youngest child attained majority, before which time the parties entitled to the capital could not be ascertained, and that neither the second nor the third party was entitled to share the income, but that the surviving children of Mr Adams were alone entitled to it.

The following questions of law were submitted to the Court:—"(1) Did one-seventh share of the free residue of the trust-estate vest in each or either of the deceased Mrs Jessie Adams or Carrick and Eliza Mary Helen Adams? (2) In the event of the first question being answered in the affirmative, did the said share vest on the death of Mrs Carrick in the second party? (3) Are the trustees, the first parties, bound to pay to, or apply for behoof of, either (*a*) the second party, or (*b*) the third party, one-seventh, or one-sixth, or such share as they may think proper, of the income accruing to the trust-estate between the death of the said Mrs Adams or Carrick and the payment or conveyance of the free residue? (4) If not bound, are the trustees, the first parties, entitled, under the powers conferred on them by the fourth purpose of said settlement, to pay to, or apply for behoof of, either (*a*) the second party, (*b*) the third party, or (*c*) the fifth parties, such share as they may think proper of the said income? (5) In the event of the third and fourth questions being answered in the negative, are the trustees entitled or bound to accumulate the share of income which they would have been entitled to pay to Mrs Carrick if alive, and to pay the accumulation to the second party if alive at the period of division of the estate, or does such income fall into residue?"

The undernoted cases were referred to by the parties in argument.[1]

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[1] *By the Second Party.*—Sloane v. Finlayson, May 20, 1876, 3 R. 678; Bryson's Trustees v. Clark, Nov. 26, 1880, 8 R. 142; Muirhead v. Muirhead, May 12, 1890, 17 R. (H. L.) 45; Groat v. Stewart's Trustees, July 7, 1894, 21 R. 961; Duncan's Trustees, July 17, 1877, 4 R. 1093; Reeve's Executor v. Reeve's Judicial Factor, July 14, 1892, 19 R. 1013, M'Clymont's Executors v. Osborne, Feb. 26, 1895, 22 R. 411; Willie v. Jackson, July 9, 1836, 14 S. 1121; Bryce's Trustees, March 2, 1878, 5 R. 722.

By the Third and Fifth Parties.—Jackson v. M'Millan, March 18, 1876, 3 R. 627; Wilson's Trustees v. Quick, Feb. 28, 1878, 5 R. 697; Peacock's Trustees v. Peacock, March 20, 1885, 13 R. 878.

By the Fourth Parties.—Hall v. Hall, March 17, 1891, 18 R. 690; Carter's Trustees v. Carter, Jan. 29, 1892, 19 R. 408; Rhind's Trustees v. Leith, Dec. 5, 1866, 5 Macph. 104, 39 Scot. Jur. 120.

At advising,— No. 164.

June 18, 1896. Adams' Trustees v. Carrick.

LORD ADAM.—The questions in this case arise upon the construction of the trust-disposition and settlement of the late William Adams, who died on the 6th August 1890.

By his trust-disposition and settlement the truster left his whole property, heritable and moveable, to trustees. He gave them directions as to the disposal of his household furniture and personal articles, but these do not appear to be material in the present case.

By the fourth purpose of the trust he directed his trustees to pay the income arising out of his whole estates to his widow, under the condition that out of such income she should pay for the education, clothing, and maintenance of such of his children as might be in minority, in so far as they might not be in a position to maintain themselves. He further empowered his trustees to give his wife possession of a house rent free, and he declared that in the event of his wife entering into a second marriage, she should, after that event, have no right or interest in his estates, and should quit possession of any house she might be occupying under his trustees.

He directed his trustees, after the death or second marriage of his wife, to pay to or apply for behoof of his children, until the youngest should attain the age of twenty-one, the income of his estates, at such times, in such proportions, and in such way and manner as his trustees should think proper, to whom he committed the fullest discretionary power.

He also empowered his trustees to make such payments out of the capital of his estates, for behoof of his spouse or children, as they might hold to be necessary in any special circumstances which might emerge.

By the fifth purpose of the trust he directed his trustees, as soon as convenient after his youngest child had attained the age of twenty-one, and after the interest of his wife had ceased by death or remarriage, to convey or pay over the whole free residue of his estates to his children equally, the issue of any child who might have predeceased leaving issue coming in place of and taking the share which would have been taken by the predeceasing parent if in life.

The truster was survived by his wife, who never remarried, and who died in August 1893.

He was also survived by seven children, of whom one, Mrs Carrick, died in June 1895, leaving one child, Margaret Finlay Carrick, who is the second party to this case. Her father is the third party. Another child of the truster, Eliza, died in 1896, leaving a trust-disposition and settlement by which she conveyed her whole estate to certain trustees, who are the fifth parties to the case. The fourth parties are the surviving children of the truster.

These are the facts relative to the present position of the truster's family which have given rise to the present questions.

The first question we are asked is whether one-seventh share of the residue of the trust-estate vested in each or either of the deceased Mrs Carrick or Eliza Adams?

It appears to me that there are only two possible periods of vesting under this deed, either *a morte testatoris*, or at the period of division.

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Now, it will be observed that this is not the case of a gift of the estate to the children, with a subsequent direction to pay or divide it among them. The gift is implied from the direction to pay. But the time at which payment is to be made is as soon as convenient after the youngest child shall have attained twenty-one and the wife's interest shall have ceased; and the persons to whom payment is to be made are the children, and the issue of any child who may have predeceased leaving issue,—that is, predeceased the term of payment. The trustees can only pay when the time for payment directed by the deed arrives, and then only to children, or to the issue of a predeceasing child. But the time for payment has not yet arrived, and it appears to me that there can be no vesting till it does, when only the parties who are to take can be ascertained.

I think, therefore, that the first question must be answered in the negative.

The next two questions relate to the disposal of the income of the trust-estate, after the widow shall have ceased to have any interest in it, by death or remarriage, till the period of division.

The direction to the trustees, on that event occurring, is to pay it to, or apply it for behoof of, the truster's children, until the youngest shall attain the age of twenty-one. It appears to me that by "children" here the truster means his own immediate children, and that grandchildren are not intended to be included. If grandchildren were held to be included, the direction would be a direction to the trustees to continue paying the income of the estate until the youngest grandchild had attained the age of twenty-one. For that purpose they would have to retain the estate in their own hands; but that is certainly not the truster's intention, because, as we have seen, he has directed the fee of his estate to be distributed as soon as the youngest of his immediate children had attained twenty-one, so that it would be impossible for the trustees to fulfil such a direction.

It is clear that the truster did not overlook the case of grandchildren in making his settlement, and that they are specially named when they are intended to take any benefit, as appears from the next clause, which relates to the disposal of the fee of his estate, by which, in that case, the issue of children are specially substituted in place of their predeceasing parents.

I am of opinion, therefore, that the trustees are directed to pay the income in question to the truster's immediate children only, and that they are neither bound nor entitled to pay any of it to grandchildren, or anyone claiming in their right, and therefore that the third and fourth questions must be answered in the negative.

In my opinion the fifth question must also be answered in the negative. There is no direction to accumulate, and, as I have said, the trustees are bound to pay the income of the estate to the immediate children of the truster alive at the time.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT answered the first, third, fourth, and fifth questions in the negative, and found it unnecessary to answer the second question.

MACGREGOR & STEWART, S.S.C.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

THE PARISH COUNCIL OF KILMARNOCK, First Parties.—*Graham Stewart.* TRUSTEES OF VISCOUNTESS OSSINGTON, Second Parties.—*Wood.*

No. 165.

June 20, 1896.

Parish Council of Kilmarnock v. Ossington's Trustees.

Trust—Chairman of Parochial Board ex officio trustee—Parish Council succeeding to Parochial Board—Local Government (Scotland) Act, 1894 (57 *and* 58 *Vict. cap.* 58), *secs.* 21 *and* 22.—The Local Government (Scotland) Act, 1894, section 21, enacted that on and after 15th May 1895 the parochial board of any parish should cease to hold office, "and on and after such day every reference in any Act of Parliament, scheme, deed, or instrument to a parochial board . . . shall be read and construed as referring to a parish council constituted under this Act." Section 22 enacted,—"A parish council shall . . . come in place of a parochial board . . . and shall be deemed to be a continuance thereof, and shall have and may exercise all the powers and duties . . . of a parochial board."

A truster in 1885 nominated among her trustees "the chairman of the Parochial Board of the parish of K. and his successor in office for the time being, so long as such board shall exist."

Held that the chairman of the Parish Council of K. was not entitled *ex officio* to act as a trustee under the deed.

2D DIVISION.

ON 8th April 1885 the Viscountess Ossington, relict of the Right Honourable John Evelyn Denison, Viscount Ossington, executed a deed of trust by which on the narrative that she had purchased a site at Kilmarnock, and that she had erected thereon a building to be used as a coffee tavern, and that she had provided furniture for said coffee tavern, and also the capital necessary for procuring provisions and defraying the cost of working the said coffee tavern, and that the said coffee tavern was then in active operation; and on the further narrative that she had resolved, in order that the said coffee tavern might be continued in all time coming, and for the furtherance of the temperance cause, to grant the said deed of trust; therefore she disponed "to the provost of the burgh of Kilmarnock, and his successor in office for the time being; the chairman of the Parochial Board of the parish of Kilmarnock, and his successor in office for the time being, so long as such board shall exist; and Frederick John Turner and Joseph Harling Turner, factors on the entailed estate of Kilmarnock, and their successors or successor in office for the time being," and certain other individuals named, and the survivors and survivor of them, and any other persons to be assumed as trustees for the purposes therein mentioned, All and Whole the subjects therein described, with entry as at the date of her death, reserving power to alter or revoke.

Viscountess Ossington died on 30th September 1889.

By virtue of the provisions of the Local Government (Scotland) Act, 1894, the Parochial Board of the parish of Kilmarnock ceased to hold office on 15th May 1895.

The chairman of the Parish Council, which, under the provisions of the statute, came in place of the Parochial Board, claimed right to act as a trustee under the deed of trust as the successor in office of the chairman of the Parochial Board.

The trustees maintained that he was not entitled to act as a trustee, and this special case was presented to the Court by (1) the Parish Council of the parish of Kilmarnock, and (2) Viscountess Ossington's trustees, the question for the opinion of the Court being "Whether the chairman of the Parish Council of the parish of Kilmarnock was entitled *ex officio* to act as a trustee under the said deed of trust?"

Argued for the first parties;—By the 21st section of the Local

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Government Act, 1894,* every reference in any deed to a parochial board was to be read as referring to a parish council, and if the reference in the trust-deed was so read the chairman of the Parish Council for the time being was clearly an *ex officio* trustee. Further, by the 22d section of the Act, a parish council "shall come in place of a parochial board, and shall be deemed to be a continuance thereof," and therefore the Parochial Board in question had not in a legal sense at all events "ceased to exist," and the event provided against by the truster had not occurred.

Argued for the second parties;—(1) The intention of the truster as expressed in the deed was clear. The deed spoke from the date of her death in 1889, when the reorganisation of local government was already in progress. The truster contemplated a probable change, and expressly provided for it by the insertion of the peculiar words, "so long as such board shall exist."[1] This it had ceased to do under the 21st section of the Act. The Parish Council differed in many essentials from the extinct body, and was not the same thing under a new name. (2) The "reference to the Parochial Board" in the trust-deed was merely for the purpose of describing the chairman individually, and was not a reference to the board in its corporate capacity such as was meant by section 21. Again, section 22 provided that the new body was to take the place of the old in regard to its corporate duties and liabilities, but that did not substitute the one chairman for the other in the management of a trust, with which the board as a body had nothing to do.

At advising,—

LORD TRAYNER.—By the trust-deed mentioned in this special case Lady Ossington appointed certain persons to be trustees to carry out and fulfil the purposes of the trust. One of the persons so appointed is thus described in the trust-deed,—"the chairman of the Parochial Board of the parish of Kilmarnock, and his successors for the time being, so long as such board shall exist." By virtue of the provisions of the Local Government (Scotland) Act, 1894, the Parochial Board of the parish of Kilmarnock ceased to hold office on 15th May 1895, and its chairman, according to the statement in the case before us, has ceased to act as a trustee, his office having "then expired." The chairman of the Parish Council, which, under the provisions of the statute I have cited, came in place of the parochial board, claims

* The Local Government (Scotland) Act, 1894 (57 and 58 Vict. cap. 58), enacts, section 21,—"On and after the 15th day of May in the year 1895 all enactments regulating the constitution and election of parochial boards shall be repealed, and the parochial board of any parish shall continue to hold office only until the said day, and no longer; and on and after such day every reference in any Act of Parliament, scheme, deed, or instrument to a parochial board constituted under the law in force at the passing of this Act shall be read and construed as referring to a parish council constituted under this Act."

Section 22,—"A parish council shall, subject to the provisions of this Act, come in place of a parochial board, and shall be deemed to be a continuance thereof; and a parish council shall have and may exercise all the powers and duties, and shall be subject to all the liabilities, of a parochial board. . . ."

[1] Incorporated Trades of Edinburgh v. Governors of Heriot's Hospital, June 3, 1836, 14 S. 873.

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right to act as a trustee under said trust, "as the successor in office of the chairman of the said parochial board," and whether that claim is well founded is the question we are asked to determine.

I think there is no room to doubt that in ordinary parlance the Parochial Board of the parish of Kilmarnock,—that is, the board which was formerly entrusted with the administration of the poor law, and that only, in the parish of Kilmarnock,—has ceased to exist, and that consequently the person who was chairman of that board no longer holding such office is no longer a trustee. But the first party to this case maintains that certain expressions in the 21st and 22d sections of the statute I have cited have conferred upon him the office of chairman of the parochial board, and that he is entitled as such to the vacant trusteeship. We must therefore look at these sections, for upon their interpretation and effect depends the answer to the question before us.

Section 21 provides that on and after the 15th May 1895 "every reference in any Act of Parliament, scheme, deed, or instrument to a parochial board . . . shall be read and construed as referring to a parish council constituted under this Act." This does not appear to me to support the claim of the first party. The reference to a "parochial board" in this section means a reference to the parochial board as such—as a collective body having well-recognised rights and duties—not merely a reference to the board incidentally, as in the present case, as part of the description or designation of one of its members. Section 22 again provides that "a parish council shall . . . come in place of a parochial board, and shall be deemed to be a continuance thereof." But to what effect and purpose this is to be deemed a continuance is made plain by the words which follow,—"And a parish council shall have and may exercise all the powers and duties, and shall be subject to all the liabilities, of a parochial board." In short, the meaning and effect of this clause is shortly and accurately stated in its rubric,—"Parish councils to take the place of parochial boards." All the duties incumbent on a parochial board are to be undertaken and performed by the parish council, and all the rights (of property or otherwise) and privileges of a parochial board are transferred to the parish council. In this sense, that the parish council in future should represent the parochial board in its rights and obligations, the one is to be deemed a continuance of the other, but only in this sense. As the trust in question was one with which the parochial board had no concern, so I think the parish council has nothing to do with it. And accordingly, I am of opinion that the chairman of the parish council cannot claim *ex officio* to be a trustee. I think, therefore, that the question put to us should be answered in the negative.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

LORD YOUNG was absent.

THE COURT answered the question in the negative.

CURROR, COWPER, & CURROR, W.S.—MELVILLE & LINDESAY, W.S.—Agents.

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White's Trustees v. White.

ALEXANDER JEFFERSON BUIST AND OTHERS (James Farquhar White's Trustees), First Parties.—*Cheyne—Clyde.*
AMY CONSTANCE ANDREW OR WHITE AND OTHERS (Alexander Sidney White's Trustees), Second Parties.—*D. Dundas—Neish.*
ALISON MARJORIE WHITE AND OTHERS, Third Parties.—*Macfarlane—Dudley Stuart.*

Succession—Vesting—Repugnancy—Power to trustees to postpone payment—Conditional institution of children of beneficiary dying before payment.—A testator, by the fifth purpose of his settlement, directed his trustees to divide the residue of his estate in certain proportions among his children, "in the case of sons, upon their respectively attaining majority, and in the case of daughters, upon their respectively attaining majority or being married," with a clause of survivorship, which *per se* imported that vesting took place in the children as they respectively attained majority, or in the case of daughters, were married. By the sixth purpose he provided, —"With respect to the shares of the residue falling to my sons, I declare that the capital of the one-half thereof . . . shall not be payable to them before they shall respectively have attained the age of twenty-five years complete . . . declaring, nevertheless, that my trustees shall have power to pay to any of my sons the capital of the said half, in whole or in part, as soon after he shall have attained majority as they shall deem advisable, and that, on the other hand, my said trustees, if they shall consider it for the interest of any of my sons, shall have power to withhold payment of the capital of such half, in whole or in part, even after he shall have attained the age of twenty-five," and to pay him the income of the capital retained as an alimentary provision, "declaring also that in case any of my sons shall die after me and after attaining majority, but without having received payment of the whole of the capital of the above-mentioned half . . . the capital of such half, or so much thereof as shall remain in the hands of the trustees, shall be paid to the lawful issue of the body of such son," whom failing, to such persons as he should appoint by a revocable writing under his hand.

Held that the provisions of clause sixth were not repugnant to the gift in clause fifth, but were to be read as effectually qualifying that gift, and that portions of capital retained by the trustees from the share of a son in the exercise of the power conferred on them, and in their hands at the death of the son, leaving issue, did not vest in such son.

Chambers' Trustees v. *Smiths*, 5 R. (H. L.) 151, and *Weller* v. *Ker*, 1 Macph. (H. L.) 8, *commented on.*

Succession—Trust—Power to withhold payment—Exercise of power.—A truster, after directing his trustees to divide the residue of his estate amongst his sons on their attaining majority, provided that the capital of one-half of their shares should not be payable to them until the age of twenty-five; "declaring, nevertheless, that my trustees shall have power to pay to any of my sons the capital of the said half, in whole or in part, as soon after he shall have attained majority as they shall deem advisable, and that, on the other hand, my said trustees, if they shall consider it for the interest of any of my sons, shall have power to withhold payment of the capital of such half . . . even after he shall have attained the age of twenty-five, . . . and that either during the remainder of his life or for such shorter period or periods as my said trustees shall from time to time determine," meantime paying him the interest.

One of the sons survived his father, and died two years after attaining the age of twenty-five, without having received payment of the whole of his one-half share of the residue. The trustees had not recorded any minute determining to exercise their power to withhold payment, but they had in point of fact not paid, without protest on the part of the son.

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White's Trustees v. White.

Held that in retaining the portion of the one-half share the trustees were to be presumed to have acted in the exercise of the power conferred on them, and there being no evidence to the contrary, that there had been a valid exercise of the power.

Chalmers' Trustees, 9 R. 743, *distinguished.*

Succession—Testament—Destination over to issue of deceasing child—Whether clause postponing payment in case of child applicable to child's issue.—Held that a clause in a trust-settlement postponing payment of provisions to the truster's children until they respectively attained majority did not apply to a destination over in favour of a child's issue.

2D DIVISION.

MR JAMES FARQUHAR WHITE, of Balruddery, died on 5th September 1884, leaving a universal trust-disposition and settlement dated 14th February 1868, and several codicils thereto of various dates.

By the fifth purpose of his trust-disposition and settlement the testator appointed his trustees "to divide the residue of my estate, heritable and moveable, real and personal, after answering the foregoing purposes, and all accumulations thereof, amongst the whole lawful children or remoter issue procreated or to be procreated of my body in such shares that James Martin White, my son, or his lawful issue, shall receive three shares, each of my other sons, or their lawful issue, two shares, and each of my daughters, or their lawful issue, one share, and that after my death, and in the case of sons upon their respectively attaining majority, and in the case of daughters upon their respectively attaining majority or being married, whichever of these events shall first happen; and in case any of my said sons shall predecease me or shall die in minority, or in case any of my daughters shall predecease me or shall die before attaining majority and without being married, the share of such deceasers shall fall and belong to his or her lawful issue, whom failing, to my other children or their issue, in the same proportions and subject to the same provisions as their original shares."

The sixth purpose was in these terms:—"Sixthly, With respect to the shares of the residue, original or accresced, falling to my sons, I declare that the capital of the one-half thereof, whether original or accresced, shall not be payable to them respectively before they shall respectively have attained the age of twenty-five years complete, but they shall receive the interest thereof from the time of their respectively attaining majority: Declaring nevertheless that my said trustees shall have power to pay to any of my sons the capital of the said half, in whole or in part, as soon after he shall have attained majority as they shall deem advisable, and that, on the other hand, my said trustees, if they shall consider it for the interest of any of my sons, shall have power to withhold payment of the capital of such half, in whole or in part, even after he shall have attained the age of twenty-five years complete, and that either during the remainder of his life, or for such shorter period or periods as my said trustees shall from time to time determine, and the interest on the capital so retained shall be paid to such son, yearly or half-yearly, as it falls due, for his aliment, and such interest shall not be assignable by him, nor subject to his debts or deeds or the diligence of his creditors: Declaring also that in case any of my sons shall die after me and after attaining majority, but without having received payment of the whole of the capital of the above-mentioned half of his shares, original or accresced, of the residue, the capital of such half, or so

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much thereof as shall remain in the hands of the trustees, shall be paid to the lawful issue of the body of such son, whom failing, to such person or persons as he shall have appointed by a revocable writing under his hand, and failing such appointment, to my other children, or their respective issue, in the same proportions and subject to the same provisions as their original shares."

By one of the codicils, dated 18th March 1876, the testator, *inter alia*, provided as follows:—"Declaring also with reference to the sale and disposal of my estate, wherever situated, that my trustees shall not be bound to realise the whole thereof unless they consider it necessary or proper, or the purposes of the trust shall in their opinion render it advisable to do so, but they shall have full power, and they are hereby specially authorised, any law or practice to the contrary notwithstanding, so long as they shall consider it advisable, to retain unrealised such property, shares, stocks, debentures, bonds, or other securities on which my said estate, or any part of it, may be invested at the time of my death, and to hold the same, at the values to be put thereon as after mentioned, as investments of my said estate under the trust: And further, with the view of enabling my trustees, in fulfilment of the purposes of the trust, to ascertain the amount of any of the shares of my said estate falling to be paid up or set aside, as provided for in the said trust-disposition and settlement, I hereby specially authorise and empower my trustees, from time to time as occasion may require, to put a value upon my said estate, and the whole securities on which the same may be invested for the time, and to hold the amount of such valuation to be the basis for ascertaining the amount of such share or shares falling to be paid over or set aside as aforesaid; and also, if they think proper, to appropriate and set aside such of the said securities or the values so put upon them as in full or in part payment of such shares falling to be paid or set aside as aforesaid; declaring that such values so to be put upon my estate, and securities on which the same is invested by my trustees, and their appropriation thereof, shall be final and binding upon all parties interested, and shall not be subject to challenge on any ground whatever: With power also to my trustees to hold and manage such parts of my estate remaining in their hands as may not be paid over or set aside as an aggregate fund for the joint behoof of the parties interested according to their several and respective rights and interests therein."

The testator was predeceased by his wife, and was survived by two sons and six daughters.

Alexander Sidney White, the testator's youngest son, was in minority at the date of his father's death, and attained majority on 29th March 1888.

Alexander Sidney White died on 4th November 1894, survived by his wife and by a pupil son and a pupil daughter, and leaving a trust-disposition and settlement, dated 26th July 1894, with relative codicil, by which he conveyed to trustees for the purposes set forth, his whole means and estate, including the share of residue falling to him under his father's settlement.

After the death of Alexander Sidney White, questions arose as to whether certain sums forming part of the share of residue left to him and his issue by his father, but still in the hands of his father's trustees, had vested in him, or fell to his children as conditional institutes under the settlement.

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A special case was accordingly presented, from which the following facts appeared.

By minutes of meeting dated 8th July 1889, the trustees resolved that valuations of the trust-estate other than certain heritable properties should be obtained as at 30th June 1889, and that a scheme of division should be made up. The valuations having been obtained and the scheme of division made up, the trustees, on 6th November 1889, instructed the agents to submit the documents to the beneficiaries, and to prepare a deed of ratification and discharge for signature by the beneficiaries.

The deed of ratification and discharge so obtained was dated 2d May 1890 and subsequent dates, and proceeded on a narrative of the truster's settlement and codicils, and of the various steps taken by the trustees towards realising the estate, and on the further narrative that, with a view to an interim division, a state and scheme of division shewing the estate of the trust, and of the portion thereof of which an interim division was then to be made, had been made up, that the securities set forth in that state had been valued, and that the trustees, in place of realising same, were to make them over to the beneficiaries. The deed contained the following clauses,—"And now seeing . . . that the said trustees have allocated to me, the said Alexander Sidney White, the securities and cash of the value of £80,957, 11s. 6d., conform to column 'B' in the said scheme of division, and have made payment or accounted for to me for the sum of £48,000 thereof, and in virtue of the power conferred upon them by the said trust-disposition and settlement, and codicil thereto, the said trustees have retained and hold for my behoof the balance of £32,957, 11s. 6d.; . . . And we the said James Martin White and Alexander Sidney White hereby severally and respectively exoner, acquit, and *simpliciter* discharge the said" [trustees], "and their respective heirs, executors, and successors, and also the agents of the trustees, and all other persons whomsoever, of and from the foresaid several and respective sums of money and securities paid and allocated to us respectively: . . . Reserving always to us, the said James Martin White and Alexander Sidney White, and to us" [then followed the names of the daughters] "and our . . . children or remoter issue, or the persons entitled to claim through us . . . the respective shares falling to us . . . of the residue of the means and estate of the said deceased James Farquhar White, in so far as the same is not included in the said scheme of division."

Prior to the date of the foregoing deed, on 8th July 1889, the trustees, having in view that Mr J. Martin White, the elder son of the truster, had attained the age of twenty-five, and also the discretionary powers conferred upon them by the fifth and sixth heads of the truster's settlement, "resolved to pay the said Mr J. Martin White his share of the residue, under deduction of . . . a sum of £15,000 withheld by the trustees in virtue of the powers reserved to them under the sixth head of the settlement, and which sum of £15,000 shall be so withheld by the trustees during the remainder of the life of the said J. Martin White, or for such shorter period as the said trustees shall from time to time determine, and the interest of the said principal sum of £15,000 shall be paid to the said J. Martin White half-yearly as it falls due for his aliment."

There was no similar formal resolution by the trustees with respect to the balance of £32,957, 11s. 6d. referred to in the deed of ratification and discharge as retained for behoof of Alexander Sidney White,

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but after he attained the age of twenty-five (on 29th March 1892) the trustees continued to retain the whole of that sum and to pay him the interest accruing thereon until his death.

It further appeared that after Alexander Sidney White's death the trustees made a final valuation and division, allocating to his share an additional sum of £5180, which they retained and held along with the £32,957, 11s. 6d. previously allocated, making together a balance of £38,137, 11s. 6d. in their hands.

The testator's trustees were the first parties to the special case, Alexander Sidney White's trustees were the second parties, and his children and their mother as their guardian under the Guardianship of Infants Act, 1886, were the third parties.

The third parties contended that the intention of the testator, as expressed in the sixth purpose of his settlement, was that any portion of a son's share, beyond the half which was payable to him on his attaining majority, remaining in the hands of the trustees at the time of such son's death should be paid to the lawful issue of his body, and that only failing issue had such son power to test thereon.

The second parties contended that the direction contained in the latter part of the sixth purpose, to pay to the issue of any deceasing son any balance of the capital of his half share remaining in the hands of the trustees, referred only to such portion of the capital of a son's share as the trustees might have from time to time determined to retain for behoof of such son, and that no such determination having been come to by the trustees, the whole of Alexander Sidney White's share in the hands of his father's trustees was conveyed to his own trustees by his trust-disposition and settlement.

The first parties contended that in the event of the third parties being successful in their contention, they (the first parties) were, in terms of the fifth purpose of the trust-settlement, bound to hold the balance in their hands until the attainment of majority in the case of the son, and until that event or marriage in the case of the daughter, of Alexander Sidney White.

The questions of law were,—"1. Are the second parties, in virtue of the disposition in their favour contained in Mr A. Sidney White's trust-disposition and settlement, entitled to demand and receive from the first parties the portion of Mr A. Sidney White's share of his father's estate allocated to him in terms of the discharge quoted, but still in the hands of his father's trustees? 2. Are the second parties entitled to demand and receive from the first parties the share of the portion of Mr J. F. White's trust-estate unallocated at the date of Mr A. Sidney White's death? 3. If the first or second question be answered in the negative, is Mrs Sidney White, as guardian of her pupil children, entitled to receive the portion of Mr A. Sidney White's share of his father's estate referred to in the first question, and the share of the unallocated estate referred to in the second question, or either of them? 4. Are the first parties entitled and bound to retain said shares, or either of them, until the attainment of majority in the case of Ian Sidney White, or until that event or marriage in the case of Alison Marjorie White?"

Mr James Pitman, advocate, was appointed tutor ad litem to the pupil children.

Argued for the second parties;—Under his father's settlement Alexander White became entitled to payment of one-half of his share of the residue on his attaining the age of twenty-one, and he acquired

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a vested right in the other half on his attaining the age of twenty-five. The discretionary power given to the trustees in the sixth purpose of the deed was merely a power to postpone payment, and could not suspend vesting.[1] The last clause of that purpose, as to sons dying after the truster without having received payment of their shares of the half to be retained by the trustees, referred to the contingency of sons dying between the ages of twenty-one and twenty-five, and as Alexander White attained the age of twenty-five on 29th March 1892 his right to the share of the balance fully vested in him. In any view the clause could not receive effect, as it was repugnant to the gift of fee already given.[2] Further, it referred to such portion of the sons' shares as the trustees might in the exercise of their discretion have determined to retain for behoof of a son after he attained majority. Now, while the trustees had indicated by minute their intention to withhold the share of one of the sons, there was nothing whatever to shew that they intended to withhold payment of Alexander's share. On the contrary, they had allocated to him his share under the powers given to them by the codicil of 18th March 1876, and following thereon they had taken from him a discharge as fiar. It had never been held that a discretionary power had been exercised by trustees where they had done nothing to shew that they had exercised it.[3] The result was that the balance of Alexander's share of the residue in the hands of the trustees at the date of his death passed to his own trustees, and was carried by his settlement.

Argued for the third parties;—(1) The present case was unlike *Miller's Trustees*,[4] *Lindsay's Trustees*,[5] or *M'Elmail* v. *Lundie's Trustees*.[6] Alexander White had no vested proprietary right in the share in question of his father's estate. The declaration in the sixth purpose of the deed qualified the fifth purpose. It rendered the gift of fee conditional, and consequently suspended the vesting.[7] (2) Upon a sound construction of the trust-deed, Mr White's trustees had done all that was necessary. Where trustees were given a power to withhold or to postpone payment, the mere fact of doing so was a sufficient exercise of the power.[8] Here the deed said nothing as to the time and mode in which the power was to be exercised. Generally the trustees were given power to consider the matter from time to time according as circumstances might change. In any view the proceed-

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[1] M'Elmail v. Lundie's Trustees, Oct. 31, 1888, 16 R. 47; Jamieson v. Allardice, May 30, 1872, 10 Macph. 755, *per* Lord President (Inglis) 759, 44 Scot. Jur. 437; Chalmers' Trustees, March 16, 1882, 9 R. 743.

[2] Stewart's Trustees v. Stewart, Jan. 22, 1896, 33 S. L. R. 297; Duthie's Trustees v. Forlong, July 17, 1889, 16 R. 1002; Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301; Lindsay's Trustees v. Lindsay, &c., Dec. 14, 1880, 8 R. 281.

[3] Chambers' Trustees v. Smiths, April 15, 1878, 5 R. (H. L.) 151; MacKinnon's Trustees v. Official Receiver in Bankruptcy in England, July 19, 1892, 19 R. 1051; Jamieson v. Allardice, May 30, 1872, 10 Macph. 755; Chalmers' Trustees, March 16, 1882, 9 R. 743; Weller v. Ker, March 2, 1866, 4 Macph. (H. L.) 8.

[4] Miller's Trustees v. Miller, 18 R. 301, *vide* note 2.

[5] Lindsay's Trustees v. Lindsay, &c., 8 R. 281, *vide* note 2.

[6] M'Elmail v. Lundie's Trustees, 16 R. 47, *vide* note 1.

[7] Chambers' Trustees v. Smiths, April 15, 1878, 5 R. (H. L.) 151.

[8] Smiths v. Chambers' Trustees, Nov. 9, 1877, 5 R. 97, *per* Lord Young, 99, *per* Lord Shand, 125.

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ings of the trustees, as disclosed in the minutes and discharge, shewed that they had applied their minds to the matter and duly exercised their discretion. The cases relied upon by the second parties contained no such declaration as occurred in the sixth purpose of the deed. In *Weller* v. *Ker* [1] the deed directed that the trustees' disapprobation must be minuted if it were to have effect in restricting the beneficiary to a liferent. Lastly, assuming that the third parties were entitled as maintained to succeed, the sixth clause negatived any idea of the first parties having to hold the fund for behoof of grandchildren till their majority or marriage. It followed from these considerations that the unpaid portion of Alexander's share was not carried by his settlement, but fell to be paid now to his widow as guardian of his pupil children.

Argued for the first parties;—In the event of the third parties being held entitled to the fund, the first parties were bound to hold their shares until respectively Alexander Sidney White's son attained majority, and his daughter attained majority or was married. The words "sons" and "daughters" in the vesting clause of the fifth purpose were intended to include grandchildren. When the truster in other parts of the deed referred to his own children, he markedly referred to them as "my sons" and "my daughters."

At advising,—

Lord Moncreiff.—Under the will of his father, James F. White, the late Alexander Sidney White was entitled under the conditions after mentioned to a share of the residue of James White's estate. Part of the share was paid to Alexander White in May 1890, but the balance of his share remained in the hands of his father's trustees at the date of his death. The first question which we have to decide in this special case is whether right to the balance which was not paid over vested in Alexander White. If it vested in him it passed to the parties of the second part, his testamentary trustees; if it did not vest, the parties of the third part, being his only children, are entitled to it under the express conditional institution in their favour in the settlement of James White.

The answer to the question depends upon the meaning and effect of the declaration at the close of the sixth purpose of James White's settlement. But for that declaration I do not think that there is anything in the earlier part of the deed which necessarily leads to a postponement or suspension of vesting. If the fifth purpose is taken by itself the shares of the sons vested at majority,—not *a morte testatoris*, because a survivorship clause prevents that, but at majority. But the sixth purpose qualifies and controls the fifth in several material particulars. It begins by declaring that the capital of one-half of the shares falling to the sons "shall not be payable to them respectively before they shall respectively have attained the age of twenty-five years complete." What follows shews that this declaration does no more than indicate the truster's views as to the time before which, in the absence of any special reason to the contrary, the remaining half should not be paid over, because immediately thereafter he confers upon his trustees a discretionary power, on any of his sons attaining majority, either to pay to him the whole of the remaining half of his share or part thereof, or, if they

[1] Weller v. Ker, March 2, 1866, 4 Macph. (H. L.) 8.

should think it for the son's interests to do so, to retain it or part thereof, not merely until he attained the age of twenty-five, but if necessary during the remainder of his life, meantime paying only the interest to him.

So far, important as are these modifications, they do not necessarily involve postponement of vesting or prevent testing. But when we come to the declaration which follows, I think it is clear that the truster contemplated, and expressly provided for, the contingency of the trustees not paying over the balance of a son's share on his attaining majority or twenty-five years, and the possibility of the son dying before receiving payment. The declaration is as follows:—"Declaring also that in case any of my sons shall die after me and after attaining majority, but without having received payment of the whole of the capital of the above-mentioned half of his shares, original or accresced, of the residue, the capital of such half, or so much thereof as shall remain in the hands of the trustees, shall be paid to the lawful issue of the body of such son, whom failing to such person or persons as he shall have appointed by a revocable writing under his hand, and failing such appointment, to my other children or their respective issue, in the same proportions, and subject to the same provisions, as their original shares."

I shall first consider the argument on the footing that this declaration, if effect be given to it, involves the result that Alexander White, having died without having received payment of the balance of his share, the capital passed to his lawful issue as conditional institutes.

The second parties, on this assumption, maintain that the declaration should not receive effect, because they say it is repugnant to the gift of fee in the fifth purpose of the trust. If it were repugnant, the general, though not the inflexible, rule of construction, would be to give effect to it as containing the later expression of the truster's intention; but it is too late to regard such a declaration as repugnant to the original bequest. It has been decided more than once in the House of Lords, that a power to trustees to restrict the right of a beneficiary to a liferent and settle the fee on his issue or other beneficiaries may be sustained as being a competent condition of the grant. This was notably decided in *Chambers' Trustees* v. *Smith*,[1] as decided by the House of Lords, 5 R. (H. L.) 151, reversing the decision of the First Division of this Court, and in the earlier case of *Weller* v. *Ker*.[2]

The ratio of those decisions I take to be that there, as here, there was not an unconditional gift of fee; that where such a discretionary power is conferred on trustees it is to be read as a condition of the bequest, and operates suspension of vesting until the share is actually paid over to the beneficiaries, even although a time of vesting is named in the deed.

This clearly appears from the opinions of Lord Young and Lord Shand in this Court and of the learned Lords in the House of Lords in the case of *Chambers*.[3]

Where, again, there is an unconditional gift of fee and no ulterior destination dependent on the exercise or non-exercise of the power, directions or

[1] 5 R. (H. L.) 151.
[2] 4 Macph. (H. L.) 8.
[3] Smiths v. Chambers' Trustees, 5 R. 97, *per* Lord Young, p. 99, *per* Lord Shand, p. 125.

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powers given to trustees to manage or withhold the provision beyond the period of vesting will, except where necessary for trust purposes, be disregarded as inconsistent with the right of fee. The recent case of *Miller's Trustees*,[1] and *Wilkie's Trustees* v. *Wight's Trustees*,[2] are strong examples of this. Again, postponement of payment alone will not postpone vesting—*Jamieson*,[3] *M'Elmail*.[4]

Here the bequest made in the fifth purpose was not unconditional, being qualified by the wide-reaching provisions of the sixth purpose, and the terms of the declaration.

It remains to notice two other points which were urged on behalf of the second parties. It was maintained that the declaration only applies to the period between the attainment of majority and the attainment of twenty-five years by the son, and that as Mr Alexander White attained the age of twenty-five years on 29th March 1892, right to the balance fully vested in him. I think that this contention is untenable, because the discretionary power given to the trustees may be exercised even after the beneficiary has attained the age of twenty-five years as well as before that period.

There is more difficulty about the remaining argument, which was to the effect that as there is no minute shewing that the trustees resolved to retain the balance after Alexander White reached the age of twenty-five, and as the balance was under the will payable on his attaining that age, the maxim *quod fieri debet infectum valet* applies. Now, in the first place, I think it clear that the words "die without having received payment" in this case do not admit of the interpretation which was put upon similar words in the case of *Chalmers' Trustees*.[5] There the words "should die previous to payment" were interpreted not as meaning previous to the actual receipt and payment of the provision, but previous to the time at which the testator had declared the provision to be payable, viz., majority. In the case of *Chalmers' Trustees*,[5] however, there was nothing to indicate that the truster intended or contemplated postponement of distribution, as in the case of *Howat's Trustees* v. *Howat, &c.*,[6] and *Macdougall* v. *M'Farlane's Trustees*,[7] and as in this case.

If, however, it had been clear that there was an express direction to pay to the beneficiary, on his attaining the age of twenty-five years, and that the trustees were in fault in not then making payment, the second parties might have been entitled to prevail. But, first, the deed only says that the balance "shall not be payable to them respectively before they shall have respectively attained the age of twenty-five years complete." Secondly, I find no statement or admission that the trustees were in any way in fault in delaying to pay, or that they did not retain the balance of Alexander White's share under the power conferred upon them. On the contrary, it appears from a discharge signed by Alexander White on 2d May 1890, at which time the trustees might if they had thought proper have paid over to him the whole of the balance (he having attained majority on 29th March 1888) that the trustees retained and held the balance in virtue of

[1] 18 R. 301.
[2] Nov. 30, 1893, 21 R. 198.
[3] 10 Macph. 755.
[4] 16 R. 47.
[5] 9 R. 743.
[6] Dec. 17, 1869, 8 Macph. 337.
[7] May 16, 1890, 17 R. 761.

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the power conferred upon them by the settlement, which was a power to retain even after the son attained the age of twenty-five.

I may observe in passing that, in my opinion, nothing turns upon the allocation of certain securities to satisfy Alexander White's share, which the trustees made, I presume, under the codicil of 18th March 1876. That allocation was not equivalent to payment to Alexander White, or an acknowledgment that the trustees held for him alone. It only operated as an appropriation of particular securities at specified values for behoof of all the parties (including Alexander White), who might ultimately be found entitled to that share or part thereof.

Further, the trust-deed does not make it imperative that the trustees should minute their resolution to retain the balance. In point of fact they did retain it without objection on the part of Alexander White for upwards of two years after he had attained majority, and I think that, in order to overcome the express declaration in the sixth purpose, the second parties required to shew by the clearest evidence or admission that, in withholding payment until after Alexander White's death, the trustees acted contrary to their duty, and in excess of their powers. This, in my opinion, they have failed to do.

I therefore think that the first question must be answered in the negative. The second question, which I take it refers to a further balance of about £5000 which was not allocated to Alexander White's share before his death, should also be answered in the negative.

The third and fourth questions have, in this view, to be considered. I think that the third question should be answered in the affirmative and the fourth in the negative. Mr James White's trustees are directed in the event which has happened, of Alexander White dying without having received payment of the balance, to pay the same to the lawful issue of his body. The only ground on which it is maintained for the first parties that they should retain the balance is, that in the fifth purpose it is declared that payment is to be made in the case of sons only on their attaining majority, and in the case of daughters on their attaining majority or being married. But I am of opinion that the words sons and daughters apply only to the truster's children, and not to remoter descendants.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD YOUNG was absent.

THE COURT answered the first, second, and fourth questions in the negative, and the third question in the affirmative.

HENRY & SCOTT, W.S.—WHITE & NICHOLSON, S.S.C.—HENDERSON & CLARK, W.S.—Agents.

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M'Aulay v. Glasgow and South-Western Railway Co.

JOHN M'AULAY, Pursuer (Appellant).—*Young—Munro.*
GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders (Respondents).—*Balfour—C. J. Guthrie.*

Reparation—Railway—Carriage—Passengers—Getting out of train not at platform—Invitation to alight.—In an action of damages for personal injury against a railway company, the pursuer averred that between five and six o'clock on a January morning he was travelling as a passenger to a

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station on the defenders' line; that "about 300 yards before entering the station platform, and in a line with, up to, and abutting the coping of the platform, is a parapet wall, which reaches to the footboard of the carriage and resembles the station platform, although it is narrow"; that on the morning in question the train stopped at this parapet wall, and the pursuer in the darkness stepped out on to the wall "thinking it to be the station platform owing to the darkness, and the fact that the defenders systematically were in the habit of leaving" the station "unlit"; and that on discovering where he was, he was about to re-enter the train when it suddenly started again, with the result that the pursuer was precipitated over the wall and injured.

The defenders pleaded that the action was irrelevant.

The Court *sustained* the defenders' plea, and *dismissed* the action.

2D DIVISION. Sheriff of Lanarkshire.

IN April 1896 John M'Aulay, mason, Crosslee, Johnstone, brought an action in the Sheriff Court at Glasgow against the Glasgow and South-Western Railway Company for damages on account of personal injuries sustained by him.

The pursuer averred that on 15th January 1896 he was a passenger on the defenders' line from Johnstone to Elderslie by a workman's train leaving Johnstone at 5.24 A.M. (Cond. 3) "The station at Elderslie is not lighted at all by the railway company, and when some yards from the platform of that station the train stopped, but at that time it had not reached the said platform." (Cond. 4) "About 300 yards before entering the station platform, and in a line with, up to, and abutting the coping of the platform, is a parapet wall which reaches to the footboard of the carriage, and resembles the station platform, although it is narrow." (Cond. 5) "On the train stopping, the pursuer in the darkness stepped out on to the parapet wall, where there is a bridge over the Glasgow, Paisley, and Johnstone Canal, thinking it to be the station platform owing to the darkness, and the fact that the defenders systematically were in the habit of leaving Elderslie Station unlit. The pursuer, along with the other passengers, believed, and was justified in believing, that the train had arrived at the station platform." (Cond. 6) "When he discovered where he was he turned round to re-enter the carriage, but the train started suddenly and without any previous warning, and the pursuer was precipitated over the parapet on to the ground, a distance of 10 feet, and was injured. In consequence of said accident defenders now light the station in the morning."

In defence the railway company pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant.

On 29th May 1896 the Sheriff-substitute (Balfour) allowed a proof before answer.

The pursuer appealed for jury trial, and lodged an issue for the trial of the cause.

On the motion for the approval of the issue, the defenders objected to the relevancy of the action, and argued;—The action was irrelevant, for the pursuer's averments did not shew that his injuries were due to fault on the part of the defenders. The existence of the parapet wall plainly was not such fault. Nor was it fault that the train stopped at the parapet wall on the occasion in question, and no warning was given to passengers that they were not at a station; railway companies were under no obligation to warn passengers that they were not at a station whenever they stopped between stations. It was said that Elderslie Station was not lighted, but the want of

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light had nothing to do with the accident to the pursuer. If the station had been lighted, and he had got out at the parapet wall, the accident would have occurred exactly as it did. To infer liability against a railway company for injuries to a passenger through his getting out of the train at a dangerous place, the railway company must have given the passenger an express or implied invitation to alight. Here there had been no such invitation. The fact that a station was not lighted did not justify a passenger in supposing that the stoppage of the train meant the station. Passengers were expected to use their intelligence in getting into and out of trains.

Argued for the pursuer;—The pursuer did not put his case so high as to say that every time a train stopped on its journey passengers were justified in believing that they were at a station. His case was that, in the circumstances averred by him, when he got out of the train on the morning in question, he was justified in believing that he was at Elderslie Station. No doubt a railway company would not be liable if they did not invite passengers to alight, but the invitation might consist in not warning passengers that they were not at a station where the circumstances were such as to impose on the company the duty of warning. Here the circumstances imposed that duty on the defenders. According to the pursuer's averments, the parapet wall was practically a continuation of the platform, except in the matters of breadth and want of protection on the offside from the train, and the station was not lighted. In such circumstances if the company chose to stop their train when it was dark at the parapet wall and give the passengers no warning, they took the risk of passengers getting out under the belief that it was the station; had the station been lighted that might have been sufficient to distinguish the wall from the platform. At all events the question was a jury one, and the pursuer's averments were sufficient to entitle him to go to a jury.[1]

LORD JUSTICE-CLERK.—This is a curious case. It is not alleged that anything the railway company did or failed to do at the place where the accident occurred was the cause of the accident; the fault alleged lay in something that occurred at another place. The allegation is that when the train stopped the pursuer made the mistake of getting out, thinking that he was at the station, and stepped on to the parapet of a bridge in the belief that he was stepping on to the platform. One would have expected some other explanation, but such is the averment. I cannot conceive how he could make such a mistake. I cannot see how such an accident could take place unless it was so dark that he could not see at all. It is a mistake for which I cannot see that the defenders are responsible. To say that if a train stops anywhere a passenger is therefore entitled to assume that the train is at a platform is surely absurd. I am of opinion that the pursuer has not stated a relevant case.

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[1] *Authorities.*—Siner v. Great Western Railway Co., 1869, L. R., 4 Exchcq. 117; Whittaker v. Manchester, Sheffield, and Lincolnshire Railway Co., L. R., 5 C. P. 464, *note;* Cockle v. London and South-Eastern Railway Co., L. R., 5 C. P. 457; Petty v. Great Western Railway Co., 5 C. P. 561, *note;* Bridges v. North London Railway Co., L. R., 7 App. Cas. 213; Roe v. Glasgow and South-Western Railway Co., Nov. 9, 1889, 17 R. 59; Aitken v. North British Railway Co., May 22, 1891, 18 R. 836.

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LORD YOUNG.—The only doubt I have arises from the case of *Whittaker*,[1] but that case is distinguishable. The train there had arrived at the station, and the name of the station was called out, so that the Judge and jury thought it was a reasonable invitation to the passengers to alight. The carriage had overshot the platform, and a passenger answered the invitation by getting out and was injured. The verdict in that case was upheld. In this case the train was not at a station, and nothing happened which could be regarded as an invitation to alight; there was nothing to shew the arrival at a station. The pursuer says he thought he had arrived at a station. What was the actionable fault? The pursuer says that the Elderslie Station, which was 300 yards off, was never lighted, and that he might therefore reasonably think that he was at the station. That is not sufficient, and does not bring this case within the rule in *Whittaker*.[1]

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

THE COURT sustained the first plea in law for the defenders, and dismissed the action.

SIBBALD & MACKENZIE, W.S.—J. C. BRODIE & SONS, W.S.—Agents.

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June 24, 1896. Logan's Trustees v. Logan.

THE RIGHT REVEREND GEORGE JOHN SMITH AND OTHERS (Logan's Trustees), First Parties.—*Burnet.*
MRS CATHERINE LOGAN, Second Party.—*Guy.*
MRS CATHERINE LOGAN AND OTHERS, Third Parties.—*T. B. Morison.*
CHARLES LOGAN, Fourth Party.—*W. Campbell.*
MRS ELIZABETH M'LAUGHLIN AND OTHERS, Fifth Parties.—*Watt.*
CHARLES M'DERMOTT AND OTHERS, Sixth Parties.—*Watt.*

Succession—Implied direction to accumulate—Thellusson Act (39 *and* 40 *Geo. III. cap.* 98)—*Heritable and Moveable—Conversion—Intestacy.*—A testator directed his trustees upon the death of the last of certain annuitants to "realise and convert into cash" his whole estate, and "divide" the residue among certain persons who until that event were to have no vested right.

The surplus revenue was accumulated in the hands of the trustees.

At the expiry of twenty-one years from the testator's death two of the annuitants still survived.

Held (1) (*foll. Lord* v. *Colvin*, Dec. 7, 1860, 23 D. 111) that there was an implied direction to the trustees to accumulate the surplus income; (2) that further accumulations being prohibited by the Thellusson Act, and no one having a vested right to residue, the surplus income as it accrued fell to the testator's heirs *ab intestato*; (3) (*foll. Thomas* v. *Tennent's Trustees*, Nov. 17, 1868, 7 Macph. 114, and *Cowan* v. *Cowan*, March 19, 1887, 14 R. 670), that the direction to "realise" when the date of division arrived did not operate conversion of the heritage prior to that date; (4) (*foll. Campbell's Trustees* v. *Campbell*, June 30, 1891, 18 R. 992, *diss.* Lord Adam), that the rents of each term as they accrued fell to the person holding at that time the character of heir-at-law of the testator; and (5) that the rents accumulated in the hands of the trustees before the expiry of the twenty-one years being moveable estate, the surplus income derived therefrom fell to the heirs *in mobilibus* of the testator as at the date of his death.

Succession—Heritable and Moveable—Collation between heir and executor—Thellusson Act (39 *and* 40 *Geo. III.*), *cap.* 98.—Where by the operation

[1] L. R., 5 C. P. 464, *note.*

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of the Thellusson Act the rents of a testator's heritage fell as they accrued to his heir-at-law at the time, and the income of his moveable estate to his next of kin, and where the heir-at-law was one of the next of kin, *held* that the heir-at-law was entitled to a share of the income of the moveable estate without collating.

JOHN LOGAN, pawnbroker in Glasgow, died on 30th March 1871, leaving a trust-disposition and settlement, whereby he conveyed his whole estate, heritable and moveable, to trustees for the purposes therein mentioned. *Inter alia*, he directed his trustees to pay certain legacies, and to pay annuities of £50 each to his widow and to his daughters Alice and Elizabeth, and an annuity of £12 to his sister. With regard to the residue of his estate he directed,—"Lastly, upon the death of the last survivor of my said spouse and sister, and my daughters Alice and Elizabeth, or at such other time thereafter as my trustees shall think proper, my trustees shall realise and convert into cash my whole estate and effects, and, after meeting or providing for the foregoing purposes, so far as the same shall not have been previously met or provided for, divide the residue and remainder of my said means and estate equally among my sons William Logan and Charles Logan, and my daughter Mrs Mary Ann Logan or Shannon, or the lawful issue of them respectively *per stirpes*, and the lawful issue *per stirpes* of my daughters Elizabeth Logan or M'Dermott and Alice Logan, and in the event of any of my said sons and daughters dying without leaving lawful issue, the share or shares that would have fallen to such deceaser of my said sons and my daughter Mrs Mary Ann Logan or Shannon, or to the lawful issue *per stirpes* of such deceaser of my said daughters Elizabeth Logan or M'Dermott and Alice Logan, shall accresce to the share or shares falling to the survivors of my said sons and my daughter Mrs Mary Ann Logan or Shannon, or the lawful issue respectively *per stirpes* of such of them as shall predecease the foresaid period of division leaving such issue, and to the lawful issue *per stirpes* of such of my said daughters Elizabeth and Alice dying leaving such issue: And it is hereby declared that the shares of residue effeiring to my said sons William and Charles, and my daughter Mrs Mary Ann Logan or Shannon, or their lawful issue respectively, and to the lawful issue of my said daughters Elizabeth and Alice, shall become vested interests in their persons at and only upon the arrival of the period of division above mentioned."

Mr Logan was survived by his widow (who died a few years after him), and by the two sons and three daughters mentioned in his settlement. Of these children, William Logan died on 30th May 1879, survived by a widow, in whose favour he left a general disposition and settlement appointing her his executrix and general disponee, and Mrs Mary Ann Shannon died intestate in 1883, survived by several children. The other children survived at the date of this case.

The estate left by the testator consisted of both moveable and heritable property, but after payment of debts and legacies there was practically no moveable estate left in the hands of the trustees. The heritable estate was of considerable value, and after providing for the annuities directed by the settlement a considerable sum was annually accumulated in the hands of the trustees. In 1892 the value of the heritable estate left by the testator was estimated to be about £8000, the rental being about £600 annually. At the same date the income accumulated in the hands of the trustees amounted to £7870.

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In view of questions arising under the Thellusson Act,* a special case was presented by the following parties:—First, John Logan's trustees: Second, the widow and general disponee of William Logan, who maintained that, as representing her husband, who was the heir in heritage of John Logan at the date of his death, she was entitled to the surplus income derived from John Logan's heritable estate since 30th March 1892 (being twenty-one years from the date of the testator's death), and to continue to receive it as it should become due: Third, Catherine Logan and others, the heirs in moveables, or the representatives of the heirs in moveables of John Logan, at the date of his death, who maintained (1) that the whole estate of John Logan became moveable by virtue of the provisions of his trust-disposition and settlement, and that the surplus income must be treated as moveable, and that they were accordingly entitled to the whole of the same after 30th March 1892; or (2) alternatively, that the accumulations of the rents and profits from the heritable estate which had accrued between the date of John Logan's death and 30th March 1892 formed part of the moveable estate of the trust, and that they were entitled to the surplus income of the same: Fourth, Charles Logan, the heir in heritage of John Logan after William Logan's death on 30th May 1879, who maintained that he was entitled to the free income of the whole heritable estate from 30th March 1892 until the trust-estate became divisible: Fifth, Mrs Elizabeth M'Laughlin and others as heirs in *mobilibus* of John Logan, as at 30th March 1892, who maintained that they were entitled to receive the surplus income from 30th March 1892: Sixth, children of John Logan's daughter Elizabeth, who claimed the surplus income as residuary legatees under his settlement.

The judgment of the Court was asked on the following questions:—"1. Is the surplus income of the trust-estate accruing during the period between the testator's death and the final division of the trust-estate undisposed of by the testator? 2. If there is an implied direction to accumulate the said income, is such accumulation subsequent to 30th March 1892 prohibited by the Thellusson Act? 3. Are the whole estates left by the testator to be treated as moveable in virtue of the terms of the said trust-disposition and settlement? 4. Are the accumulations of the rents and profits of the heritable estate which have accrued from the date of the testator's death till 30th March 1892 part

* The Thellusson Act (39 and 40 Geo. III. c. 98) enacts as follows:—"Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained . . . be it enacted . . . that no person or persons shall, after the passing of this Act, by any deed or deeds, . . . settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator, . . . and in every case when any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

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of the moveable estate of the trust? 5. Are the parties entitled to succeed to such of the surplus income as is held to be moveable estate (*a*) the heirs *in mobilibus* of the testator as at the date of his death; or (*b*) the heirs *in mobilibus* of the testator as at 30th March 1892; or (*c*) the heirs *in mobilibus* of the testator when such income accrued or may accrue? 6. Is the party entitled to succeed to such of the surplus income as is held to be heritable estate (*a*) the second party as representing the heir-at-law of the testator as at the date of his death; or (*b*) the fourth party who is the heir-at-law of the testator as at March 1892; or (*c*) the heir-at-law at the time when such income accrued or may accrue? 7. In the event of the fourth party's claim as heir in heritage being sustained, is he also entitled to a share of such of the estate as may be held to be moveable as one of the third or fifth parties as the case may be?"

Argued for the second party;—This party assumed, and indeed it could not be disputed, that there was here an implied direction to accumulate to which the Thellusson Act applied.[1] Vesting being postponed, the prohibited accumulations were undisposed of and fell into intestacy. Two classes of cases had come before the Court. Where there was a present gift burdened with a direction to accumulate, the accumulations after twenty-one years fell to be paid to the donee,[2] but where there was no present gift they fell into intestacy.[3] It followed that, as the estate from which the accumulations were derived was heritable, they were heritable also, for the direction to realise the residue of the estate when the period of final division arrived could not affect the character of that part of the estate which had fallen into intestacy. If the accumulations were heritable estate they fell to the second party as the representative of the heir-at-law of the testator as at the date of the testator's death.[1] That was the date to be looked at, and not the date when the accumulations fell due. *Campbell's Trustees*[4] seemed to decide otherwise, but must be held to have been wrongly decided, being inconsistent with *Lord* v. *Colvin*,[1] and the other cases in which that decision had been followed.

Argued for the third parties;—The whole estate was moveable in virtue of the direction to convert,[5] and the accumulations were therefore moveable. At anyrate the funds accumulated in the hands of the trustees were moveable. The accumulations fell into intestacy, and the parties entitled thereto were the testator's heirs in moveables. These must be looked for as at the testator's death.[6]

Argued for the fourth party;—The Thellusson Act applied, and there being no present gift or vested right, the prohibited accumulations fell into intestacy. Being the income of heritable estate, they were themselves heritable, for the direction to convert could not affect estate liberated by the operation of the Thellusson Act before that direction took effect.[7] If heritable, the accumulations fell to the

[1] Lord v. Colvin, Dec. 7, 1860, 23 D. 111, 33 Scot. Jur. 55.

[2] Maxwell's Trustees v. Maxwell, Nov. 24, 1877, 5 R. 248.

[3] Lord v. Colvin, *supra*, note 1; Cathcart's Trustees v. Heneage's Trustees, July 13, 1883, 10 R. 1205.

[4] Campbell's Trustees v. Campbell, June 30, 1891, 18 R. 992, esp. *per* Lord Rutherfurd Clark, at p. 1008.

[5] M'Gilchrist's Trustees v. M'Gilchrist, March 8, 1870, 8 Macph. 689, 42 Scot. Jur. 348.

[6] Campbell's Trustees, *supra*, note 4.

[7] Cowan v. Cowan, March 19, 1887, 14 R. 670.

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person who was heir-at-law of the deceased at the date when they accrued.[1] Nor was he bound to collate in order to participate in the proceeds of the funds accumulated prior to 1892, as this was not a case of ordinary intestate succession.

Argued for the fifth parties;—The estate was moveable and the accumulations fell to the heirs in moveables of the deceased, but these were to be looked for at the date when the accumulations accrued.[1]

Argued for the sixth parties;—Although the Thellusson Act applied the result was not necessarily intestacy. The testator's intentions must, so far as possible, be carried out. The funds which could no longer be accumulated should therefore be paid over to his residuary legatees.[2]

At advising,—

LORD M'LAREN.—The subject of dispute between the parties may be considered under three heads. (1) Is there an implied direction to accumulate rents, so that the income of the heritable property falls under the operation of the Thellusson Act? (2) Assuming that the residue of the truster's estate does not vest until the period of distribution, so that the surplus income cannot be treated as residue, is this income heritable or moveable as to succession? (3) If the income is heritable, who is the heir?

On the first point I think there is no room for doubt. If a truster directs that to be done which as a consequence leads to indefinite accumulation, he must, within the meaning of the statute, be taken to have directed accumulation. This is the principle of the decision in *Lord* v. *Colvin*,[3] where the cause of the accumulation was the failure of the parties to whom the testator had left the intermediate income of his estate. Here, the income of the trust-estate is undisposed of; and if the trustees were to act up to the letter of the will, they would be under the necessity of adding the income year by year to the capital until the arrival of the period of vesting. I think this is a plain case of accumulation contrary to the express provisions of the statute.

On the second point it is only necessary to read the residuary destination in the last trust purpose, to see that the beneficiaries cannot be ascertained until after the failure by death of the truster's spouse and sister, and his daughters Alice and Elizabeth. Then the principle to be applied is stated by Lord Justice-Clerk Moncreiff in the case of *Stirling-Maxwell*,[4]—"If the fund directed to be accumulated is not the subject of any present gift, the right of the eventual beneficiary will not be accelerated or arise at the term of twenty-one years. . . . But if there be a present gift of the fund itself, and the direction to accumulate be only a burden on the gift, then the burden will terminate at the expiration of twenty-one years."

In the case before us there is certainly no present gift of the residue; and as the income cannot lawfully be accumulated for the benefit of unknown residuary legatees, it must go to heirs-at-law, or to next of kin. But in considering who is entitled to the income, it is necessary to dis-

[1] Campbell's Trustees, note 4, *supra*, p. 851.
[2] Muirhead v. Muirhead, May, 1890, 17 R. (H. L.) 45.
[3] 23 D. 111. [4] 5 R. 248.

tinguish the sources from which the residue is derived, because the existing residue consists in part of the truster's heritable estate, and in part of the rents which have been lawfully accumulated during the permitted period of twenty-one years.

As regards the rents of the truster's heritable estate, my opinion is that these, as they fall due, are heritable, and that the principle of constructive conversion is inapplicable. In the argument addressed to us on this subject our attention was called to the introductory part of the last trust purpose, where the truster directs his trustees to "realise and convert into cash" his whole estate and effects, with a view to distribution. If we were here considering the devolution of a share of residue given under the will, I should think it perfectly clear that the heritable estate was constructively converted, and that the next of kin of the beneficiary were the persons entitled to take as his representatives. But then it is settled law that constructive conversion in virtue of a direction to sell only exists and takes effect for the purposes of the trust, and it cannot well be said that the application of surplus income in terms of an Act of Parliament is one of the purposes of this will.

If the question were, who is entitled to take a heritable subject, or a share of heritage, which in a certain event is undisposed of, the answer must be the heir in heritage; and I am unable in this question to distinguish between the undisposed of capital and undisposed of income, because the principle is that the heir cannot be displaced except by giving the estate to another. I think the reasoning of Lord Barcaple in *Thomas* v. *Tennent*[1] and of the Lord President in the case of *Cowan*,[2] apply just as truly to the case of estate set free by the operation of an Act of Parliament, as to cases of proper intestate succession arising through the failure of the objects of a trust; and if this view be well founded, it follows that the rents which accrue after accumulation ceases are heritable.

Again, with respect to the income which has accrued and may accrue by the investment of the rents which were lawfully accumulated during the permitted period of twenty-one years, I am of opinion that such income must go to the truster's next of kin, because, as soon as these rents were lawfully reduced into possession by the trustees, for the purposes of the trust, they became moveable in every sense, and the income derived from their investment is also moveable. I need hardly add that next of kin are always ascertained at the death of the intestate. There are no other next of kin known to the law.

On the third point, my opinion is, that the right to uplift rents which are not disposed of by the will falls under the heir's title of apparency. It is, of course, an elementary rule that the apparent heir has a title to receive the rents of his ancestor's estate, and this title must subsist until it is displaced by a better title.

I do not think it is possible in the actual circumstances of this trust to make up a title to rents *in genere*, and it follows, in my opinion, that each termly payment as it accrues vests in the heir-apparent, that is, in the person who, at the time, has the character of nearest heir of the truster. My

[1] 7 Macph. 114. [2] 14 R. 670.

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view is supported by the judgment of the other Division of the Court in the case of *Campbell's Trustees* v. *Campbell*,[1] and I desire to express my concurrence in the reasoning of Lord Rutherfurd Clark on this point.

LORD KINNEAR concurred.

LORD ADAM.—(The following opinion of Lord Adam, who was absent when the case was advised, was read by Lord Kinnear):—The late John Logan died on 30th March 1871, leaving a trust-disposition and settlement by which he conveyed his whole estates, heritable and moveable, to trustees for certain purposes.

Inter alia, he directed his trustees, who are the first parties to this case, to pay out of the annual proceeds of his estates an annuity of £50 to his wife during her life or widowhood, an annuity of £50 to each of his daughters Alice and Elizabeth, and an annuity of £12 to his sister Mrs King. Lastly, he directed his trustees on the death of the last survivor of his spouse, sister, and daughters Alice and Elizabeth, to realise and convert into cash his whole estate, heritable and moveable, and divide the residue equally among his sons William and Charles, and his daughter Mrs Shannon, or their lawful issue respectively, and among the lawful issue of his daughters Elizabeth and Alice, but it was declared that their shares of the residue should only become vested in their persons at and only upon the arrival of the period of division.

The truster's daughters Alice and Elizabeth are still alive, so that the period of division has not arrived, and consequently no right to a share of the residue has vested in the persons named as residuary legatees, but their contingent interest in the residue is represented in this case by the parties of the sixth part, who are the children of the truster's daughter Elizabeth Logan or M'Dermott.

It appears that after providing for payment of the annuities the income of the estate has been largely in excess of the expenditure. That income is now derived from the income of the original estate left by the truster, which appears to be entirely heritable, and from the income derived from the accumulations of the surplus income which has been invested from time to time.

The period of twenty-one years from the truster's death expired on 30th March 1892, and the principal questions raised in this case are whether the Thellusson Act applies, and if so who are the parties entitled to the surplus income subsequent to the 30th March 1892, first, from the heritable estate left by the truster, and second, from the before-mentioned accumulations.

It seems to me to be very clear that there is an implied direction to accumulate the surplus income in this case, and that therefore the Thellusson Act applies to the effect of prohibiting such accumulation after the 30th March 1892. It is also sufficiently clear that the surplus income must now be paid over to some one or other of the claimants who can shew a present right to it; but as the residue has not vested in the residuary legatees, and they have no present right to it, and may never have any right at all, they can have no right to the surplus income, and that disposes of the claim of the sixth parties.

[1] 18 R. 992.

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The Act says that the direction to accumulate beyond twenty-one years shall be null and void, and that the proceeds of the property so directed to be accumulated shall go to such person or persons as would have been entitled thereto if such accumulation had not been directed. Now, as the only testamentary direction with regard to this surplus income is null and void, it seems to follow that it must be treated as estate not disposed of by the truster, and therefore to go to the person entitled to succeed to him therein *ab intestato* at the time of his death. But the estate left by the truster was entirely heritable, therefore it seems to me the surplus income subsequent to 30th March 1892, in so far as derived from that estate, must go to the heir in heritage of the truster at the time of his death, or to the person now representing him,—that is, to the party of the second part.

The future income derived and to be derived from the accumulations of surplus income during the period of twenty-one years appears to me to be in a different position. That income was properly received and administered by the trustees during that period. Although derived from heritable estate it became moveable in their hands. But the truster must be held to have given no direction as to the disposal of the future income derived from these accumulations, and being derived from moveable estate I think it must go to the truster's heirs in moveables at the date of his death, or to their representatives,—that is, to the third parties to this case.

I am therefore of opinion that the first question should be answered to the effect that the surplus income accruing after the period of twenty-one years from the truster's death is undisposed of; that the second question should be answered in the affirmative, the third in the negative, the fourth in the affirmative, question five (*a*) in the affirmative, six (*a*) in the affirmative.

The LORD PRESIDENT concurred with LORD M'LAREN.

THE COURT pronounced the following interlocutor:—"Answer the first and second questions in the affirmative: Find, in answer to the third question, that the rents subsequent to 30th March 1892 are heritable, and fall to the heir for the time being: Answer question four and questions five (*a*) and six (*c*) in the affirmative: Find, in answer to the seventh question, that a party who is heir and also one of the next of kin may take a share of the moveables as well as the rents falling to him by statute."

J. W. & J. MACKENZIE, W.S.—CARMICHAEL & MILLER, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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Roberts & Co. v. Yule.

A. ROBERTS & COMPANY, Pursuers (Respondents).—*J. Wilson*—*J. J. Cook.*

DAVID YULE, Defender (Appellant).—*Salvesen*—*T. B. Morison.*

Sale—Sale of second-hand machinery—Disconformity to description—Sale of Goods Act, 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 11, *subsec.* 2, *and sec.* 13.—A firm of machinery merchants sold a second-hand four-horse power nominal gas-engine, described as in "excellent order," "running up to about a week ago," and "a great bargain at this price,"—£47, 10s. When the engine was delivered on 22d October 1895, the buyer found

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that it would not work, and an engineer sent by the sellers to inspect it also found that it would not work. He reported that it would require an expenditure of £8, 10s. to put it right, and the sellers offered, on 16th December, to execute these repairs. This offer was refused by the buyer, who required the engine for an immediate and temporary purpose, and had supplied himself with another engine.

In an action by the sellers for the price, the evidence led by them shewed that the engine had been working up to about a week before the sale; that certain breakages absolutely prevented the engine from working; that these breakages could be repaired at a cost of about £1 or £1, 10s.; but that so repaired it could not work up to more than 5½ actual horse-power, instead of 7, the proper amount for a four-horse power nominal engine. To bring it up to that horse-power certain parts which had been worn through ordinary wear and tear would have to be renewed, these latter repairs being included in those which the sellers offered to execute.

The sellers contended that the buyer was not entitled to reject, as the breakages could be repaired at trifling cost, and as deterioration from tear and wear was to be expected in a second-hand machine.

Held that the engine was disconform to description, and that the buyer was entitled to reject it.

2D DIVISION. Sheriff of Fife and Kinross.

ON 16th October 1895 Roberts & Company, machinery merchants, Leeds, wrote to David Yule, Abbotshall Mills, Kirkcaldy,—"We have pleasure in bringing to your notice, 10,245 one 4 h.-p. 'Stockport,' by the well-known makers, Messrs Andrews & Co., with tank and all accessories. This engine is in excellent order, and was running up to within about a week ago, when we pulled it out to replace with a new 8 h.-p. nominal. There was no fault of it being taken out, but simply because it was too small. It would be put on rails, Leeds, for £47, 10s., and as it is really in excellent condition, it is a great bargain at this price, and will soon go. You need not be afraid of ordering it without seeing, but, of course, we should be only too pleased to shew it you or to any one else you may depute, by giving us a clear day's notice so that our Mr Roberts could be about."

On 17th October the following telegrams passed between the parties:—

Yule to Roberts & Company.—"Offer forty-five delivered Kirkcaldy. Wire forward immediately if accepted."

Roberts & Company to Yule.—"Will deliver Kirkcaldy for £47, 10s. Cannot do better. Bargain. Wire instantly."

Yule to Roberts & Co.—"Accept your offer. Send at once."

These telegrams were duly confirmed by letters between the parties, also dated 17th October; and on that day Roberts & Company wrote another letter to Yule, in which they said,—"Thanking you for your order for gas-engine. You will be pleased to hear that we have been looking at it this afternoon personally, and have to say that it is about the best second-hand gas-engine we have ever sold, and you have really got a bargain. All the parts are very good, and scarcely worn; in fact it has done very little work, and we have replaced it with a larger one."

The gas-engine arrived at Kirkcaldy on 22d October, and Yule, after getting the gas company to lay down piping for the introduction of gas, employed Thomas Bernard, a local engineer, who had had experience in the erection of gas-engines, to erect and work the engine. After erecting the engine Bernard found that it could not be made to work, and on 12th November Yule wrote to Roberts & Company intimating this.

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Roberts & Company replied next day, expressing their surprise, and suggesting some slight remedies.

Yule replied on the 15th November,—"The engineer has again tried the engine, but can make nothing of it. I would suggest that you should get Messrs Andrews [the makers of the engine] to send one of their men. I presume they have men in Scotland."

Roberts & Company replied next day that the engine "was running splendidly when we bought it here, and certainly it is no fault of the gas-engine, but must be the fault of your men fixing the connections, &c.; of this we are absolutely certain, and it is a pity if any ordinary mechanic cannot make it work right. However, we have asked our friends, Messrs Andrews, for whom we are agents, if they have any men in Scotland who can look at it," and in a subsequent letter Roberts & Company intimated that the engineer attached to Messrs Andrews' Glasgow agency would be sent.

On 2d December Yule wrote to Roberts & Company:—"Messrs Andrews' man has not yet turned up here, and as I cannot afford to wait longer, I will require to look out for something else, unless it is set agoing this week."

Messrs Andrews' engineer at Glasgow—a man named Price—inspected the engine on 9th December, having been unable to come earlier through ill-health; and on the same day Yule wrote to Roberts & Company,—"The engineer from Glasgow called here to-day in connection with the gas-engine, and along with Mr Bernard tried to start it, but without any result, and no doubt he will be sending you his report to-day. I will leave him to tell his own story. . . . I enclose Messrs Bernard's account, and on receipt of your cheque will return the engine to your order at Kirkcaldy Station."

Roberts & Company replied on 16th December,—"Referring to the 4 h.-p. 'Stockport' gas-engine we sold to you, we have been having some considerable correspondence with works respecting this matter, and we have decided to make it right by putting in a new liner, and new piston rings, and a new mushroom valve box, &c., as recommended by the engineer who came to inspect on our behalf. We have requested the works to have this done immediately, and yon may rely upon it being done in a businesslike manner, and it will then work all right.

"This will be a very serious thing to us indeed, but we do it rather than put you to any more inconvenience, and to keep up to the description given you."

Yule replied next day that he regretted he could not keep the engine now, as he could not wait longer, and had to get a machine elsewhere.

As Yule declined to recede from this position, Roberts & Company, on 22d January, brought an action against him in the Debts Recovery Court, at Kirkcaldy, for the price of the engine.

A proof was allowed.

Price, Andrews & Company's engineer, as a witness for the pursuers, deponed,—"On trying to start the engine I discovered that it would not start, therefore I had to take it to pieces to discover where the defect was. On pulling out the piston I discovered that one of the three working piston rings was broken, also one of the junk rings and one of the compression rings. The half of the compression ring was off. This would prevent the engine from working, these breakages being at vital points. On further examination of the engine I dis-

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covered that the mushroom valve was a little worn. The mushroom valve is that by which the air and gas is let into the explosive chamber; the effect of the mushroom valve being worn was that it would not allow the valve to come down on its seat, and consequently there was a loss of pressure. I examined the cylinder lining. There was nothing defective in its construction, only ordinary wear and tear. I put the engine together again. I tried to start it. I found that it would not go. I did not expect it to go under the circumstances, the breakages that I have mentioned being sufficient to prevent it working. . . . I pulled the engine to pieces again, and minutely inspected the cylinder lining, and I found this was worn one-sixteenth of an inch, and this, together with the broken piston rings and junk rings, is the cause of the engine not starting. I reported on the defects. . . . I consider a new liner and new piston rings, and the new mushroom valve box, as ordinary repairs to second-hand engines. After these are done the engine is practically as good as new. Messrs Andrews sell such engines after they have had such repairs put on them from £70 to £80. They usually give the same guarantee with a second-hand engine so repaired as they do with a new engine. A second-hand engine so repaired is as good as a new one so far as the working parts are concerned. A person acquainted with gas-engines would not expect to get a second-hand 4 h.-p. engine thoroughly overhauled for £47, 10s. He would assume from the price that such a 4 h.-p. engine would require some overhauling. . . . I reported that I would make the engine right by putting in a new liner, a new set of rings, a new mushroom valve, and a new compression ring. The engine then would be practically new. These repairs would have taken me four days to execute. The defect of the liner was caused by the ordinary tear and wear, and the action of the gas-engine. . . . There is nothing incredible in the statement that this engine, before being sent here, might have been working with the worn liner and doing very well, but not with the broken rings. . . . It might have been working quite well even although the rings were worn, even old rings. There would be a little escape of compression owing to the tear and wear of the liner and the rings. The loss of compression might depreciate the horse-power to the extent of 1½ horse-power. A 4 h.-p. nominal engine works up to 7 h.-p. actually if required,—that is, when the engine is taxed to its full power. My 1½ means 1½ off 7. Notwithstanding this slight escape of compression this engine might have been a good working 4 h.-p. engine before it came here. . . . The liner was not too far gone for the repairs that I have mentioned [*i.e.*, the renewal of the broken rings.] The engine would work with a good deal less than my report, three new piston rings and a new compression ring would make it work as a second-hand engine. . . . Roughly speaking the cost of three new piston rings and a compression ring, which would make it go as a second-hand machine, would be £1 to £1, 10s." In cross-examination, witness further deponed,—"(Q.) As a skilled engineer, would you consider that this engine could have been describable as one of the best second-hand engines ever seen? (A.) My answer to that would be that I would consider it a fairly good second-hand machine. . . . When an engine is advertised as 4 h.-p., that means 4 h.-p. nominal, unless stated otherwise. (Q.) Supposing you knew that it had lost 1½ h.-p., would you still advertise it as a 4 h.-p. engine? (A.) Yes, as a 4 h.-p. second-hand engine."

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Arthur Roberts, the sole member of the pursuers' firm, deponed that he had "seen the engine running and working about a week or ten days before it was taken out of the yard in which it was working" before being removed to the pursuers' premises, and that it remained in their premises for about a week before being sent to the defender. Witness further deponed that the total cost of the repairs specified by Price, including the renewal both of breakages and worn-out parts, would be about £8, 10s. "The cost of a new 4 h.-p. gas-engine is about £95. I certainly would not sell an engine which had just been fitted up by Messrs Andrews & Company for £56. I know that they are in the habit of making such repairs to second-hand engines and selling them. They will be able to sell a 4 h.-p. gas-engine overhauled in this way for £75. . . . Cross.—I draw a distinction between a second-hand engine which is as good as new, and a second-hand engine which is fit to run. . . . The engine is not a particularly old-fashioned one. It was not made to-day."

Bernard, the Kirkcaldy engineer, employed by the defender, and examined as a witness for him, deponed in cross-examination,—"(Q.) What would be the value of this engine after it got all these repairs? (A.) Just about its present price, £47, 10s. Of course it is one of those old-fashioned ones. (Q.) If it belonged to you and you had to sell it, would you sell it for that? (A.) Yes, if I could get it. (Q.) After all these repairs were put upon it? (A.) Yes."

Benjamin J. Smith, the engineer in charge of the engine before it was sold to the pursuers, a witness adduced by the pursuers, deponed that it "was a fairly good engine. We worked it . . . regularly till the day it was taken out. We got some new machinery which was very heavy, and the gas-engine was not competent for that work. Up to the time we got that new machinery it worked all right."

The defender's manager deponed that the defender required it for an immediate and temporary purpose.

There was a conflict of evidence as to whether any or all of the breakages above mentioned occurred before or after the engine came into the defender's possession.

On 26th March 1896 the Sheriff-substitute (Gillespie) pronounced this interlocutor:—" . . . Finds that the gas-engine in question is a fairly good second-hand engine, and that it was running up to about a week before the sale to the defender: Finds that the engine was received at Kirkcaldy on 22d October; that after being erected it could not be got to work: Finds that the cause of this has since been ascertained to be the breakage of certain rings which formed vital parts of the engine, but which would only have taken about £1, 10s. to renew: Finds that it is uncertain whether the breakage occurred in transit or after delivery to the defender, but that the former is more probable. . . . Finds in law that the gas-engine fairly corresponding with its description, the defender was not entitled to reject it, though he was entitled to get the broken rings renewed at the pursuers' expense, and that in any view the pursuers' offer of 16th December 1895, to which they still adhere, was an adequate offer: Finds that on that offer being satisfactorily carried out the pursuers would be entitled to the price, or, more simply, that they are now entitled to the price less the estimated cost of the proposed operations; therefore ordains and decerns the defender to make payment to the pursuers of £39: Finds the pursuers entitled to

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expenses, subject to a deduction of one-fourth from the taxed amount thereof," &c.*

On appeal, the Sheriff (Mackay) pronounced this interlocutor:—"Having considered the proof and whole process, adheres to the interlocutor appealed against, and decerns." †

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* "NOTE.— . . . The ordinary rule applies that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with that description—Sale of Goods Act, 1893, sec. 13.[1]

"The Sheriff-substitute is of opinion that though the engine did not deserve the superlative epithet bestowed on it by the pursuers, it fairly corresponded with the description as distinguished from quality. In arriving at this decision he relies much on the evidence of Benjamin J. Smith, an impartial and intelligent witness.

"The defender knew that the engine was second-hand, and a second-hand machine necessarily means some wear and tear. It was a pity, no doubt, that the pursuers should have put the defender off his guard by writing, 'You need not be afraid of ordering it without seeing,' even though he adds that he would be pleased to shew it. It is a case in which the seller is morally bound to do more than the law probably compels him, and the pursuers have properly recognised their obligation by their offer of 16th December, which, in answer to a question by the Court, was expressly adhered to by the pursuers' agent after consultation with his client. It is not even alleged, however, that the expression of opinion above quoted was made in bad faith.

"It would have been better if the pursuers had made the offer of 16th December at an earlier stage. At first they seemed to take the position that they were under no obligation whatever in regard to this engine. But in the Sheriff-substitute's opinion all that the defender could claim as matter of strict legal right was to have the breakages, but not the worn parts, made good at the pursuers' expense. The expense of renewing the broken rings was so small a part of the price of the engine that it cannot be said that the pursuers failed to perform their contract in any material part—Sale of Goods Act, sec. 11 (2).[1] Consequently it was not open to the defender to reject the engine. . . ."

† "NOTE.—I have found this case not free from difficulty. It is impossible not to have some sympathy with the appellant, who bought an engine described as 'now running in good order and a bargain,' and got one which he was unable to make work, and which, after examination (necessarily at some cost) by a practical engineer at his instance, and a second engineer probably of wider experience in gas-engines in the employment of the makers of this one, was found to have defects which disabled it from going without an expenditure of about one-fifth of the price. But after examination of the evidence I have come to agree with the Sheriff-substitute, and I add a few remarks on points which appear material in consequence of the importance of the case to the parties.

"1. This engine was described as 'in good order' and 'running' . . . and the proof that it was so by the evidence, not only of Mr Roberts, but of Mr Benjamin J. Smith, who took charge of the working, is uncontradicted and unshaken.

"2. The fact that it was a second-hand article is necessarily implied from the above description, and its price, which was much below that of a new gas-engine of 4 horse-power. It is stated to be second-hand in the invoice.

"3. The faults which prevent it working are, I think, proved to have been a combination of ordinary wear and tear, with breakages of vital parts, and the former would have been insufficient by itself." [The Sheriff then

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[1] Quoted *infra*, p. 861, note.

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The defender appealed, and argued;—The engine here was sold by description, a material part of the description being that the engine was in "excellent order." It did not correspond with that description, for it would not work at all. The defender therefore was entitled to reject.* *Bradley's*[1] case was not in point, for there the defects could have been remedied at a trifling cost, here the defects would require an expenditure equivalent to about one-fifth of the price. Further, in *Bradley's*[1] case the machine always worked when in the hands of the seller's own men, which was not the case here. It was nothing to the point to prove that the engine was very cheap at £47, 10s.; that was what the pursuers said it was—"a great bargain." The evidence, however, did not establish that it was a great bargain—even with all the repairs it was nothing more than a fairly good second-hand engine of an old-fashioned type. It might be that the case would have been within the rule of *Bradley's*[1] case if the only defects had been the breakages, but there was also the question whether the wear and tear was not greater than was to be implied from the description. A second-hand machine meant anything from a machine which was as good as new to one which was practically useless, and the description here imported one of the former class. Assuming that a certain amount of wear and tear was to be implied, a loss of horse-power through wear and tear, equivalent to nearly one-fifth of that stipulated, shewed that the machine was not conform to the description, and an expenditure of £7—in addition to £1, 10s. for breakages—where the price stipulated was £47, 10s. was a much more serious matter than the trifling defects contemplated in *Bradley's*[1] case.

Argued for the pursuers;—The defender had bought a second-hand engine, but his arguments proceeded on the assumption that the rules applicable to new machines applied. Assuming that the pursuers were responsible for the breakages, the rule of *Bradley's*[1] case applied,

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considered the question whether the breakages had occurred after the engine had reached the defender, coming to the conclusion that they had.]

"4. Although the defender was naturally anxious to have the faults repaired speedily, . . . I do not think he clearly intimated it was required for a special temporary purpose, and certainly he did not do so before accepting the offer.

"5. Whether the case is taken on the principles of the common law of Scotland, or under section 11 (2) and section 13 of the Sale of Goods Act, 1893, I do not think the defender is now entitled to reject the engine. The defender has not proved a breach of any material part of the contract, or that the engine did not correspond with the description.

"To persons familiar with the style of business advertisements, the description of an article in an advertisement as 'a bargain,' should be by no means an unqualified recommendation. The eulogies of dealers are not warranties.—Bell's Prin, sec. 111. . . ."

* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), section 11, subsection 2, enacts,—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Section 13 enacts,—"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. . . ."

[1] Bradley & Co. v. G. & W. Dollar, May 20, 1886, 13 R. 893.

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so far as breakages were concerned, for the breakages could be repaired at a trifling cost; they were not a failure to perform a material part of the contract within the meaning of the Sale of Goods Act, 1893. The wear and tear, and consequent loss of horse-power, were more serious in point of cost; but wear and tear was just what was to be expected in a second-hand machine. A second-hand machine did not cease to be a 4 horse-power machine merely because it had lost some of its horse-power through wear and tear. If a very large sum of money had been required to put it right, the case would have been different, but adding £8, 10s. to £47, 10s. came to £56, which was well within the £70 or £80 which the makers would have charged for a second-hand machine restored so as to be as good as new. It therefore had been truly described as in excellent condition and a great bargain. In any view the expression "excellent condition" was not a warranty. The pursuers' letter of 16th December was not an admission of fault, but an amicable offer to settle.

LORD JUSTICE-CLERK.—This case relates to a not very large sum of money, and it has been decided in the same way by both the Sheriffs, although on slightly different grounds. It is a case relating to the construction of a contract, and the question is whether that contract has been fulfilled or not. The contract was made by letter, the pursuers offering to send for £47, 10s. a gas-engine, which they say "is in excellent order" and "a great bargain at this price." This offer was accepted by the defender, and the engine was sent to Kirkcaldy. When it arrived it could not be got to work. A man, who is said to have had large experience in fitting up such engines, was sent to examine it, and he could not start it. Then a man called Price was sent by Messrs Andrews, the makers of the engine, and he could not make it work either. He took it to pieces, and found that one of the piston rings was broken, and also one of the junk rings and one of the compression rings. He also discovered that the mushroom valve was a little worn, and that the cylinder lining was worn to the extent of one-sixteenth of an inch. He reported that he could put the engine right by putting in a new liner, a new set of rings, a new mushroom valve, and a new compression ring. Then he gives evidence that the defects found by him were defects which it would require an expenditure of about one-fifth of the price paid for the engine to rectify, and that if it were only repaired sufficiently to make it go at all, it could only work up to five and a-half horse power instead of seven. It is difficult to say that an engine could be in "excellent working order" which required such repairs.

It would be difficult and indeed impossible to find as matter of fact that the engine was sent as it was stated to be in the letter by which it was offered for sale, "in excellent order." The repairs which required to be done to it involved an expenditure of £8, 10s. If the pursuers had offered to make these repairs at an early stage, when there had been no loss to the defender by delay, there might have been a different question, although I do not say that even then the defender would not have been entitled to reject. The defender did his best for the engine. He required it for immediate use and for a temporary purpose. I am unable to hold that when he rejected it he was not within his legal right in rejecting, or even that he was acting harshly to the pursuers. The engine was useless to him

and the repairs which it required to make it of use were not trifling repairs, but material and essential. The letter of 16th December is practically an admission that this was so. On the whole matter I am of opinion that the defender was entitled to reject.

LORD YOUNG.—I am substantially of the same opinion. I really expressed the view which presses on my mind in the last question I put to pursuers' counsel. The question I asked was whether we could find in fact that this engine conformed to the description given of it by the pursuers. We must here pronounce findings in point of fact. I could not find as the Sheriff-substitute has found, or use the expressions which he has used, when he finds that the gas-engine fairly corresponded with its description. We shall have to find that the contract was as expressed in the offer contained in the letter of 16th October, and accepted by the defender. I desire to say, because I am convinced it is so, that I think the pursuers acted in all integrity, and with an honest belief that the engine was in the condition described in their letter. I am sure they were not intentionally exaggerating, or acting otherwise than might have been expected from any perfectly respectable business man. But taking the contract as made in the letter to which I have referred, we must find that the engine was not according to contract. In terms of the pursuers' own letter of 16th December, the engine would require £8, 10s. to make it right. The Sheriff accepts that view, and he uses language which shews that he was somewhat doubtful as to his judgment. He proceeds on the view that £8, 10s. was necessary to make the engine according to contract, and proceeding on that view, I cannot affirm his judgment, for if £8, 10s. was required to make the engine according to contract, then the legal conclusion is that it was not according to contract before, and that the buyer was entitled to reject. I think there was perfect integrity in the seller, but I think there was perfect integrity on the part of the buyer also. He fairly and repeatedly tried the engine and found that it would not work. He had bought it for a temporary purpose, which was explained to the pursuers, and he required it immediately. I think he was perfectly entitled to reject. With an interlocutor expressing these views, I am prepared to concur. I think we should alter the judgment of the Sheriffs, and assoilzie the defender.

LORD TRAYNER.—I agree. I think it right to express my concurrence with what Lord Young has said as to the good faith of the pursuers. I do not think they were trying to palm off an engine which they knew was totally disconform to the description they gave of it. On the other hand, the defender was not rejecting the engine because it was more convenient for him to do so, or on trivial grounds which he had set himself to discover.

The contract is in writing. The pursuers offer to sell, and do sell, an engine "in excellent order" delivered at Kirkcaldy for £47, 10s. I think that the letter of 17th October is of some importance. It is true that as it followed the conclusion of the contract, it cannot be read as qualifying the contract, or as increasing the burden laid upon the sellers, but I think that it may legitimately be read as a contemporary interpretation of what the pursuers meant by the contract. They tell the defender "We have been

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looking at it this afternoon personally, and have to say that it is about the best second-hand gas-engine we have ever sold, and you have really got a bargain. All the parts are very good, and scarcely worn." That letter shews what kind of engine they understood they had sold, and were to deliver to the defender. But without attributing too much weight to that letter, and reverting to the undoubted terms of the contract as contained in the letter of 16th October, the question is whether the engine in question was delivered in excellent order and condition. It is rather curious that the engine should have been running within a week, and that it would not work at all when tried at Kirkcaldy. It was not merely that it would not work properly, it would not work at all. The defender was so anxious to get the use of the engine for his temporary purpose that he applied to the sellers and they got a man from the makers to try and make it go. That man says very distinctly that he tried various ways, but that the engine could not be made to work. In short, it never could be made to work in defender's premises at all. An engine in such a state cannot be said to be in excellent condition. Then we find that after giving it a fair trial, and being unable to get it to work, the defender rejected it about a month after it had been sent to him. Various suggestions by the pursuers follow. In their letter of 16th December they offer to repair it, as recommended by their own engineer. For what purpose was it to be repaired? They say in their letter that if certain things are done, which they purpose to do, then it (the engine) will work all right. Without the repairs it would not work. That, as your Lordship has said, is a practical admission, after a report by their own engineer, that it was not in excellent working condition when it was sent.

A good deal has been said as to whether the defects were material. Surely they were, when without their being remedied the engine would not work at all. But on this point it is important to observe that according to the evidence of the pursuers' own witness, the engine as delivered (sold as an engine of 4 h.-p.) could not be worked much above three-fourths of that power, and that to bring it up to the description in the contract would require an expenditure on repairs to the extent of about a fifth of the whole price.

I am of opinion that there were material defects in the engine, and that the pursuers failed to fulfil their contract.

I agree with Lord Young's observations on the Sheriff-substitute's findings.

I think that the appeal should be sustained, and the defender assoilzied.

LORD JUSTICE-CLERK.—As your Lordships have both expressed an opinion as to the *bona fides* of the parties in this case, and as it might be supposed, if I remained silent on that matter, that I was of a different opinion, I think it right to say that I entirely concur with what your Lordships have said as to the perfect *bona fides* of both the parties.

LORD MONCREIFF was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutors appealed against: Find in fact (1) that the contract for the sale of the gas-engine in question was contained in the letter from the pursuers to the defender and telegrams dated respectively 16th and 17th October 1895; (2) that the said gas-engine was not conform to contract, and was timeously rejected by the defender: Find

in law that the defender was entitled to reject the engine as disconform to contract: Therefore assoilzie the defender from the conclusions of the action, and decern: Find him entitled to expenses in this and in the inferior Court," &c. No. 169. June 24, 1896. Roberts & Co. v. Yule.

WISHART & SANDERSON, W.S.—PETER MORISON Jun., S.S.C.—Agents.

JOHN WEIR AND OTHERS (Urie's Trustees), Pursuers and Real Raisers.—*John Harvey.*
MRS AGNES URIE OR ANDERSON AND OTHERS, Claimants (Reclaimers).—*W. Campbell—James Reid—John Harvey.*
MRS JESSIE URIE AND OTHERS, Claimants (Respondents).—*Johnston—Umpherston.*

No. 170. June 24, 1896. Urie's Trustees v. Urie.

Succession—Provision to children and issue of children—Clause of forfeiture—Revocation of provision in favour of one of children—Claim for and receipt of legitim by that child—Effect on provision for issue of child.—A testator directed his trustees to hold and convey one-fourth of the residue of his estate for behoof of his son John in liferent, and John's children in fee, and made similar provisions in favour of his sons Thomas and George, and their children, and provided the remaining one-fourth part to the children of his deceased son James. The settlement contained this declaration,—"Declaring that in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect in whole or in part, then such sons, as well as their descendants, shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of, which right and interest shall in that event accresce and belong to such of my sons, the said John, Thomas, and George, and their descendants, and the descendants of my son James, as shall abide by this settlement and accept of the provisions herein contained."

By codicil the testator revoked the liferent provision of one-fourth share in favour of his son John, and instead directed his trustees to hold and apply the said share for behoof of John's children, "and with this alteration I confirm the said trust-disposition and settlement in every respect."

John claimed and received payment of legitim.

In competition between John's children and the surviving descendants of the testator other than John and his children, *held* that the right to the portion of the trust-estate bequeathed to John's children by the trust-disposition and codicil had not been forfeited by John having claimed and received payment of his legitim.

2D DIVISION. Lord Low.

GEORGE URIE, blacksmith in Glasgow, died on 28th June 1885, leaving a trust-disposition and settlement, dated 28th November 1876, and a codicil thereto, dated 5th May 1879. By the trust-disposition and settlement the testator in the first place directed payment of his debts. In the second place, he directed that the whole free income of his means and estate should be paid to his wife during her viduity. He then, in the third place, directed his trustees that they should, "upon the lapse of the foresaid liferent, by the death or second marriage of my said spouse, or upon my own death should she predecease me, hold, apply, pay, and convey the whole rest, residue, and remainder of my means and estate, as follows, viz., one-fourth part or share thereof to and for behoof of my son John Urie for his liferent alimentary use allenarly, not affectable by his debts or deeds or the diligence of his creditors, and to and for behoof of his lawful children alive at the period of payment after mentioned, jointly with

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the lawful issue of any of his children who may have predeceased that period leaving issue (the division being *per stirpes*), whom failing, the lawful children alive at said period of payment of my other sons, Thomas, George, and James (the division being *per stirpes*), jointly with the lawful issue of such of the children of my said sons, Thomas, George, and James, as may predecease said period leaving issue, such issue being entitled equally among them to the share their parent would have been entitled to if in life, whom all failing, my own nearest heirs and assignees in fee." The testator made similar provisions of one-fourth of his means and estate in favour of each of his sons, Thomas and George Urie, and their children, and provided that the remaining one-fourth of his means and estate should be held and applied, paid and conveyed, to and for behoof of the lawful children alive of his son James Urie (who had predeceased him), jointly with the lawful issue of any of said children who might predecease the period of payment. The deed then contained declarations with respect to the payment and vesting of the provisions in favour of the testator's grandchildren and their issue, and also the following declarations:—"Which provisions in favour of my said wife and sons and their descendants respectively are hereby declared to be, and shall be accepted of as in full to my said wife and sons respectively of all terce of land, *jus relictæ*, legitim, dead's part, portion-natural, and generally of the whole claims competent to them by, through, or in consequence of my decease: Declaring that, in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect, in whole or in part, then such sons as well as their descendants shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of, which right and interest shall, in that event, accresce and belong to such of my sons, the said John, Thomas, and George, and their descendants, and the descendants of my said son James, as shall abide by this settlement, and accept of the provisions herein contained."

The codicil was in the following terms:—"I, . . . do hereby revoke the liferent provision of one-fourth part or share of the residue of my estate in favour of my son John Urie, specified in the third purpose of the said trust-disposition and settlement, and instead I direct my trustees to hold and apply, pay and divide the said one-fourth part or share of said residue to and for behoof of the lawful children alive at said period of payment of my said son John Urie, jointly with the lawful issue of any of his lawful children who may have predeceased that period leaving issue (the division being *per stirpes*); whom failing, the lawful children alive at said period of payment of my other sons, the said Thomas, George, and James Urie (the division being *per stirpes*) jointly with the lawful issue of such of the children of my said sons, Thomas, James, and George, as may predecease said period leaving issue, such issue being entitled equally among them to the share to which their parent would have been entitled if in life; whom all failing, my own nearest heirs and assignees: And with this alteration I confirm the said trust-disposition and settlement in every respect."

The testator was survived by his widow, by his sons John and George, by issue of his son James, who, as already mentioned, was dead at the date of the trust-disposition, and by issue of his remaining son Thomas, who also predeceased him.

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John Urie, the son whose provision had been revoked by the codicil, claimed and received payment of his legitim in 1885.

Mrs Urie, the testator's widow, died on 14th April 1894.

On her death questions arose as to the effect on the provision in favour of John Urie's children of his having claimed and received payment of his legitim, and the trustees accordingly brought the present action of multiplepoinding.

The primary question, and the only question under the consideration of the Court at the stage of the proceedings now reported, was as to whether the provision in favour of John Urie's children had been forfeited in consequence of his having claimed and received legitim.

Mrs Jessie Urie or Williams and others, John Urie's children, lodged a claim in which they maintained that the provision in their favour was not affected by their father's action.

On the other hand Mrs Agnes Urie or Anderson and others, the children of the testator's deceased son Thomas, George Urie, the testator's other surviving son, and children, and Mrs Martha Urie or Folland and others, the children of the testator's deceased son James, lodged claims in which they maintained that on a sound construction of the trust-disposition and codicil, the provision in favour of John Urie's children had been forfeited by his claiming and receiving payment of his legitim.

On 29th May 1896 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the right to the portion of the trust-estate bequeathed to the children of John Urie by the trust-disposition and settlement and codicil of his father George Urie mentioned on record, has not been forfeited by the said John Urie having claimed and received payment of his legitim out of the trust-estate, and with that finding, appoints the cause to be enrolled for further procedure; meantime reserves all questions of expenses." *

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* "OPINION.—The only question in this case with which I have at present to deal is, Whether John Urie, by claiming his legitim, caused the provisions made for his children by the settlement of his father, the late George Urie, to be forfeited?

"If the original settlement had not been altered, and if John Urie had repudiated the liferent thereby provided to him, and claimed legitim, I should have had difficulty in coming to any other conclusion, upon a construction of the clause of forfeiture, than that, not only John Urie's right of liferent, but also his children's right of fee was forfeited.

"But by the codicil the provision in favour of John Urie was revoked, and the question is, Whether the clause of forfeiture applies to the case of a son who was not a beneficiary under the settlement claiming legitim?

"It was argued that the language of the clause was wide enough to cover such a case, because it was declared that a forfeiture should take place, not only 'in the event of any of my said sons or their descendants repudiating this settlement,' but also in the event of their 'by any means preventing it from taking effect in whole or in part.' The argument was that, by claiming legitim, John Urie had prevented the settlement from taking effect.

"It is quite certain that the clause, as originally framed, was intended only to apply to the sons John, Thomas, and George—who were given a liferent interest by the settlement,—because, although another son—James—is mentioned in the settlement, he was dead, and his name is only brought in for the purpose of describing a class of beneficiaries, namely, his children. But the result of the codicil was to strike John out of the settlement as a beneficiary, and his name thereafter only remained in the settlement, like that of James, for the purpose of describing a class of beneficiaries. The

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The Lord Ordinary having granted leave to reclaim, the claimants other than John Urie's children reclaimed. The arguments for them sufficiently appear from the opinion of the Lord Ordinary.
The respondents, John Urie's children, were not called upon.

LORD JUSTICE-CLERK.—I think the Lord Ordinary's interlocutor must be affirmed. John Urie, at the time this testament came into operation, had nothing given to him which he could accept as being in full of all his claims, and he had nothing under the settlement which he could repudiate. He had no interest in the settlement at all, and was not in a position to demand anything under the settlement. Therefore, I think the Lord Ordinary is right when he holds that the penalty clause does not apply under the circumstances which have arisen.

LORD YOUNG.—I am of the same opinion, and really without any doubt. The will divides the estate of the testator into four parts, and it gives one-fourth to each of his three surviving sons in liferent, and to the sons and descendants of each in fee, and it contains the declaration that "in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect in whole or in part, then such sons, as well as their descendants, shall forfeit their whole right." Undoubtedly that applied to the whole three sons, as the will said "in the event of any of my said sons repudiating the settlement." The dead son of course could not repudiate; he could do nothing. When the codicil was made and executed, one of the sons, John, is taken out of the number. He is no longer "one of my said sons." He is taken out of the settlement altogether—as com-

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question, therefore, whether the 'said sons,' to whom the clause refers, includes John, is a question of construction.

"Now, the penalty for any of the sons repudiating the settlement, or preventing it from taking effect, is that 'such sons, as well as their descendants, shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of, which right and interest shall, in that event, accresce and belong to such of my sons . . . and their descendants . . . as shall abide by this settlement.' That is a penalty which is only applicable to persons who have been given a right and interest in the succession, because the event contemplated is the repudiation of the settlement by his son or his descendants, and the penalty is the forfeiture of the right of the son and his descendants. The penalty, therefore, does not apply to the circumstances which have arisen. The truster has declared his intention if a son for whom he has made a provision repudiates the settlement, but he has not declared his intention if a son to whom he has given nothing claims his legitim.

"No doubt, in order that his intention that John should get no part of his estate might be enforced, the truster might very well have stipulated that the children of John should take one-fourth of the estate only on condition that he should not claim legitim. The truster may, indeed, have believed that the clause of forfeiture would have that effect. But, in my opinion, that is not what the clause of forfeiture says. It is a clause which is framed upon the ordinary basis of a clause of forfeiture, the basis, namely, that an election is offered between conventional and legal provisions, and the forfeiture is to be incurred if the beneficiary chooses the latter and rejects the former. John therefore, who had no election given to him, does not seem to me to fall within the scope of the clause, and I am accordingly of opinion that the right of fee given to his children has not been forfeited."

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pletely out of it as if he had never been in it. Accordingly upon his father's death he is left, so far as his father's will is concerned, without anything—destitute. His children take a share under the will, and they might have repudiated the settlement like any of the other descendants of his sons, or done something to prevent it from taking effect; but John could do nothing in the way of repudiating the settlement, for there was nothing in the settlement he could repudiate. He was not in it at all. I think the true reading of the clause is, "in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect" —meaning, in the event of their repudiating it or by any other means preventing it from taking effect. Now, John could not do that; he could not prevent it from taking effect by repudiation. But it is said he could prevent it from taking effect, if he could be regarded as one of the sons to whom it applied after the codicil, by taking a fund of legitim which would diminish the estate for division among the others. But that is not taken under the settlement, and he no more diminishes the estate under the settlement by taking that than if he had been a creditor of his father upon his father's death, say upon a bond for £1000 which the father had granted to his son for lent money—a quite conceivable case—and he had demanded payment of that sum of money. He would thereby have done something which would have diminished the estate, and prevented the will from taking effect with respect to that £1000 which he claimed as his debt, but it would not have been a reasonable or admissible meaning to put on this will that it was intended to apply to repudiation of that kind. But when his father leaves him nothing and he claims his legal provision of legitim—that is, what is due to him by law—he does no more to interfere with the operation of the will than in the case which I have supposed of his claiming payment of the £1000 bond which his father owes him. Therefore, I do not think the clause applies to the case at all, and the true reading of the provision is in my opinion this:—"If any son repudiates what I have given him under the will, and claims something else or does anything inconsistent with my will taking effect according to its expression, he shall forfeit his right, and if any descendants of sons who are provided for by this will, repudiate it, claiming the legal provisions which descendants might, or in any other way interfere with the execution of my will, according to the intention expressed, they shall forfeit"—not that a son repudiating or doing anything to hinder the will, shall forfeit for himself and his descendants, but that he shall forfeit for himself, and descendants shall be in the same position as sons. If they do anything to repudiate or prevent the will taking effect, they shall forfeit for themselves. It is not only capable, I think, of that reading and interpretation, but that is in my opinion the true reading and interpretation. But if the clause were only reasonably capable of that reading and interpretation I should adopt it and give effect to it as leading to the real justice and equity of the case, which is presumably in accordance with the intention of the testator. I therefore agree with the judgment of the Lord Ordinary.

LORD TRAYNER.—I agree with the Lord Ordinary, and with the views which he has stated in support of his interlocutor.

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LORD MONCREIFF.—I agree with the Lord Ordinary for the reasons which he has given. I think that in the circumstances the clause of forfeiture does not apply to the case. It applied only to the case of a son for whom a provision is made in full of legitim in the will; and as by the codicil the testator struck John out of his will altogether, and deprived him of the provision which he had given him under the will, I think the clause of forfeiture does not apply to the case which has arisen.

THE COURT refused the reclaiming note, and adhered to the interlocutor reclaimed against.

MORTON, SMART, & MACDONALD, W.S.—MILLAR, ROBSON, & M'LEAN, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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THE STANDARD SHIPOWNERS' MUTUAL FREIGHT, DEAD FREIGHT, DEMURRAGE, AND DEFENCE ASSOCIATION, LIMITED, Pursuers (Appellants).—*D.-F. Asher—Salvesen.*

ROBERT TAYLOR, Defender (Respondent).—*Kennedy—W. Thomson.*

Process—Appeal—Competency—Sheriff—Value of cause—Debts Recovery (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 96), *secs.* 12 *and* 13.—*Held* that when a Sheriff's judgment in an action for payment of a sum under £25 involves the determination of a question as to the defender's liability for further payments, an appeal to the Court of Session will not be competent unless it appears from the process that the amount involved in the determination is over £25.

Opinion (*per* Lord Kinnear), that as the only process competent under section 2 of the Debts Recovery Act, 1867, was a summary process for payment of a debt, the value of the cause must be the highest sum for which decree could be given.

Drummond v. *Hunter*, Jan. 12, 1869, 7 Macph. 347, 41 Scot. Jur. 203, *approved and distinguished.*

1ST DIVISION.
Sheriff of Forfarshire.

ON 15th July 1895 the Standard Shipowners' Mutual Freight, Dead Freight, Demurrage, and Defence Association, Limited, raised an action in the Debts Recovery Court at Dundee against Robert Taylor, shipowner, Dundee, for payment of £12, 4s. 6d., "being amount of call made by the pursuers upon the defender and other members of their association towards meeting their liabilities for the year 1894-95, and annual membership fees for the year to 20th February 1896, such call and fees being payable by the defender in respect of the said steamers 'Alice Taylor' and 'Nellie,' entered by him in the pursuers' association for the purpose of protection, in terms of the rules of the association, and which the said defender refuses or delays to pay."

The defender denied liability for the sum sued for, and denied having been a member of the pursuers' association for the years 1894-95 and 1895-96. At the same time, "without prejudice to all his rights and pleas," he tendered payment of £8 as the amount of "calls for 1894-95 policy," and consigned the amount in the hands of the Clerk of Court.

On 26th February 1896 the Sheriff-substitute (Campbell Smith) "finds it to be admitted by the defender that he authorised his name to be entered as a member of this association for the years 1893-94 and 1894-95: Finds that he has paid the proper subscription or con-

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tribution for the year 1893-94, and admitted his willingness to pay the contribution for 1894-95, and that he tendered and consigned said contribution on 24th December 1895, being the sum of £8 sterling: Finds it proved that he did not expressly or knowingly enter the said association for the year 1895-96, and that the pursuers' claim for £4, 4s. for that year has no legal justification of any kind: Therefore assoilzies the defender from the pursuers' claim for £4, 4s. applicable to the year 1895-96."

On appeal the Sheriff (Comrie Thomson), on 19th May, affirmed the interlocutor of his Substitute.

The pursuers appealed. The defender objected to the competency of the appeal.*

Argued for the pursuers;—The appeal was competent. Although the sum sued for was only £12, 4s. 6d., the judgment involved the question of the defender's continuing liability for membership of the association for the year 1895-96, which liability would greatly exceed £25. The pursuers had printed, and now referred to an account,† shewing that the obligations incurred by the defender in respect of membership for 1894-96, amounted to much more than £25. The true criterion of the competency of the appeal had been enunciated

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* The Debts Recovery (Scotland) Act, 1867 (30 and 31 Vict. c. 96), sec. 12, enacts,—"Subject to the provisions contained in the 10th section hereof, and where the cause exceeds the value of £25 sterling, where the case has been heard and the judgment pronounced by the Sheriff, and not by the Sheriff-substitute), in the first instance, it shall be competent for either party to appeal against such judgment to either of the Divisions of the Court of Session. . . ."

Sec. 13.—"Where the cause has been heard by the Sheriff on appeal, and judgment pronounced by him, it shall be the duty of the Sheriff-clerk, immediately on receiving the Sheriff's interlocutor, to transmit a copy thereof to the parties or their procurators; and within eight days . . . after the date of such transmission it shall be competent for either of the parties to appeal against his (the Sheriff's) judgment in the same manner, and to the same effect, and under the same limitations as provided for in the immediately preceding section with regard to appeals from judgments of the Sheriff in the first instance."

† [This account was not lodged in process.]

"ACCOUNT due by Defender to Pursuers as at 24th February 1896.

	"*Policy*, 1894-95.		
"1.	Call made, March 1895,	£8	0 0
	"Paid December 1895.		
"2.	Call made September 1895,	£16	0 0
"3.	Call made February 1896,	8	0 0
	"(Total of calls for 1894-95, £32.)		
	"*Policy*, 1895-96.		
"1.	Annual contribution,	4	4 0
"2.	Call made February 1896,	8	0 0
		"£36	4 0

"*Note.*—Assuming that the calls for 1895-96 will be the same as for the previous year, this will involve a further liability of £24, bringing up the total amount due to £60, 4s."

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by Lord Barcaple in his opinion in *Drummond's* case,[1] which had been since approved of in *Cunningham* v. *Black*,[2] viz., that the appeal would be competent, although the sum concluded for was less than £25, if it appeared that decree could not be given for that sum without determining a question which involved a larger pecuniary amount than £25. If the interlocutor of the Sheriff was not appealable the question of the defender's liability was *res judicata* in any action for calls due for 1895-96 which the pursuers might make. The soundness of the judgment in *Welsh* v. *Duncan*[3] was questionable, and Lord Rutherfurd Clark had dissented.

Argued for the defender;—The appeal was incompetent. No question of continuing liability was involved. The true test of the value of the cause was the sum which appeared on the face of the summons, or the sum by payment of which the defender could get rid of the action against him.[4] The pursuers had not established that even a continuing liability for calls involved a sum larger than £25, nor was the judgment appealed against one *ad factum præstandum*.[5] The judgment of the Sheriff would not be *res judicata* in any future action.[6]

Lord President.—I should be prepared to give effect to the principle laid down in the case of *Drummond*[7] in cases to which it is clearly applicable. It seems to me to be a very intelligible view which is stated by Lord Barcaple, and one capable of being applied with precision to similar cases. The principle I understand to be this—*prima facie*, the value of the cause is to be found on the face of the summons, but it may turn out that no decree can be given for the sum concluded for in the summons without determining a question which involves a larger pecuniary amount than £25.

When I turn to the present case I find that it is deficient in the facts postulated for the application of that principle. It is quite true that there is a general contention as to the membership of the pursuers' association, and that that problem had to be solved by the Sheriff in order to give decree for the sum concluded for. But then it does not appear that the amount involved directly in the determining of that question is more than £25. We were referred to documents not in process, and it was admitted that, unless we look at them, there is no material before the Court for instructing a greater amount than £25 as depending on any proposition which must form a basis of judgment. Therefore I think that the facts of this case do not bring it within the principle of *Drummond*.[7]

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[1] Drummond v. Hunter, Jan. 12, 1869, 7 Macph. 347, *per* Lord Barcaple, p. 348, 41 Scot. Jur. 203.

[2] Cunningham v. Black, Jan. 9, 1883, 10 R. 441, *per* Lord President Inglis, p. 444; *vide* also Brydon v. Macfarlane, Nov. 2, 1864, 3 Macph. 7, 37 Scot. Jur. 3.

[3] Welsh v. Duncan, July 19, 1893, 20 R. 1014.

[4] Macfarlane v. Friendly Society of Stornoway, Jan. 27, 1870, 8 Macph. 438, 42 Scot. Jur. 209; Dickson v. Bryan, May 14, 1889, 16 R. 673; North British Railway Co. v. M'Arthur, Nov. 5, 1889, 17 R. 30; Heddle v. Gow, Nov. 26, 1880, 18 S. L. R. 96.

[5] Aberdeen v. Wilson, July 16, 1872, 10 Macph. 971, 44 Scot. Jur. 540.

[6] Duke of Sutherland v. Reed, Dec. 18, 1890, 18 R. 252.

[7] 7 Macph. 347.

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It is to be observed that this is a purely petitory action, and it is also to be observed that the rights involved in the determination of the main question for judgment—whatever the amount yielded by them—could yield nothing but money. Accordingly, it seems to me that the appellant here, as the basis of his right to appeal, ought to have been able, but is unable, to instruct that more than £25 was involved in the larger question tabled for the decision of the Court. On these grounds I think this appeal is incompetent.

LORD M'LAREN.—I should be against a very strict construction of the clauses of this Act of Parliament, which limit the right of appeal upon grounds depending on the value of the action, because the expressions used in the statute are, I think, of an intentionally indefinite character, leaving a margin which may be defined by judicial decisions. I think the criterion proposed by Lord Barcaple in the case of *Drummond*[1] does not go in the least beyond what the language of the statute would justify. Where it clearly appears from the pursuer's statement, taken in connection with his petitory conclusions, that the petitory conclusions are not the limit of the question for judgment, but merely represent the amount actually due under a continuing obligation, the decision of the Sheriff is not final in such a case.

I should have been willing to extend that principle to this case if I had thought that it could have been brought within the scope of the decisions as to actions *ad factum præstandum*. But I rather think that the ground on which such actions are appealable is that the value does not admit of pecuniary estimation at all, and therefore that the statute does not exclude the right of appeal. But in this case, so far as we are able to discover, the consequent liability of the defender in respect of his subscription is a thing that admits of pecuniary estimation. We are told that it is known, and that it exceeds the value of £25. Now, as no steps have been taken to amend the record so as to make it appear that there is a question behind which would raise the value of the action above the limit of £25, I agree that there are not materials within the case for applying the rule of *Drummond*.[1] The lease in *Drummond*[1] was for five years, and it was an arithmetical result that the value of the question involved in the decision exceeded the statutory limit. But here the obligation to pay calls is wholly indefinite as to amount, and we do not find it averred, nor does it appear on the face of the proceedings, that the sums involved are in amount beyond £25.

LORD KINNEAR.—I agree with your Lordships.

The only process competent under the second section of the Act is a summary process for the payment of a debt, and therefore we must look at this petition as being simply a petitory action for payment of a debt. If that be so, then I think that the value of the cause must be the highest sum for which decree could be given.

I agree with your Lordships that there is nothing more to be found in this action than a conclusion for payment of a sum of £12 odds. It may

[1] 7 Macph. 347.

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be that the Sheriff's findings go beyond the conclusions of the action—I do not say whether this is so or not—but if it be so, then neither party can be prejudiced by that.

LORD ADAM was absent.

THE COURT dismissed the appeal as incompetent.

J. SMITH CLARK, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 172. June 26, 1896. Martin and Stark v. Cruickshanks.

WILLIAM MARTIN, Pursuer.—*Watt*—*A. S. D. Thomson.*
JAMES STARK, Pursuer.—*Watt*—*A. S. D. Thomson.*
WILLIAM CRUICKSHANKS, Defender.—*Balfour*—*Grierson.*

Reparation—Slander—Privilege—Report of railway inspector to superior—Motion for new trial—Credibility—Evidence to support verdict.—A railway inspector lodged a report with the traffic superintendent stating that he had detected, in a goods shed, a railway clerk using a gimlet in the side of a cask, and a railway porter sitting on the cask with a water can in his hands, that he had said to them that they were in a very awkward position, and that the clerk said they were, while the porter followed him and asked if he intended to report the matter.

The clerk and the porter raised an action of damages for slander against the inspector, and obtained an issue which contained malice.

At the trial the defender, who had been for thirty years in the employment of the railway company, deponed to the truth of his report, and stated that on leaving the goods shed he went to the stationmaster and told him what he had seen, and that the stationmaster returned with him to the goods shed and examined the cask, which he pointed out. The stationmaster deponed that he went with the defender to the goods shed and examined the cask along with him, and found that the bung appeared as if newly chipped or roughly cut in one or two places. Certain other officials of the company deponed to seeing marks of a sharp instrument upon the cask. The pursuers, who had also been for some time in the employment of the company, deponed that the whole report was an invention, but they offered no explanation of the defender's motive in making the charge against them. It was proved that when separately charged they gave the same account of what had occurred that afternoon, and their account was so far confirmed by servants of the railway company who were working at the shed shortly before the arrival of the defender. The consignee of the cask deponed that he failed to find any indication upon it that it had been tampered with.

The jury having returned a verdict for the pursuers, and awarded £100 to each as damages, the Court (*dis.* Lord Young) refused to grant a new trial, on the ground that the question was one of credibility, and that if the jury believed the evidence for the pursuers the false report by the defender was sufficient evidence of malice to warrant the verdict returned.

2D DIVISION.

WILLIAM MARTIN and JAMES STARK, who were formerly employed by the North British Railway as goods porter and railway clerk at Inverkeithing Station, raised this action of damages for slander against William Cruickshanks, an inspector in the service of the railway company.

The issues for both of the pursuers were in similar terms. The issue for the pursuer Martin was as follows:—"Whether the defender wrote and transmitted to John Stewart, Burntisland, the report set forth in the schedule hereto annexed, and whether the said report is of and concerning the pursuer William Martin, and falsely, maliciously, and calumniously represents that the said pursuer was, on or

about 8th August 1895, pilfering, or attempting to pilfer, from a cask in the custody of the North British Railway Company, at or near their station in Inverkeithing, to the loss, injury, and damage of the said pursuer? Damages claimed by the pursuer William Martin, £250.

"SCHEDULE.

"Goods Department, Dunfermline Station, to John Stewart, Esq., Burntisland, date 12th August 1895.

"Inverkithing, 8th August 1895.—Dear Sir,—On me visiting the above, and entering goods shed from east end, I came on the clerk Stark using a gamlet in side of a cask, and it on its end. The porter was sitting on it with a watter can in his hands. I went to them and said men you are in a very awkward position, the clerk turned up his head and said they were. I saw another man sitting in shed looking at them, I did not know him, he had on a mixted soot of tweeds. The clerk left shed, so did the porter with can, and the porter returned to me and asked me if I was going to say anything about it. I told him that I would consider what I was to do with that; he was not pleased, and he folled me up the time I was checking three sidings, repeting the same questin. I told him I was afraid it was not his first time, and he said it was. I asked him whatever attempted him to do it, and he said he had been drinking this last two nights. When I put it to him was it his first time, he said he was brought up to it. I went to the hut—there was a party there with clerk, and I did not speak to him, but went to Mr Simpson, and him and me examined cask, and found there had been a spail put in as cask was liking. The cask was addressed Sim, Invkithing.—Yours truly, W. CRUICKSHANKS."

The trial took place on 25th February 1896 before Lord Low (Ordinary) and a jury.*

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* Pursuers' evidence:—

The pursuer Stark deponed that in May 1890 he entered the employment of the North British Railway Company, and that after various promotions he became goods clerk at Inverkeithing, where he had full charge of the goods department under the stationmaster; that on 8th August 1895, between 3 and 4 P.M., he was in the goods shed. "Two men came to the door of the shed inquiring for goods. I did not know them. They inquired at me. The goods, they said, were addressed to Somers. . . . When I was speaking to them the defender came into the shed. I saw him just about the middle of the shed on platform. He came in at the south side, the side next the goods office, by the loading table. When the men left I went back to the office. The defender had not spoken to me or I to him. This would be between 3 and 4 P.M. Martin was about the place where he had sat down. When he came in he was some distance away from me. I did not see defender speak to Martin. There was beer in the shed at that time—some ale returned as not having been ordered, I understand. It was at end north of shed exactly at the back of me. There was a piano case between me and it. I knew of some beer to be delivered that day to one Sym, at Inverkeithing—two half-barrels and a quarter-hogshead. I don't know if that beer was there at the time I speak of, or had been sent away by carrier. . . . Never heard of charge till Angus, policeman, and Simpson, the station-master, challenged me on the morning of 9th August. . . . All the statements in the report referring to me are untrue, except that defender went to goods office and found me there with a man. I was much distressed at the charge. . . . Cross.—Defender had a general duty of inspecting and reporting to his superiors of anything wrong if he

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The jury returned a verdict in favour of each pursuer, and awarded to each £100 as damages.

On 11th June the defender obtained a rule on the pursuers, and on 20th October the pursuers shewed cause.

Argued for the pursuers;—The question was one of credibility. The evidence was fairly balanced, and the jury preferred that of the pursuers. The verdict must stand unless it was impossible to reconcile it with the evidence.[1]

Argued for the defender;—The verdict was contrary to the evidence. All the elements determining the quality of the evidence must be considered. The report was made by a privileged person against whom there was no presumption of falsehood. He was not likely to invent the charge. On the other side two young men were accused of a not uncommon offence. A discovery of such an offence was very likely to be met by a denial. The jury affirmed the view that the charge was invented, but this was so much against the weight of the evidence, in the absence of all suggestion of motive, that the verdict could not stand.

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could prove it. Smith had gone away before defender came. . . . The whole of the report is an invention, except the statement to which I have already referred."

The pursuer Martin deponed that he had been in the railway company's service for 3½ years. "On 8th August last was at my work . . . I came from dinner at two o'clock, and loaded up a general waggon. . . . After loading waggon I went to shunt at three o'clock. Was shunting about three quarters of an hour. I was alone at that work. Thomas Rose was engine-driver. . . . I got water from the tender. I brought the pan across from the shed for that purpose. That was the only way to get water. . . . I took pan to the shed and put it on the floor. After pilot was away I went in and sat down on bags of oakum which were lying for delivery. They were a little past middle of shed, towards the office. I was smoking. Stark came into shed with two men. He asked about a box men were wanting. He said it was addressed to Somers or Somerville. He was looking for box. Did not know men. Were like showmen. It was Lammas Fair time. The defender came through the shed. He came in at last door next the goods office. He passed on and gave me good-day, and I answered him. Nothing else passed. He went through the shed and out at the end. I had no conversation with him that day, except a word at passing one time. Nothing said about any charge. First I heard of charge was next day from Angus and Simpson. . . . On 8th August there was beer lying in shed belonging to Kerr of Inverkeithing. He could not take it, as his cellars were full. It was lying at the end away from goods office near a piano case. There was also Sym's beer. It came in morning. Two small barrels, I think. They were delivered to Sym just after dinner by Charles Stewart the carter. Sym's barrels were away before defender came to the shed. I never put a spile in Sym's cask. . . . The statements in the defender's report are untrue. Cross.—The defender's report an invention from beginning to end. Defender came into shed near four o'clock. Smoking in shed is not allowed. The can was not between my feet. It was on floor a few feet from me. I was sitting with my face towards the line. It was then the defender passed along. The can was full. It was intended to be taken to the office. Kerr's casks were the only barrels of beer in shed at time. They were at end of shed. I was about the middle. I don't know how many barrels there

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[1] Kinnell v. Peebles, Feb. 7, 1890, 17 R. (*per* Lord President Inglis, Lord Shand, and Lord Adam), pp. 424, 425.

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LORD LOW.—If I had been trying this case alone, and without the assistance of a jury, I should have come to the conclusion that the pursuers had failed to prove their case, because I should have been unable to get over the extreme improbability that the defender, who for some thirty years has held a position of trust and responsibility in the employment of the North British Railway Company, had, without any cause which can be suggested or imagined, invented a wicked and injurious charge against two young men whom he hardly knew. But it is a very different thing to say that upon the evidence which was laid before them the jury were not entitled to come to a different conclusion. I think it must be conceded that the pursuers presented to the jury a strong case. Your Lordships cannot know, and it is right that I should mention it, that the appearance of both the pursuers and their demeanour in the witness-box were markedly in their favour. They gave their evidence apparently with great candour and moderation. In the next place they were both young men who had been in the employment of the railway company for a considerable time, and nothing against their previous character was suggested, and, as Lord Trayner pointed out, it would have

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were exactly. Sure that all Sym's casks were away before defender came in. There were two for Sym. . . . They had been taken away on the back of two o'clock. . . . I know James Anderson, coal-merchant and storekeeper, Inverkeithing. He spoke to me about the charge, and so did other people. I don't remember inquiring from him about a bottle of whisky. I did not say to him that Stark and I had been boring at the barrel when the defender came in, or anything like that, or that we had been sitting on the barrel or on two barrels together. Re-examined.—I may have told Anderson what defender charged us with."

James Sim, spirit-dealer, Inverkeithing, deponed,—"Barrels delivered in afternoon of 8th August. . . . I was not at home when the beer was delivered. I found it there on my return, but I can't say as to time, but I think it was a little before five o'clock. On 9th August Simpson and Angus called for me, and asked to see the barrels. I shewed them to them. They told me the reason for wanting to see the barrels. We looked for marks of a gimlet, but saw none. The spile in bung did not appear to be tampered with. It was of usual kind, and fitted properly. The bung quite dry. The spile could not have been made by hand, but by machinery. Nothing suspicious about the casks. If a hole had been made with a gimlet, some froth would have been forced out, as the beer is brisk at that time of year. The barrel quite full. Must have two holes in barrel to run the beer out. A little would flash out of one hole, but it would not run. My opinion that no tampering with barrel."

Thomas Rose (39), engine-driver, Dumfermline.—"On 8th August, in afternoon, I was shunting waggons in and out of goods' shed. I left about 3.40 P.M., and just before Martin came up with the can, and got it filled with water. I was on east side of goods' shed, and he went in that direction. I went to the east with my engine, and came back past the shed towards the Forth Bridge. I saw defender coming from north entrance of shed. I passed twice towards Queensferry that afternoon, once at 3.45, and once at four o'clock. I think I saw defender the first time at 3.45, or very near that time. About 4.30 I saw defender going towards passenger station. I had come back with goods at that time. I saw him return with station-master, and go into goods shed. They were about five minutes in shed."

Charles Stewart (23), lorryman at Inverkeithing, and works at station.—"Remember charge against pursuers. Heard of it on 9th August. I saw

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been practically impossible for the jury to give a verdict against the pursuers without affirming that they had been guilty of an attempt at dishonesty, because there was no suggestion in this case that they had been innocently doing something which the defender believed to be an attempt to draw beer from a barrel in the goods shed. In the next place it appeared that the pursuers, when separately charged with having tampered with the barrel of beer, gave the same account of what had occurred when the defender came to the goods shed, and they did so, as far as could be seen, without any opportunity of communicating or consulting with each other. In the next place, Mr Sym, to whom the barrel was consigned, and who may be regarded to a certain extent as a man of skill in the matter, said that he could find no indication upon the barrel that it had been tampered with, and that he does not believe that it had been tampered with, and finally the pursuers' story as to what took place in the goods shed when the defender came there receives important confirmation from the evidence of the engine-driver and the fireman of the goods engine, who had been working at the goods shed shortly before the arrival of the defender.

Angus in goods office that day. On the 8th August had delivered beer to Sym—two casks. I did so the first thing after dinner. I dine as near one o'clock as possible, and go back to work at two o'clock. I delivered the beer between two and three o'clock. I put the barrels down in front of Sym's shop."

There was no evidence or suggestion of motive on the defender's part to make the charge against the pursuers if it was not true.

Defender's evidence:—

The defender deponed,—"About thirty years with company, and eighteen years inspector. . . . My duties as inspector are—I have to give a note to superintendent of anything which comes under my observation in any interference with property or irregularities I see. I came to Inverkeithing on the 8th of August. I arrived at goods shed according to my book at 3.50. I made a note of my arrival and departure from station. I went over the waggons at Inverkeithing on siding. Then I went into goods shed at south end to look at waggons there. I passed one waggon, and on second waggon the clerk, Stark, was sitting using his right hand on a barrel which was on platform. The porter, Martin, was sitting on cask facing clerk, with can between his legs. Stark was down on his right knee. Martin was sitting on top of cask. It was a common station water pitcher that Martin had. I did not look into it, but by the way Martin was holding it it looked empty. I came on them suddenly. I can be under no mistake as to what I saw. I walked up to them and said, 'Well, men, don't you think you are in a very awkward position?' and they turned their heads and said, 'Yes.' When I spoke, Stark stopped the movement with his hand. I can't say what he had in his hand, but it was either a gimlet or other instrument. He rose up and said nothing more. Martin also rose to his feet with the pitcher. I thought at first he was the fireman. Nothing more passed at that time. I then went out of shed. Martin followed me and said, 'I hope you won't say anything about it,' and I said I would consider. He still followed me up and repeated the same question three or four times. I made the same reply, and then he said, 'The cask's open, I must go and shut it.' He said if I said anything about it it would be his job. The only other thing I said was that 'I wish to see the clerk before you see him.' I then went to the office, but someone was with Stark, and so I did not mention the subject. I should have said that I asked Martin what made him attempt it, and he said he had been drinking for the last two

There is only one point, I think, in regard to which it could be argued that the evidence given by the pursuers was contradicted, and that was in regard to the time when the barrel with which they are said to have tampered was removed from the goods shed. That from one point of view was a very important matter. From another point of view, I do not think that it was so important. If the pursuers had been able to establish that the barrel with which they are said to have tampered had been removed from the goods shed before the defender came there, that would have been a piece of evidence in their favour so strong as to be almost conclusive; and at the close of the pursuers' case it did appear as if they had proved that that was the case, because Stewart the lorryman who removed the barrel, and who is a witness against whose credibility nothing can be suggested, gave evidence which, if correct, made it quite certain that the barrel had been taken from the shed long before four o'clock or a quarter to four, when the defender says he came there. But then there is the evidence of the stationmaster, whom I also take to be a perfectly unimpeachable witness, that when he went to the goods shed about half-past four with the defender the barrel was still there, that he took the

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nights. He said he had been brought up to it, but whether it was to the drinking or the broaching I did not know. I thought I was bound in duty to report the matter to my superiors. Mr Simpson was the stationmaster, so I went to him and told him that I had seen two of his men in a very awkward position, and would he come with me. We went to the shed. This was about five to ten minutes after I had caught the men. I pointed out to Simpson the cask at which the men had been working. It had been put away among other casks. It was alone when I caught the men. I had no difficulty in recognising the cask. There were four or five others, but it was the smallest cask the men had. Simpson and I turned the cask up, and I pointed where it had been broached. It was leaking, and a spile of white wood put into it. It was a soft wood spile. They are usually hard wood. I saw it was different from the usual spile. There was a little leakage. The spile looked new wood, not like as if it had had a journey. Simpson and I took number of cask and name of consignee. The number was 25,586, and the consignee was Mr Sym. I entered the name and number in my book at the time. Having reported the matter to Simpson, I left it, but I afterwards received from Mr Stewart a request for a written report to him, and I wrote report in schedule to issues, and sent it to Stewart. That was the only written report I made. All I say in report is true. . . . Had no ill-will to either Martin or Stark, and never had. I had no quarrel with either, and knew little of them. I had no desire to do anything but my duty."

George Simpson, stationmaster, Inverkeithing, deponed,—"Defender came to me on 8th August. In consequence of what he said I went with him to goods shed, and he pointed out a barrel to me. I examined it. It was about centre of shed with four other barrels—three consigned to Arnott, and two to Sym, one of which was this one. It was from Bernard, Edinburgh. No. 15 is like the label on barrel. I took number at time—25,586. It was about 4.30 when I went with defender to shed. We examined the bung of the cask. It looked as if newly chipped or roughly cut in two or three places. I had not time to examine the spile, but there was one in the bung. . . . . I communicated with John Angus. We went first to Martin, and told him what had been said about him. He denied the charge, and said that the can was one with water from the engine. . . . Then we went to Stark, and then to Mr Sym's. We saw the cask in his cellar. I pointed out the

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number of the barrel and found that was the number of the barrel on Sym's premises next morning. Now, the result of that is that the pursuers cannot be held to have proved that the barrel was removed before the defender came to the goods shed, but I do not think it goes further. I do not think that fact can be used as discrediting the pursuers, or as shewing that they wilfully gave false evidence in the witness-box. All that it amounts to is this, that they have been mistaken in common with one or other of the witnesses in the case. They have either been mistaken in common with Stewart as to the time when the barrel was taken to the goods shed, or they have been mistaken in common with the stationmaster, and with the defender himself, as to the time when the latter went to the goods shed. The question before the jury therefore appears to have been entirely a question of credibility, and a question of credibility in regard to which the considerations upon the one side and upon the other were not unevenly balanced.

In these circumstances it appears to me that it is impossible to say that the verdict of the jury was contrary to the evidence. I therefore come to the conclusion, although I confess that I do so with some regret, that it is not competent for the Court to allow a new trial in this case.

Lord Justice-Clerk.—I am of the same opinion as has been expressed by Lord Low. Of course it is a very unusual case which depends absolutely on credibility as between the pursuer and the defender, as it does in this case practically, and in the ordinary case one could not, judging

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cuts in the bung, and Sym pointed out that the spile was soft wood spile, and not a trade spile. We all tried it with our nail and saw it was soft. It struck me that something unusual had been done to the cask."

John Angus, railway detective, deponed,—"We went to Sym's to examine the barrel. Simpson had a note of number of cask. I asked what the number was, and Simpson said, 'Here you are,' and pulled out a note-book and told me the number. He mentioned the number which was on the cask. The bung was a little chipped looking. We talked about the spile, and Sym said it looked like a soft wood spile. Then we went and saw both Martin and Stark. . . . Cross.—I saw the men again with Duncan, and they again denied the charge, and gave the same story as before. They both told the same story—at least very nearly so. I did not see much that was suspicious about the cask. It was Sym that pointed out that the spile was soft wood."

George Duncan, police-inspector, deponed,—"I went to Sym's and saw the cask. . . . There was a white soft spile in the bung, and at side of spile there appeared to have been a corkscrew slightly inserted into the bung, and drawn out again, ruffling the surface of the wood. I think it was a machine-made spile."

John Stewart, traffic superintendent, deponed,—"It was the defender's duty to bring the matter before his superiors. He is a very zealous officer, and a very honest reliable man. He has a responsible position."

James Anderson (69), coal-merchant and cement-merchant, Inverkeithing, deponed,—"Know Martin, and heard about the charge against him. I had a conversation with him upon the subject. I got a bottle of whisky among the cement and Martin came speering about it, and he asked me to taste it, and I did so. Then he told me defender had come upon them piercing a barrel, and had said they were in an awkward position, and that he had asked the defender not to say anything about it, but that 'he had done it already.'"

such a case for one's self, pronounce a verdict such as was given by the jury here except on strong grounds; but as the case does turn on credibility, and as the evidence of the pursuers was distinct and clear on the matter, and as we have heard from the Judge who tried the case that they impressed him favourably in regard to their truthfulness, I am unable to say that the verdict is contrary to the evidence so that we should set it aside and send the case to another jury. Therefore I think we must discharge the rule.

LORD YOUNG.—The question is whether we have grounds upon which we can and ought to send this case to be tried again. The case is certainly peculiar. I have not seen an action in the course of my not short experience exactly like it. The defender has been I think over thirty years in the employment of the North British Railway Company, and for eighteen years he has been an inspector, with a duty of taking notice of—inspecting—the conduct of others, with a view to reporting anything which he sees amiss, and which he in his judgment (which is not inexperienced) thinks ought in the interests of the company to be reported. He did, in the case of the two pursuers, with respect to whom he had the duty I have referred to, give a report to his own superior officer in writing, which we have printed in these proceedings. He reports in it no more than that he saw one of the men using a gimlet in the side of a cask which was on its end. The porter was sitting on it with a water can in his hand, and the other man had just begun to use, or was just using, the gimlet. He does not say he saw them take anything out of the cask, but merely that he saw them in this suspicious position. He went to them and said,—"Men, you are in a very awkward position." That is what he reports that he did, and one of the men turned his head aside and said they were in an awkward position, and asked him to say nothing about it.

Now, I think it was his duty to report this, and that in doing so he was in a privileged position. When anybody speaks of another—a neighbour, or friend, or an enemy—slanders, or writes of him libellously, falsehood and malice are presumed, and it is incumbent on him to remove the presumption by shewing that what he said or reported is true. A man in the privileged position of the present defender is not in that case. His position altogether removes—excludes—any presumption of falsehood or malice, and makes it incumbent upon the party who charges him with having made a false and malicious charge to prove falsehood and malice. To prove that the charge is erroneous is not enough; it must be proved to be malicious, and in the common case—certainly in this case—the proof of malice, and the only proof of malice, is that it was false to his knowledge. When a man is in a privileged position where malice and falsehood are not presumed, but require to be proved, if it is shewn that what he said was false to his knowledge, that is evidence of the falsehood of course, and also of the malice. Now, it was incumbent upon the pursuers here to prove that; not only (to use an expression used by Lord Low) to present a case not unevenly balanced. I am by no means of opinion that the case here is evenly balanced. But where the burden is incumbent upon the pursuer as a condition of his success to prove malice—falsehood—so that that can be affirmed by a jury, he certainly does not discharge the *onus* upon him by

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presenting a case not unevenly balanced. Nor do I at all concur in the view that the jury, by saying that they were not convinced and not prepared to affirm that the pursuers had proved wilful and malicious falsehood on the part of the defender, thereby affirmed—at all thereby affirmed—that the pursuers had been guilty of dishonesty. They merely affirmed that the pursuers have not proved the case which it was incumbent on them to prove as a condition of their success. By finding that the party upon whom the *onus* lies did not prove that, they do not affirm that the contrary is the truth. If this old servant of the railway company, thirty years in their employment, and eighteen years in a comparatively high position, were indicted now—as he might well be upon a verdict by a jury finding that he was guilty of malicious falsehood—and the jury found that it was not proved against him, they would not thereby affirm that the two porters had been guilty of dishonesty. They would merely affirm that it had not been proved to their satisfaction — that there was not evidence which ought to satisfy anybody that that was the truth which could be affirmed by a verdict, which is a declaration of the truth. I suppose nobody can doubt for a single moment that any jury who were asked the question upon such evidence as was submitted to this jury,—"Is it proved that this man is a malicious slanderer and guilty of wilful and corrupt perjury?" would have said,—"No, it is not proved." Suppose any man—say the chief constable—going along the street, or in a railway station, and seeing somebody attempting to pick a pocket, goes up to him and says, "I saw you attempting to pick that man's or that lady's pocket," and takes him into custody against the man's remonstrances, who says, "Oh, don't take me, I will never do it again; I was hungry, I was wanting something, but I will really not do such a thing again." There is then a prosecution such as this against him as being a false and malicious slanderer. There is no suggestion that he had any malice—no suggestion that he knew the party or was otherwise than perfectly respectable himself, or that he had any knowledge whatever of the individual—nothing to suggest a notion of malice. Nevertheless the jury finds that it is proved, because the person whom he apprehended said,—"Oh, I am not guilty, I did not do it." There is nothing else here—nothing in the world besides the denial by the party who is charged by one having a duty as much as an inspector, a constable, or the head of the police force, to interfere in the matter as he has done—nothing except the denial of the party against whom the charge is made; and the learned Judge who tried the case said that if he had been trying it, and had had to return a verdict, he would have returned an opposite verdict from that which the jury here returned. Did the learned Judge mean when he said that, that by returning an opposite verdict he would have found the two pursuers guilty of dishonest conduct, or would have found merely that there was no reasonable evidence on which to come to the conclusion that this old railway servant had been guilty of wilful and corrupt falsehood? Now, I am clearly of opinion that there was no evidence heard upon which that conclusion—the opposite conclusion at which the learned Judge arrived—expressed in the verdict can alone depend.

Of course, a commonplace observation occurs here as in every case when there was evidence to submit to the jury,—that it was for them to judge.

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That observation is applicable, and is true in every case that comes before us on a motion for a new trial, upon the ground that on the evidence as we read it the verdict is not satisfactory. Motions for a new trial are not always, or even generally, upon the ground that there was no evidence at all for the consideration of the jury. It is said that there was not evidence which reasonably supports the verdict, and that is enough if the Court comes to that conclusion, and I put the question more than once in the course of the discussion whether in a case of this kind such a verdict as this had ever been returned where there was no evidence shewing malicious feeling on the part of the person in a privileged position towards the party against whom he made the charge. The answer was in the negative, and I do not believe that the experience of any one of your Lordships is different from my own in this, that I never met with or heard of a case such as this, where a perfectly respectable individual in a privileged position is found guilty of wilful and corrupt malice in inventing a charge against a person of whom he knew nothing and against whom he had no ill-will whatever. Such a case has never been presented. I am therefore of opinion that this is a clear case—I should say a gross case—in which we are not only entitled, but in our duty called upon, to grant a new trial—in duty to this highly respectable man, who, no one will be surprised to hear, is continued in the service of the company, against whom no one could believe such a charge as the jury have affirmed. I think it is in all justice to him our duty in such a gross case to send the case again for trial.

LORD TRAYNER.—I concur in all that Lord Low said, except one observation, and that was, that if he had been trying this case himself he would have been unable to have got over the improbability of the defender, considering him as a most respectable man as Lord Young has said, having made a statement absolutely untrue and without foundation.

In dealing with this case I think that the question of probability and improbability is not for us to consider at all. The probabilities or improbabilities of any case, as affecting the effect to be given to the evidence adduced, is a consideration to be urged on the jury, and in this case was, we were told, urged as strongly, I have no doubt, as possible. It is just the peculiar function of the jury to deal with the probabilities of the case before them, in considering what effect they are to give to the evidence adduced. But if we are to consider probabilities, I repeat now what I said in the course of the discussion, that notwithstanding the respectability of the defender, I am not able to see that there is any more probability that the pursuers are thieves than that the defender is untruthful. The defender is a very respectable man, and has been a long time in the service of the railway company. Granted. The pursuers are respectable men, and have been a long time in the service of the railway company. Why should it be suggested that to save one man from the charge of untruthfulness, other two men are to be subjected to the charge or the supposition of dishonesty? I see no reason in the world for such a suggestion.

I quite concede that in this case the pursuers had to establish not only that the charge was false but that it was malicious. Have they not done so? The jury thought they had, for they affirmed it, and they did that on

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a charge of a very distinct character from the learned Judge who presided at the trial. His Lordship told the jury that there were two stories as they must have seen; that the story of the pursuers and the story of the defender were absolutely conflicting and contradictory, and that it was a question of credibility entirely, and one on which they must make up their own minds. If the defender's statement was true—if they believed the defender's evidence—then the pursuers could not succeed, for the defender had then established to the satisfaction of the jury that the statement he had made to his superior officer was true. If they believed the pursuers' case, then they must of necessity have disbelieved the defender, who did not suggest that he might have been mistaken, but told a circumstantial story, not only as to what the pursuers were engaged in doing, but as to the conversation which took place between him and them thereafter, which involved practically an admission of guilt on the part of the pursuers, and a request that their conduct should not be reported. Now, if that is not true, or if it is not believed—and that is the same thing—if the jury did not believe the defender's statement, it was the same as if it were not there at all,—then the defender's story was a story that was false, and false to his knowledge. Nothing could be more malicious; and if that was the view the jury took of the evidence they were entitled and bound to find for the pursuers as they did.

I have, contrary to my original intention rather, expressed some views that I had not intended to express in this case, because I think it is sufficient for the determination of the question before us to hold, as I do very distinctly hold, and I think I do in common with the learned Judge who tried the case, that there was sufficient evidence adduced by the pursuers to warrant the verdict returned if that evidence was believed. That it was believed is ascertained by the fact that the jury returned the verdict they did, and I am clearly of opinion that to grant a rule for a new trial in this case would be utterly inconsistent with the principles and practice that have ruled and formed part of our procedure during the whole time I have known the procedure of the Court.

Lord Moncreiff.—I have felt some difficulty about this case. The pursuers had to prove that the charge complained of was made by the defender maliciously, and I have no doubt that this was clearly explained to the jury by the presiding Judge. The peculiarity of the case is that there is no proof or suggestion of motive on the part of the defender to make the charge if it was not true. Further, in order to arrive at their verdict the jury must have held, not only that the defender swore falsely, but also that the station-master at Inverkeithing, and Angus, the railway detective, and Duncan, the police inspector, were not to be believed when they said that they saw marks of a corkscrew or other sharp instrument having been used on the cask.

But we are dealing with the verdict of a jury. The question is one of credibility. There is no room for mistake; the story on the one side or the other is false. The jury have thought fit to believe the evidence for the pursuers, and we cannot set aside their verdict unless we are prepared to hold that that evidence if believed is not sufficient to support it. Now, I

am unable to say that if the evidence of the pursuers and the witnesses Sym and Stewart is to be believed, it is not sufficient to support the verdict. I have therefore with some hesitation come to the conclusion that the rule should be discharged.

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THE COURT discharged the rule, and of consent applied the verdict.

JOHN VEITCH, Solicitor—JAMES WATSON, S.S.C.—Agents.

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Perth General Station Committee v. Ross.

THE PERTH GENERAL STATION COMMITTEE, Pursuers (Appellants).—*Balfour—F. T. Cooper.*
ALEXANDER ROSS AND ANOTHER, Respondents.—*W. Campbell—Graham Stewart.*

Railway—Right of railway to exclude from station persons other than travellers—Exclusion of hotel servants wearing hotel badge—Interdict.—The Perth General Station Committee presented a petition to the Sheriff to interdict A B, a hotelkeeper in Perth, "himself, or by his boots, or other servant . . . unlawfully entering or trespassing upon any of the railway stations . . . of the pursuers; and in particular from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises connected therewith, while wearing the uniform or badge of the hotelkeeper, or of his hotel."

The petitioners stated that they were proprietors of Perth Station; that on 17th July 1894 they intimated to A B that they had right to prevent, and would not permit, hotel servants wearing hotel badges to appear upon their platforms; that on various occasions in July 1895 A B had sent the boots of his hotel, wearing the hotel uniform and badge, to wait the arrival of certain trains, and that the latter on each occasion had been asked by the petitioners' servants to leave the station, but that he had refused to do so.

The defender admitted that in July 1895 he had sent his hotel boots to meet customers arriving by train.

The Sheriff refused the petition, and on appeal the Court affirmed the Sheriff's judgment, *holding* (1) that an interdict against the pursuer or his servants "unlawfully entering" the station could not be granted, as such an interdict would not specify the act forbidden; and (2) that *quoad ultra* the interdict sought was merely to prevent hotel servants entering the station in a certain dress to meet customers, and that that was not a case for interdict.

Question, whether the petitioners' right of property in the station was of such a character as to entitle them to exclude from the station all persons other than travellers.

2D DIVISION. Sheriff of Perthshire.

ON 26th July 1895 the Perth General Station Committee, incorporated under the Perth General Station Act, 1865, presented a petition in the Sheriff Court at Perth against Alexander Ross, hotelkeeper, Royal British Hotel, Leonard Street, Perth, and Charles Julius, boots at that hotel, in which the Court was craved "to interdict the defender Alexander Ross himself, or by his boots or other servant, or any others in his employment, or acting for him, or for whom he is responsible, and the defender Charles Julius, from unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the pursuers; and in particular from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises therewith connected, while wearing the uniform or badge of the defender Alexander Ross, or of the said Royal British Hotel, and from waiting the arrival of passenger trains therein for the purpose of obtaining customers for said hotel."

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The pursuers averred that they were proprietors of Perth General Railway Station; that the defender Ross was tenant of the Royal British Hotel, Perth, and that Charles Julius was his boots or porter; that on 17th July 1894 the pursuers intimated to Ross that the pursuers had right to prevent persons with hotel badges appearing on the platforms of the station, and that the pursuers had instructed their servants to remove such persons. That at various specified dates in July 1895, the defender Ross had sent the defender Julius, his hotel boots, with the uniform and badge of the hotel, to await the arrival of certain passenger trains, and that on these occasions he was warned and requested by the officers or agents of the pursuers to quit the platforms, but that he refused to do so, and was persisting in repeating the trespass.

The pursuers pleaded;—(1) The defenders having trespassed upon the said Perth General Railway Station, the property of the pursuers, and declined to desist, the pursuers are entitled to have such trespass interdicted by the Court.

The defender Ross admitted that in the month of July 1895 he had sent his hotel boots with the uniform and badge of his hotel for the express purpose of meeting customers.

The defender Ross pleaded;—(2) There being no averment that the defender Ross or his servants ever unlawfully entered or trespassed on the Perth General Station, or that he or they ever awaited the arrival of passenger trains for the purpose of obtaining customers for said hotel, the pursuers are not entitled to interdict as craved, and the interim interdict awarded should be recalled and the petition dismissed, with expenses. (3) The defender Ross never having either by himself or his servants trespassed on the Perth General Station, and having no intention to trespass thereon, the pursuers are not entitled to interdict. (4) The pursuers having by statute immediate recourse against the defenders in the event of their wilfully trespassing on the Perth General Station, the present proceedings are unnecessary and oppressive, and the petition should therefore be dismissed, with expenses. (5) The object of the petition being an attempt to restrict the liberty of the defender Ross or his servants in the matter of wearing a uniform or badge is illegal, and the pursuers are not entitled to interdict.

The defender Julius did not appear, and decree in absence was pronounced against him.

On 1st August 1895 the Sheriff-substitute (Grahame) granted interim interdict.

On 19th November a proof was allowed. It was proved that Ross did not by himself or his servants enter the station except for the purpose of accompanying passengers who were leaving his hotel, or of meeting passengers who had intimated that they were to arrive at his hotel, and that neither he nor his servants had "touted" for business, nor caused any obstruction or inconvenience at the Perth Railway Station.

On 13th February 1896 the Sheriff-substitute pronounced an interlocutor, in which he found "... that it is proved that on several occasions in the month of July 1895, as set forth in the pursuers' condescendence, the defender Ross was, by himself or his servants, present in said station while wearing the uniform or badge of his hotel, waiting the arrival of passenger trains, for the purpose of obtaining customers for his hotel: That it is not proved that such

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presence of the defender Ross, by himself or his servants, interfered with the proper or convenient management or control by the pursuers of their station: That the pursuers, as proprietors of said station, hold their said property under the condition of their not preventing its convenient use by any member of the railway travelling public, or with the presence therein of the keeper or servants of the hotel where such traveller has been staying, or which he may propose to go to, except in so far as is necessary for the proper management and control of the station, and for the securing of which the pursuers have power to make such regulations or bye-laws as they may think necessary: That the pursuers not having proved that the presence of the defender Ross, by himself or his servants, in said station has interfered with the pursuers' proper control or management thereof, and it having been proved that the exclusion of the defender Ross, by himself or his servant, from said station, as craved, would be an interference with the convenience of the members of the railway travelling public who have been staying, or propose to stay, at his hotel, the pursuers are not entitled to the interdict which they crave against him: Therefore recalls the interim interdict formerly granted, and refuses the prayer of the petition." *

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* "NOTE.— . . . The sole point at issue is, as already stated, whether or not the pursuers, as proprietors of the Perth General Station, are at common law, and apart from the statutory provisions of the Railway and Canal Traffic Act, entitled to obtain interdict against the defender Ross, on the ground of his having, by himself or his servants, while wearing the uniform or badge of his hotel, illegally trespassed on the pursuers' property, and that he is threatening to continue to do so. In considering this, it must be kept in view that an alleged trespass on a railway station is not the same as the case of an alleged ordinary trespass upon private property which has been acquired and is possessed under the ordinary conditions and for the ordinary purposes of proprietorship, and it is right in dealing with the present case that this should be kept in view. The Perth Railway Station was acquired by the pursuers compulsorily and for railway purposes, and they cannot be held entitled to exercise the powers of proprietorship thus obtained in a manner inconsistent with the purposes for which a power of compulsory purchase was given to them. The public, and especially the railway-travelling public, are entitled to require that their enjoyment of the travelling facilities, in respect of affording which the pursuers compulsorily acquired the property of the Perth Railway Station, should not be interfered with; and in this connection it is worthy of remark that, in the Perth Station Hotel Act, 1865, the convenience of the railway-travelling public is set forth as a ground on which the building of said hotel should be authorised, and the granting of the statutory authority to erect said hotel may be taken as affording a presumption as well as an illustration of the reasonableness of holding that any unnecessary interference with the convenience of the travelling public in obtaining such hotel accommodation as may be required by them for railway travelling, in connection with either the departure from or arrival by train at the Perth Railway Station, is not warranted, in respect of the pursuers' right of proprietorship of said station.

"If the interdict which the pursuers here crave will have the effect of causing such interference, and as I think the evidence shews that it will, I am of opinion it cannot be granted. Under the present arrangement, which excludes from the pursuers' said station on the arrival and departure of trains any hotelkeeper or his servants, while wearing a badge and waiting for customers, except those belonging to the Station Hotel, inconvenience must, I think, be caused to a certain portion of the travelling public,

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who are thus unable, in consequence of this prohibition, to recognise the boots or servant of the hotel at which they intend to stay, and to whom they might apply for information, or give such instructions in regard to their luggage, or other matters bearing upon their convenience and comfort, as they might think right. Such a prohibition as this is, I think, beyond the right of the pursuers to make, and appears to me to be unnecessary, for though, no doubt, the unrestricted presence of hotel servants in uniform, and seeking or touting for customers at the arrival of trains, would probably lead to confusion and interference not only with the orderly conduct of the railway station business but with the comfort of the railway travellers themselves, the absolute prohibition which the pursuers seek is unnecessary, and whether or not it is their right to enforce this absolute prohibition is the question here at issue, and I am of opinion that it is not. The pursuers have, under the Railway Station Act, power to make such regulations or bye-laws as they may judge necessary for the regulation and control of the station, but they have not done so, and have insisted in the enforcing of their alleged right of absolute exclusion. It has not been shewn that the making of such regulations would be ineffectual to prevent the evil referred to, and looking to what is proved to have been done in other stations, the presumption is that such regulations could be made by the pursuers for the admission of hotelkeepers or servants, even while wearing the badge, to the railway station, without any injurious interference with its proper management and the convenience of the travelling public. The result which, in the whole circumstances, I have arrived at is that while pursuers would be quite within their right in requiring that the presence of hotelkeepers or their servants, while wearing the uniform or badge, in the station, should be only allowed under such regulations as might be necessary for the proper conducting of the station business and the convenience of the travelling public, the absolute exclusion which is asked for in the present action is beyond what the pursuers are entitled to require, and that therefore the defender Ross has not unlawfully trespassed on said station, and the interim interdict which has been granted against him ought to be recalled, and the prayer of the petition refused."

* "NOTE.— . . . This action is purely an application for interdict at common law. Such applications must be very precise as to the acts against which they crave interdict, and it must be clear that the acts which are sought to be interdicted are wrongous. As was said by one of the Judges in the case of *Winans* v. *Macrae*, 12 R. 1051:—'Interdicts are granted by Courts of law when appreciable wrong to a man, whether in his property or other rights, is threatened,' and in the case of *Hay's Trustees* v. *Young*, 4 R. 398, it was said that 'interdict is a remedy either against a wrong in course of being done, or against an apprehended violation of a party's right only to be awarded on evidence of the wrong, or on reasonable grounds of apprehension that such violation is intended.' Now, what is the wrong alleged here? It is said generally that the wrong was a trespass upon the private property of the Station Committee; that the station being the private property of the Committee, they are entitled to admit whom they please, and exclude whom they please, subject only to this that they are not entitled to exclude persons who have travelled or intend to travel by their railways, or who come to receive or send away goods that have been carried, or are to be carried, by such railways, and that accordingly any other person whom they prohibit to come there is a trespasser if he does come there after such prohibition. I cannot accept this as a correct statement of the pursuers' rights. I think that persons having lawful business in connection with any members of the public travelling by railway are, *prima facie*, entitled to access to the station in pursuit of such business. In particular, I think that if a traveller by railway writes to his own

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The pursuers appealed.

Argued for the pursuers;—(1) They had right by statute to the Perth Railway Station, and except in so far as they were bound to the public as railway carriers they were entitled to all the common law rights and remedies in connection with the station which any private individual had with reference to his own private property. It followed that they were, if they chose, entitled to exclude from their station all persons not resorting to it on railway business; in other words, all persons who did not employ them either to carry them as passengers or to carry their goods. They were even entitled to exclude people who came to the station in order to see their friends arrive at or depart from the station.[1] There was nothing novel in this, for in certain stations in Scotland and in many parts of the Continent, only passengers by the trains were allowed to go on to the platform. It was said that the pursuers by granting free admission to their own servants, and excluding the defender's servant, were granting an undue preference, in contravention of the Railway and Canal Traffic Act, 1854 (17 and 18 Vict. c. 31), and interfering with the convenience of the travelling public. But the power of deal-

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servant, or to the servant of the hotel where he intends to reside, to meet him at the station, and assist him with his luggage, such servant cannot be deemed to be *versans in illicito* in entering the railway station for the purpose of meeting such traveller. It is, however, manifest that the presence of indefinite numbers of such persons might obstruct the railway officials in their duty, especially if they began interfering with passengers' luggage before it was out of the hands of the station servants. Accordingly, every railway company and the present pursuers have power, subject to the sanction of the Board of Trade, to make bye-laws and regulations for the management of their stations, and if these are broken they may be entitled to interdict against such breach. But no such regulations were made in the present case. Apart from such regulations, if it were proved that any particular hotel boots was in the habit of annoying passengers by touting, or of obstructing the station servants in their duty, a good case for interdict might be established against him. But no such case has been proved here, while, on the other hand, it has been proved that, as a rule at all events, the boots of the defenders' hotel only went to the station to meet customers who had written that they intended to arrive by specified trains. But the groundlessness of the present application for interdict is, I think, most clearly shewn by this, that according to the railway officials, and specially the railway constables, who in this matter are entirely corroborated by the witnesses for the defence, the whole *gravamen* of the offence complained of as having been perpetrated by the boots was that he appeared in the station in uniform, or with a hotel badge on his cap. This appears clearly from the evidence of William Donald, station constable, on the one hand, and of Charles Julius on the other. But that this is so is apparent all through the proof, and the prayer for interdict as amended only craves interdict, 'in particular against the defenders entering the station while wearing the uniform or badge of the defender, Alexander Ross, or of the Royal British Hotel.' I must say that it appears to me to be out of the question to hold that, at common law, the Station Committee are entitled to an interdict against anyone wearing what clothes he pleases in their station, unless

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[1] Case v. Storey, 1869, L. R., 4 Exch. 319; Beadell v. Eastern Counties Railway Co. (Railway and Canal Case), 1857, 1 Neville and Macnamara, 56; Marriott v. London and South-Western Railway Co., 1857, 1 Neville and Macnamara, p. 47, and 1 Scott's Reports, C. B., New Series, 499.

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ing with this question was now vested exclusively in the Railway Commissioners.[1] (2) Such being the nature of the pursuer's right of property, and the defender asserting his right to continue his invasion, interdict was the appropriate remedy. *Winans'*[2] case was in contrast to this, for the owner of the pet lamb did not assert any right to graze on the land. In the *Institute of Patent-Agents*[3] case there was no invasion of a right of property.

Argued for the defender;—(1) There was no analogy between the case of an alleged trespass on a railway station and a trespass upon private property. The station was acquired compulsorily by the pursuers for railway purposes, and they were not entitled to use it in any way inconsistent with these purposes. The public were therefore entitled to receive from them such reasonable travelling facilities as were claimed here. The undernoted cases shewed that the question of inconvenience to the public was one which the Court would consider,[4] and it was obvious that inconvenience would be caused to members of the public who had engaged rooms at the defender's hotel if his servant was excluded from the station. The *gravamen* of the pursuer's complaint was the wearing of the badge by the defender's servant, but any member of the public could wear what uniform he pleased in the station so long as it was decent. The attempted exclusion was also vexatious, for it was not proved that there had been any touting by the boots. If the railway officials found that the defender's servant caused any obstruction, they had it in their power to make rules and regulations, subject to the sanction of the Board of Trade, for the management of their station. *Case* v. *Storey*[5] had no application. It only decided that a station was not public in the same sense as a road. Further, in seeking to exclude the boots, the pursuers were granting an undue preference to their own servants, in contravention of the Railway and Canal Traffic Act, 1854 (17 and 18 Vict. c. 31). (2) There was no appreciable wrong suffered by the pursuers, and

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they are of such a description as to be against decency or likely to cause a breach of the peace. Besides this, it is proved that some distinctive dress or badge is needed to enable travellers to recognise the particular boots whose services they desire to obtain, and I should think it a protection alike to the public and the Station Committee that such badges should be worn. With regard to the first part of the prayer for interdict, I think it is far too general in its terms to be granted, even were there grounds for an interdict at all, which I think there are not. On the whole matter I am of opinion that no case for an interdict at common law has been made out, in respect that no wrong has been proved, and that if it should turn out that the influx of hotel boots into the station is likely to become a source of inconvenience to the public and the railway officials, the proper remedy of the pursuers is to frame appropriate bye-laws for the regulation of hotel servants awaiting trains at the station, which would be applicable to all hotels alike."

[1] Murray v. Glasgow and South-Western Railway Co., Nov. 29, 1883, 11 R. 205; *cf.* Rhymney Railway Co. v. Rhymney Iron Co., 1890, L. R., 25 Q. B. D. 146.

[2] Winans v. Macrae, June 3, 1885, 12 R. 1051.

[3] Institute of Patent-Agents v. Lockwood, Jan. 26, 1893, 20 R. 315, and June 11, 1894, 21 R. (H. L.) 61.

[4] Hall v. London, Brighton, and South Coast Railway Co., 1885, L. R., 15 Q. B. D. 505, *per* J. Wills, 536; Palmer v. London, Brighton, and South Coast Railway Co., 1871, L. R., 6 C. P. 194.

[5] Case v. Storey, 1869, L. R., 4 Exch. 319.

interdict was therefore not a competent remedy.[1] In any view, the first part of the prayer for interdict was too vague.

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At advising,—

LORD JUSTICE-CLERK.—This is a somewhat novel case. Indeed, none of the cases which were referred to in the course of the argument come near to it at all. The facts out of which it has arisen are these. The Perth Railway Station, which, of course, is a station of great size, and has a large number of passengers coming in crowds to it and leaving it in crowds, is managed by a joint committee of several railways. The hotels in the neighbourhood have been in the practice, where the passengers are leaving their hotels and going out by the trains, to supply servants from the hotel to help the passengers with their small things and luggage when getting into the trains. On the other hand, they have been in the practice of sending their servants to the station to meet passengers who have given notice that they intended to come to the hotel and wished to be met by someone from the hotel at the station. There is no question here, so far as I can see, of touting at the station—meeting the trains and touting for passengers who had not expressed any intention at all of going to a particular hotel. It is only at the request of passengers that hotel servants meet them. It further appears that the servants of these hotels have been in the practice, by instructions of their masters, of wearing a cap or badge by which it was made manifest to a passenger arriving that a particular individual was the boots or porter of a particular hotel. The Station Committee, while stating that they do not object to the servants of the hotels going to the station with passengers to see them off and meeting passengers by appointment, object to their coming into the station with the cap or badge shewing where they come from. A dispute on this point having arisen, and intimation having been given that servants of the hotels would not be allowed to enter the station and go near the trains wearing such a cap or badge, the question was brought to an issue by a servant appearing at the station with his badge or cap on, and, on the train entering the station, being ordered out of the station, and on declining to go, being taken out of the station by one of the station constables. Then the Station Committee raised this action of interdict, which is an action whereby it is sought in effect to have it declared illegal for the servants of these hotels to enter the station wearing a badge or cap with the name of the hotel on it, and that if they do so they shall be punishable as for breach of interdict.

Now, these being the facts, I may, in the first place, say unhesitatingly that I have no doubt whatever of the power of the Station Committee to regulate the use of the station—to regulate it even in the case of passengers actually going and arriving, subject, of course, to the Station Committee being put right if they take any steps in the regulation of the station which are not truly steps of reasonable regulation, but steps which they have no right to take. But it is to be kept in view that their right to have the station there, and their right to regulate it, originates in those whom they

[1] Winans v. Macrae, June 3, 1885, 12 R. 1051; Institute of Patent-Agents v. Lockwood, Jan. 26, 1893, 20 R. 315, and June 11, 1894, 21 R. (H. L.) 61, *per* Lord Chancellor (Herschell), p. 67.

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represent having been empowered to make the railways which come into it, and to make that station, because it was for the public advantage and convenience that it should be made. Therefore it is quite plain that all regulations they make must be regulations of proper management for the purpose for which they received statutory right to become proprietors of that place at all, and to erect the station as they did. There is one thing certain as regards these regulations which they may make, that they can get the means of enforcing them if they are regulations that ought to be made, because they can obtain the sanction of the Board of Trade to their regulations, with penalties attached against anybody committing a breach of them. And accordingly we know very well that in all large railway stations a long list of offences, which the public are not allowed to commit at stations or on the line, is posted up, with a statement of corresponding penalties, and we generally see, under these, placards stating that persons named have been fined for breach of some regulations, such as a regulation forbidding persons to alight from a train before it has been stopped, or from getting into the train while it is in motion. But here what is asked is that a servant of a hotel going on what is plainly in itself perfectly lawful business, and for the convenience of passengers coming to the station, shall be prevented from wearing such a cap or badge on his person as shall indicate that he is the servant of that hotel. That is the specific legal wrong which the Railway Station Committee demand shall be interdicted, so that the doing of it in future shall be followed by penal consequences. Suppose a person goes into the station in such a manner and for such a purpose, he could not be interdicted if he came in what is ordinarily called plain clothes. I cannot see that there is any ground for interdicting him if he wears something of the nature of uniform which is perfectly decent and according to propriety in itself. I see no ground whatever why the company should be entitled to ask interdict against that. I could quite understand that if any person who was not a servant of the company was to insist on dressing himself up in some costume for the purpose of being mistaken, or which might from its character and style be mistaken for the uniform of an officer of the company, in order that he might do something which only officials of the company might do, then steps might be taken to prevent that. But this is nothing more nor less than a demand that a servant from the hotel, of whom it is not said that he might not go into the station to meet a passenger—on the contrary it is said he may go—is to be interdicted from going merely because he wears a cap indicating that he is from the hotel. I do not think that this action forms any ground for granting interdict.

But it is also the fact that this Committee asks for an interdict in general terms. They desire to obtain an interdict against Ross and his servant—why they should have brought in the servant at all I cannot understand—from unlawfully entering or trespassing upon any of the railways, stations, and other works or premises of the pursuers. It would be a very extraordinary thing if such an interdict should be granted. If it was, they could be brought up and subjected to criminal punishment merely because they entered the station. It is a perfectly vague and general demand that the defender is to be interdicted from "unlawfully" entering the station. The station is a place which he has a right to enter into, and in the course of

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business may require to enter. But in this prayer for interdict there is no definition and no limitation, and to grant interdict in these general terms would, I think, be out of the question. I am of opinion that we should not interfere with what the Sheriff-substitute and the Sheriff have done.

LORD YOUNG.—We have a very simple case to deal with. There is a general prayer for interdict, to which your Lordship has referred, against Mr Alexander Ross, who is a hotelkeeper in Perth, by himself or by his boots, or other servants or any others in his employment, unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the pursuers.

Now, it is not alleged that Mr Ross claims any right to be in the railway station unless he is either departing or arriving by a train there, or unless he is going or sending to meet a guest expected at the hotel, and who has sent word that he is coming, or accompanying a guest from the hotel who is going to the station with his luggage. There is no suggestion of any other pretence on his part of right, or that he ever acted otherwise than as a hotelkeeper arriving or departing at that station, or sending guests to the station with their luggage, or sending to meet guests expected at the station, and conducting them to the hotel to which they had sent notice. There is a particular reference in the prayer, no doubt, in regard to wearing a uniform, or badge, or anything indicating Mr Ross' hotel, but we are relieved from the necessity of dealing with that, although it would be very easily dealt with, by the very proper and candid admission of Mr Balfour that if his argument is good for anything it is good without the cap. He maintains that Mr Ross is not entitled to come with guests from the hotel, or to send anybody with guests from the hotel, or to meet guests for the hotel. If his argument is good for anything, it is good to exclude that. And it is also good—if good for anything—to have any man interdicted from ever going to meet his wife at the station or to take her there and see her off with her luggage or to send his servant to meet her or to see her off. The station is private property, the pursuers say, and they are absolute private proprietors, incorporated by Act of Parliament, and they maintain that they are just as much entitled to keep husbands or wives or servants, with or without livery, out of the station as any private individual is entitled to keep anybody out of his dining-room who is not invited or welcomed there. Now, I think that is absolutely ridiculous. It is not law, and it is certainly not sense.

I am by no means of opinion that it is for us to say in this action, or perhaps in any action, what a railway company may do in the way of putting up rails or fences to exclude people from approaching a platform where the trains are arriving or starting, and letting in through the gate only certain people, and excluding others. But I am not disposed at all to put up the rail of an interdict against Mr Ross or his servants, or against anybody else, under such circumstances as are set forth here. If this Committee choose to take the responsibility of putting up practical physical impediments, they will be answerable for their conduct, but we are not going to put up an interdict to prevent husbands coming or going with their wives, or brothers with their sisters, or servants being sent with any of the

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family to see them off and their luggage fairly put on board the train. The Committee may make any regulations they please. They will have to be submitted to another authority before they are approved of and become operative, but in the meantime, upon facts which I think we must find in conformity with the Act of Parliament, here I think there is no case whatever made out for an interdict. The proof makes clear enough—what indeed I think was not seriously disputed—that Mr Ross never sends his servant except with guests from the hotel, or to meet guests who were coming, and therefore we may find that is the fact. But I put the question whether it had ever been disputed that that was the truth of the matter, and the answer I got was "No," and it is rather a curious observation to have to make, and with this long and ridiculous proof—for that is the character of it—that the answer I got from each of the parties to the question was that there was no fact in dispute between them. We will have to put findings under the Act of Parliament as to what we hold to be the facts of the case upon the evidence. I would put in merely findings to the effect which I have already stated, namely, that there was no going by the hotelkeeper or sending by the hotelkeeper with passengers or to meet passengers except guests going from or coming to the hotel. And upon that find that there are no grounds whatever for the interdict asked, and accordingly dismiss this application, with expenses.

Lord Trayner.—In the course of the debate before us on this appeal some observations were made indicating that the question here raised involved questions regarding the facilities which the pursuers were bound to afford the public, and of undue advantage conferred by the pursuers on some persons over the advantages conferred on others. In my opinion no such questions are raised here, or involved in the question, and the only question, we are called upon to decide. Nor do I think it necessary to consider or determine what are the rights of the pursuers in their General Station at Perth and the accesses thereto. Whether their right is absolute, as that of a private proprietor, or conditional and limited by the purpose for which they are alone entitled to hold and use their railway and station, is a matter on which I give no opinion, any such opinion being in my view unnecessary for the decision of this case.

The pursuers seek an interdict in certain terms, and the question is, are they entitled to what they seek? I think they are not. The first thing prayed for is an interdict against the defender "from unlawfully entering or trespassing upon any of the railway stations," &c., of the pursuers. No interdict can be granted on these terms. It is certain that entering upon the pursuers' premises is not, in the circumstances, unlawful for the defender, and to grant interdict in the terms prayed for would leave it to be determined, and that in a *quasi*-criminal proceeding, what was lawful and what was unlawful entering on the pursuers' premises. It would be unfair to the defender to grant any interdict against him without specifying precisely what it is he is prohibited from doing, so that he may know, and know exactly, what he may not do without incurring the penalties which attach to breach of interdict. The second branch of the prayer seeks an interdict against the defender's servant from entering, and the defender

from sending his servant to the station, wearing the badge or uniform of the defender or of his hotel. The pursuers have no right to such an interdict, because they have no right to dictate to the persons coming to their station what clothes they shall wear, or to prohibit anyone coming there in whatever costume or uniform he pleases, provided it be decent and one which he is otherwise entitled to wear. The last branch of the prayer of the petition is for interdict against the defender or his servants waiting the arrival of trains "for the purpose of obtaining customers for said hotel." I think this must also be refused. It is not proved that the defender ever went or sent his servant to the station "for the purpose of obtaining customers"; on the contrary, it is established that the defender's servants only went to the station to meet customers who were coming to the defender's hotel, or with customers who were leaving it, so that there is no ground in fact on which this part of the prayer could be sustained. I am not to be understood as expressing any opinion as to whether the pursuers would have been entitled to interdict in terms of this part of the prayer had the facts averred in support of it been established.

The pursuers have the power to regulate the use of their station by rules and bye-laws issued by them with the approval of the Board of Trade. It appears to me that that affords a better way of regulating the station than is afforded by an application like the present.

LORD MONCREIFF.—I am satisfied that the pursuers are not entitled to interdict in terms of any branches of the prayer. They ask, in the first place, that the defenders should be interdicted from "unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the pursuers." This is far too general. The pursuers were bound to specify wherein the unlawful entering or trespass sought to be interdicted consists. If, for instance, by the words quoted it is meant that anyone who enters the precincts of a railway station without intending to travel by the railway, or without having travelled or arrived by it, commits a trespass, this should have been distinctly stated.

In regard to the remainder of the prayer, I am satisfied from the proof that it is not proved that the respondents entered the complainers' premises for the purpose of "obtaining" customers. They only went there for the purpose of meeting customers who were known to be arriving by train, or to see customers off.

It is not proved that the defender Ross's boots touted for business or caused any disturbance or confusion.

As to the boots' uniform or badge—if the complainers are entitled to exclude from the station, without reason assigned, any person except travellers, they may attach any conditions they please, and therefore they may exclude a man on account of any badge or uniform he may choose to wear. But taken by itself it is not a ground for interdict.

The more general question which was dealt with in argument, viz., whether the pursuers are entitled, as matter of right, to exclude not merely from their platforms, but from the precincts of their stations, anyone who has not actually travelled or is about to travel by the railway, is not properly raised. It is not covered by the prayer, and leave to amend was not asked.

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But I must say that as at present advised I am not prepared to affirm that broad and startling proposition. A railway company is not in the position of an owner of private property. They hold their stations for the convenience of the travelling public. It may be that the ultimate decision as to what facilities they are bound to provide for the travelling public rests with the Railway Commissioners. But when a railway company applies to this Court for interdict on such grounds, in the absence of any deliverance by the Railway Commissioners, I do not think that they should obtain the assistance of the Court, unless their right is demonstrated beyond doubt. Now, *prima facie*, there are many cases in which a passenger requires as a necessary convenience the attendance of a relative or servant to see him away or meet him at the train, and to call the relative or servant a trespasser seems an abuse of the term. To recognise the traveller's right to have this accommodation in no way interferes with the railway company's right to regulate the admission of those who are not passengers. They have power to frame regulations, to be approved of by the Board of Trade, and possibly they have power without any such sanction to erect barricades at the platforms or other suitable places within the station. But what the pursuers desire to do here is to exclude such persons altogether from the premises. As I have said, whatever remedies they may be able to obtain from the Railway Commissioners on cause shewn, I do not think they are entitled to interdict at common law.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors appealed against: Find in fact (1) that the defender did not by himself or his servants enter the pursuers' station except for the purpose of accompanying passengers who were leaving his hotel, or of meeting passengers who had intimated that they were to arrive at the defender's hotel; and (2) that neither the defender nor his servants have caused any obstruction or inconvenience at the pursuers' station: Find in law that the pursuers are not entitled to interdict against the defenders as craved: Therefore recall the interim interdict formerly granted: Refuse the prayer of the petition, and decern."

JAMES WATSON, S.S.C.—JOHN HAY, I.A.—Agents.

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GLASGOW POLICE COMMISSIONERS, Pursuers (Respondents).—*Lees—Salvesen.*

J. & J. M'OMISH & ARTHUR, Defenders (Appellants).—*Ure—Clyde.*

Burgh—Police—Drainage of houses—Glasgow Police Act, 1866 (29 *and* 30 *Vict. c.* 273), *secs.* 332-5—*Glasgow Police Amendment Act*, 1890 (53 *and* 54 *Vict. c.* 221), *sec.* 16.—Section 16 of the Glasgow Police Amendment Act, 1890, enacts that if the drains of any house, &c., are found to be defective, the owner of the premises shall be bound immediately on an "order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, and to do such acts as may be requisite to prevent risk to health, and failing compliance the Police Commissioners may do the work and recover the expenses from the owner." No appeal is provided.

By secs. 335, 337, 321, and 322 of the Glasgow Police Act, 1866, the Police Commissioners are empowered to require owners of houses to construct new drains if such should be necessary; and it is provided that in the event of an owner objecting the case shall be brought before the Dean of Guild.

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The Glasgow Police Commissioners having found the drains of a block of houses to be defective, issued an order in terms of section 16. The owner having failed to obey the order, the Police Commissioners proceeded to execute certain work, on the advice of their sanitary engineer, discarding as useless the materials of the old drain, and constructing at a safer distance from the property a new drain in a different site, and with a different outflow.

In an action by the Police Commissioners against the owner for the expenses of the work, the Court (*diss.* Lord Young) *assoilzied* the defender on the ground that the proceedings of the pursuers were not warranted by section 16 of the Act of 1890, in respect that it only contemplated repairs to existing structures, and not the formation of a new system of drainage.

2D DIVISION. Sheriff of Lanarkshire.

THE GLASGOW POLICE COMMISSIONERS having spent a sum of £80, 10s. 8d. on the drainage of a block of houses at Garngad Hill, Glasgow, raised this action for repayment of the amount against J. & J. M'Omish & Arthur, the factors for the proprietor of the houses, and as such owners in the sense of the Glasgow Police Acts.

The action was raised in the following circumstances: In March 1894 the sanitary inspector of the city intimated to the defenders that there were reasonable grounds for believing that the drains of the houses were defective so as to cause risk to health, and that a test would be applied on a certain date. The drains were found to be defective, and on 4th April 1894 the sanitary inspector issued to the defenders this notice:—

"29° and 30° Victoriæ, cap. 273.* 53° and 54° Victoriæ, cap. 221.

"Chambers, 1 Montrose Street.

"M'Omish & Arthur, 19 Parliamentary Road, Glasgow.

"The Glasgow Police Commissioners hereby give you notice, that within or near the premises situated at 134 and 140 Garngad Hill,

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* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 335, enacts,—"The Master of Works may by notice given in manner hereinafter provided to the proprietor of every land or heritage adjoining or near to any turnpike road within the city, or to any public or private street or court, require him, so far as not already done, to construct on such land or heritage in a suitable manner, and from time to time to alter, renew, add to, repair, and maintain, one or more private sewers for the purpose of draining such land or heritage, or any lands and heritages adjoining or near thereto. . . ."

Secs. 337, 321, and 322 contain provisions for the case of any owner objecting being brought before the Dean of Guild.

The Glasgow Police Amendment Act, 1890 (53 and 54 Vict. cap. ccxxi.), sec. 16, enacts,—"Whenever the sanitary inspector has reasonable grounds for believing that the drains connected with any house or building are defective so as to cause risk to health he may (after twenty-four hours' notice, and except in the case of tenement houses), with consent of the owner and occupier of such house or building, or in the event of objection by any such owner or occupier, after obtaining the warrant of a magistrate, apply the smoke test, or other test, to such drains for the purpose of discovering the defect . . . and if the drains are found to be defective, the owner of the premises shall be bound immediately on an order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health, and failing compliance with such order, the Police Commissioners may execute the work and recover the expense thereof as damages from the owner."

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Glasgow, of which you are owners, there exists the following nuisance within the meaning of the Glasgow Police Acts, 1866 to 1890, viz.:—"Drains in back court and in wash-houses are very defective, also branch drains from sink conductors and under surface gratings, and in wash-houses untrapped, likewise the whole is discharged into the Monkland Canal.

"Remedy.—Disconnect from canal and lay down a new drainage system from present drain in court through close at No. 134 Garngad Hill, and insert in drain under foot pavement of street an improved ventilating trap, &c. With certification that, if you fail to do so, the said Police Commissioners will immediately thereafter take proceedings to enforce the provisions of said Acts."

At this time it was supposed that by taking the drains through the closes junction could be effected with a public sewer in front or on the west side of the houses. It was afterwards discovered, in the course of the operations conducted by the Police Commissioners, that the public sewer did not run in front of the houses, but stopped some distance from the south gable of the block. The assumption that the drains discharged into the Monkland Canal was also erroneous. They were actually connected with the public sewer.

Representatives of the sanitary authority and the defenders met at the premises on 11th April, and it was agreed to delay operations until the defenders could consult their client, the owner. The pursuers again urged the execution of the works, and on 10th September the defenders informed them that they were unable to induce the owner to undertake the repairs, and that the pursuers would require to do the work and charge them with the expense. "The matter was, however, allowed to lie over till on or about the 20th of September 1894, when the defenders or their representatives called on the sanitary inspector, and he then informed them that he insisted on their executing the work specified in said notices dated 4th April 1894." This was stated in cond. 8, and admitted.

The following notice was served upon the defenders on 25th September 1894:—"53° and 54° Victoriæ, cap. 221, sec. 16.—The Glasgow Police (Amendment) Act, 1890.—By virtue and in terms of section 16 of the Glasgow Police (Amendment) Act, 1890, the Glasgow Police Commissioners hereby intimate to you that the drains connected with the houses or buildings situated at 134, 140, 146, 152, 160, and 164 Garngad Hill, Glasgow, have, after examination thereof, been found to be defective, so as to cause risk to health, and order you, as the owner of said houses or buildings, to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health, and that within seven days from this date, under certification that if you fail to comply with this order within the above period, the said Police Commissioners will, on the expiry thereof, execute the work, and recover the expense thereof as damages from you, all in terms of the section above mentioned of the said Glasgow Police (Amendment) Act, 1890."

The defenders failed to execute the repairs.

The sanitary inspector then took estimates for the work, and the operations were conducted under the superintendence of the sanitary engineer of Glasgow, by whose advice a new drain was laid down some feet further from the windows of the houses than the old drain, and the materials of the old drain were discarded as injured and use-

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less, and new pipes were used. As the pursuers were ignorant that the old drain was connected with the public sewer, they connected the new drain to the sewer by a new outfall.

The defenders refused to pay the expense of these operations.

After a proof, the Sheriff-substitute (Spens), on 14th March 1896, pronounced this interlocutor:—"Finds that the Sanitary Inspector for the city of Glasgow had, on or about March 1894, reasonable grounds for believing that the drains connected with the houses or buildings at Garngad Hill, specified in article 2 of the condescendence, of which defenders were factors, were defective: Finds that he gave notice to defenders on 16th March, having in view the 16th section of the Glasgow Police Act, 1890, that the sufficiency of said drains would be tested on 2d April 1894: Finds on the said 2d April the smoke test was applied to the drains in said tenement, with the result of indicating the drains were defective, and finds in point of fact said drains were defective: Finds that certain procedure thereafter went on, but finally, on 24th September, the pursuers, the Glasgow Police Commissioners, issued an order under the 16th section of the statute above referred to, ordaining the defenders to carry out all necessary operations for removing defects of structure, or to do such acts as might be requisite to prevent risk to health, and that within seven days, under certification that if they failed to comply with said order within said period the pursuers would execute the work at the expense of the defenders: Finds nothing was done by defenders, and the sanitary inspector, on or about 17th October 1894, ordered the witness John Shaw to proceed with the work, which the sanitary authorities specified as in their opinion necessary to put the drainage right: Finds the charge for the work done in connection with the premises by the said John Shaw amounted *in cumulo* to the sum of £80, 10s. 8d., being the amount of the account sued on: Finds, under reference to note, the defenders are liable for said expenditure by pursuers; therefore repels the defences, and decerns as libelled: Finds defenders liable in expenses," &c.

The defenders appealed, and argued;—The pursuers' proceedings were *ultra vires*. The notice of 25th September referred to and incorporated the notice of 4th April, and both were under section 16 of the Glasgow Police Act, 1890. From the first a new drainage system was contemplated and ordered. All that the corporation could legitimately do was to call for remedy without specification.[1] If on failure of the owner the pursuers did the work, they could only repair the existing structure. Instead of this they had made a drain which was new throughout. Accordingly they were outside the provisions of section 16 of the Act, and the defenders were not liable.[2] They should have proceeded under the Glasgow Police Act, 1866, sections 332-335, or under the Public Health Act, 1867 (30 and 31 Vict. c. 101), section 85, which was applicable to Glasgow, both of which applied where there was either no system at all, or where an existing system had to be discarded.

Argued for the pursuers;—The Local Authority was *prima facie*

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[1] Cadder Local Authority v. Lang, July 11, 1879, 6 R. 1242.

[2] Campbell v. Leith Police Commissioners, June 29, 1865, 3 Macph. 1035, Feb. 28, 1870, 8 Macph. (H. L.) 31; Magistrates of Edinburgh v. Paterson, Dec. 3, 1880, 8 R. 197; Campbell v. Magistrates of Edinburgh, Nov. 24, 1891, 19 R. 159.

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the judge of sanitation, and the Court would only interfere in very exceptional circumstances. [LORD TRAYNER.—We might not interfere in respect of the manner in which a Local Authority executes what it has power to do, but here was there not a new construction substituted for repair?] Even if there were, the pursuers were within the statute. "All necessary operations for removing defects of structure," and "such acts as may be requisite to prevent risk to health," were sufficient to cover a new structure. Section 335 of the Act of 1866 did not apply. It concerned a case where there was no drain, or where a sewer only went part of the way. *Magistrates of Edinburgh* v. *Paterson* was not in point, for the only question was whether the statutory words were wide enough to cover any actings. These only involved a renewal of the drain, and a removal of defects.

At advising,—

LORD JUSTICE-CLERK.—The pursuers ask that the defenders be ordained to pay the expense of certain works executed upon property for which they are responsible as proprietors, the legal ground for the claim being statutory, and statutory only. The pursuers are the public authority which has certain statutory powers in regard to the drainage of house property in Glasgow; that power includes the right to examine drains, and if defects are found, to give notice to the proprietor or his factor to have the defects remedied, and if this be not done then to execute the works necessary to cure the defects and to charge the defaulting owner with the expense. These powers are conferred by the Glasgow Police Act of 1890. In this case the public authority represented by the pursuers proceeded under section 16, and under section 16 only. No notice was given under any other section, or under any other Act of Parliament. The procedure was that a notice under section 16 was served by which the defenders were called upon "to carry out all necessary operations for removing defects of structure or to do such acts as may be requisite to prevent risk to health." The work was not done by or for the proprietors, and thereupon the pursuers proceeded to do certain works themselves, for the cost of which they now sue. The real question is whether what they did were works falling under the notice. If they were, then the defenders have no answer to the pursuers' claim. What the pursuers in point of fact did was to substitute an entirely new drain some feet out from where the existing drain was at the back of the premises, and to carry a new drain from the end of the houses to the main drain which was in the road in front of them. I am unable to hold that this work was work which can be held to fall within the notice under section 16. That section bears to relate to the remedying of defects of structure requiring remedy, not to entirely new works. It is true that to the words "removing defects of structure" these words are added "or to do such acts as may be requisite to prevent risk to health," but I cannot hold that these words are to be read as separate from the previous words of the section, which point at remedy of defect in the existing system. The notice indicates that this, and nothing more, is contemplated, allowing as it does only seven days for the completion of the work. The words are "to carry out . . . and that within seven days," which seems quite inconsistent with the idea that proceedings are contem-

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plated in which no portion of the existing works is to be utilised at all, but an entirely new system substituted for them.

It is to be observed that the public authority has power, where this is necessary, to require that a property not drained shall have a system of drainage put in, and to require that a bad system which cannot be made efficient shall have a proper system substituted for it. But in such a case the procedure is different. Whereas under section 16 of the Act of 1890 the proprietor has no option but to submit to the order or to do the work for himself or pay for it if on his failure the Commissioners execute it, the Police Act of 1866 provides that if a proprietor is to be required to put in a new system of drainage, the authority of the Dean of Guild Court must be invoked, the matter being considered by a judicial tribunal which will deal impartially between the executive authority and the private citizen, and an appeal being open to a higher Court where grounds for appeal may exist.

In this case the work done was one entirely of substitution of a new system, professedly under a mode of procedure which gave the citizen no protection by judicial inquiry or appeal. The proprietors had no reason to expect that anything more would be done than the notice under section 16 of the Act of 1890 implied. As matter of fact one part of the work, viz., the new drain leading to the main street drain was not made because of any defect in the existing drain, but because the Commissioners were not aware of the existence of the drain, and believed that the sewage of the defenders' houses passed in an opposite direction into the Monkland Canal.

I do not lay any weight upon the fact, although it illustrates the looseness of the Commissioners' procedure, that before the formal notice under sec. 16, notices had been given in which they specified certain works which they required to be done, and which it turned out were based upon a totally erroneous idea, that there was a main street drain in front of the defenders' houses, which drain did not in fact exist. I take the case as if the notice on 25th September under sec. 16 was the only notice given. I have not been able to hold that the works done were such as fall under the notice, and therefore, although I agree with the Sheriff-substitute in thinking that the officials of the Commissioners acted *in bona fide*, still I think that the works they executed were not such as can, under the notice served upon the defenders, be charged against them.

LORD YOUNG.—It is admitted, and indeed is the case of both parties, that the appellants, although only the factors for the owners of the premises referred to in the pleading, must in this action be regarded and dealt with as if themselves the owners. I am nevertheless of opinion that account may be, and ought to be, taken of the conduct of the owner himself, as to which we have the evidence of his factors and of his own letter of 27th March 1895.

The premises in question consist of a tenement of houses in Glasgow. The tenement comprehends eighty-two houses of about three rooms each, and occupied by several hundred individuals. It is more than twenty-five years old. In 1893 and 1894 complaints were made to the sanitary inspector of the condition of the drains connected with the tenement, which were said to be very bad, sending foul and smelling air into the houses, and causing

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enteric fever, which in one case at least ended in death. The inspector, in consequence, communicated with the defenders with a view to proceedings being taken under section 16 of the Glasgow Police Amendment Act, 1890, for testing the drains, removing defects, and doing such acts as might be requisite to prevent risk to health. It is not questionable, or I think questioned, that this was his duty. This was the only notice given. That which the Lord Justice-Clerk referred to was not a notice, but an order. The result was that the drains were found to be very bad indeed. This was found not only by the smoke test, but by the test of all the eyes and noses which were used for the purpose. The defenders afforded all due facilities for testing and examining the drains, and themselves saw and knew the results. There is not, I think, a statutory duty on the Commissioners of Police, or of the Health Committee, or sanitary inspector, when informing an owner that his drains are defective and dangerous to health, to point out or suggest remedies; but Mr Fyfe, the chief sanitary inspector of Glasgow, in his evidence says,—"The Health Committee desire to do it just out of courtesy to the proprietors before Mr Lang is asked to issue the statutory notice." This course was followed in the intimations made to the defenders in April 1894, and led to a request by the defenders that Mr Fyfe should meet them on the ground on 11th April. The meeting took place accordingly on that day between Mr Crawford, who was then, and is now I suppose, inspector under Mr Fyfe, and Mr Arthur, one of the defenders' firm. An account of the meeting is given by Crawford, the result being that Mr Arthur asked a fortnight's delay, which was granted. Nothing was done by the defenders, and the trifling pressure by the pursuers resulted in Mr M'Omish, one of the defenders, calling on Mr Fyfe, on 10th September, and saying to him,—"I am afraid you will require to do the work and charge us with the expenses." This is the evidence of Mr Crawford who was present, and of Mr Fyfe. Mr M'Omish explained "that he could not get the proprietor to move in the matter, and do anything." Mr M'Omish's own account of his client's conduct in the matter is very frank, and I think in accord with the evidence of Crawford and Fyfe. The evidence of these witnesses satisfies me that the police and sanitary authorities did not act hastily, but, on the contrary, gave much indulgence to the defenders, or rather perhaps to their seemingly eccentric and impracticable client. Mr Fyfe says that he instructed Mr Shaw to proceed with the removal of the nuisance on 17th October. "That was about seven months after I had first started this case, and after I had been delayed more or less by the factors or the proprietor. On various occasions they requested delay from my inspector and from me."

Thus far the case seems clear. The drains connected with the tenement were "found defective" in the only practical meaning of the word in a clause of a sanitary Act requiring that drains shall not be allowed to continue in a state causing risk to health, viz., so unfit for their purpose as to cause such risk. The duty of the owner of the premises with which these defective drains were connected is described in these very plain words—"The owner of the premises shall be bound, immediately on an order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may

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be requisite to prevent risk to health." There is nothing whatever in the Act prescribing that this must be done in seven days. It is in the order, but I attach no importance to this. If the work had been begun, or steps taken for its execution within seven days, that would have been sufficient, and no proceedings would have lain against the appellant because the work was not completed within that time. An order to the above effect was admittedly given by the proper authority on 25th September 1894, and disregarded by the owner of the premises, who took no notice of it, and did nothing in consequence of it. This failure of duty by the owner is not denied or defended. He undoubtedly ought to have ascertained for himself whether any, and if so what, operations were necessary "for removing defects of structure," and what acts, if any, were "requisite to prevent risk to health." If assured that no such operations or acts were "necessary" or "requisite" he was entitled to prevent the Police Commissioners from executing any work on his property under section 16 of the Act. This is really not doubtful, but it would be unprofitable to pursue this topic, it being clear, and indeed admitted, that some "operations" and "work" were "necessary" and "requisite." The skilled witnesses for the defenders in the proof before us suggest in their evidence the advice they would probably have given if consulted as to what was necessary to be done to satisfy the reasonable requirements of the sanitary authorities. Now, why was such advice not taken and acted on? Abundance of time to do so was given, but nothing done. It was, in these circumstances, clearly the duty of the Police Commissioners to ascertain for themselves what operations and acts were necessary, and to execute them. This is what they did, acting throughout as a public body in the discharge of a public duty put upon them by statute. It is of course conceivable that they might have been otherwise and better advised than they were, and so remedied the defective drainage at less cost to the owner. But I am not disposed to give very favourable attention to criticism and complaint of this sort by an owner who declines to do his duty by attending to the matter for himself.

The Commissioners were advised, and acted on the advice, that the pipes in the existing drain were of bad material and bad construction, and much broken, that they were not worth lifting, and that the proper thing to do was to get and use new pipes of better material and more efficient construction. They were also advised, and acted on the advice, that it was requisite, to prevent risk to health, that the pipes of the main drain should be laid two or three feet further from the windows of the tenement. This was all done openly and slowly on the property, with due notice to and in the sight of the owner's factors, who were themselves fully informed of everything that was intended to be done and was done, and who kept their client duly informed, although he did not choose to notice their communications.

It is said that the Commissioners incurred extra expense through a mistake on their part as to where the outlet of the drain was. I attach no importance to this. The owner's letter of 27th March 1895 is rather an important one, and shews where the mistake as to the outlet of the drain sprang from. Mr Macdougall there writes to his agents, the defenders—"You are perfectly aware that I have all along denied the right of the

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sanitary inspector to order the diversion of the drainage system from the former outlet to the canal into the road at my expense."

I think there is really no good objection to the proceedings of the Police Commissioners, or to any of the operations which they executed under presumably competent advice. But if I thought otherwise I should be disposed to hold that the owner was barred from objecting in respect of his own failure of duty, and his conduct in standing by and seeing and allowing without objection what was done by the Police Commissioners that the public health might not suffer from his failure.

The evidence shews, I think, satisfactorily—first, that the drains were defective in the sense of being so unfit for the purpose to which they were habitually and continuously put by the large population living in the tenement with which they were connected as to be seriously dangerous to health. Second, that the owner of the tenement failing to comply with the statutory order to carry out the necessary operations for removing the defects, the Police Commissioners executed the work which they believed to be necessary "for removing defects of structure" and preventing "risk to health." Third, that the defects were thereby removed and risk to health prevented; and fourth, that there was no extravagance or excess in the extent or course of the work thus executed. I have already said that I think it would be necessary for an owner who had failed to perform his own duty by executing the necessary work himself to establish a clear and even gross case of extravagance and excess to entitle him to decline to relieve the Police Commissioners of their actual outlay.

I have now to consider another view, which was the last which occurred in the case, namely, that the operations which were executed were not such as were authorised by clause 16 of the statute. I think it is according to the evidence that the drains were defectively constructed. I do not know what drains consist of except material and structure. The pipes are not the drains. The pipes are the material used in constructing the drains. Nevertheless defects in the pipes are, I suppose, defects of structure, and I suppose defects in the material would be defects of structure, and what other defects can a pipe have except defects of material or structure? What defects can a drain have except such defects? A defective drain is one not so constructed with such pipes so laid as to answer the purpose to which a drain is put consistently with due regard to the health of the inhabitants of the houses in the neighbourhood. When drain-pipes are of bad material, when they have no joints such as drain-pipes ought to have, and when they are so bad as not to be worth relaying, what is the remedy for that defect of structure? I think common sense would suggest to put in better material. Can any other remedy occur to any human being? That is what they did, and it is according to the evidence that that was a reasonable and proper thing to do. I do not mean that there may not be difference of opinion, that some of the witnesses might not think that some of the pipes might have been made to answer, and other pipes put in for the broken ones, and the asphalt lifted and relaid—in short, that the Police Commissioners might have repaired the existing pipes, putting in new pipes at some places and using the old at some other places, and trying to mend the joints as well as they could. But if the police authorities were advised that the most economical

course, and the only sensible course—and if they believed that the economical and sensible course—was to put in new pipes better jointed, are we to say in point of law that that is a new system of drainage, and that it is not removing defects of structure? I know of no authority for that. It does not recommend itself as a reasonable proposition to my mind. Are we to inform the sanitary authorities in Glasgow and elsewhere that they cannot under this clause put in new pipes of good material and good construction in place of old pipes of bad material and bad construction without taking proceedings under a statute thirty years old as to the construction of new drains altogether? I cannot assent to that. I do not think it is reasonable, and in my view of the law the law is not so unreasonable as to take that view. But then it was said if you remove the drain-pipes, and put them further from the windows, that is not within clause 16, because it is not removing a defect of structure. I am not persuaded of that. Structure does not mean merely building. The sense of the word is not limited to that. It means placing and arrangement. But I do not need to pursue that, because they are not merely entitled, but bound, to do any act which is requisite to prevent risk to health. Now, it is an unintelligible proposition that the sanitary authorities may be rightly advised, and they were advised here, that an act certainly requisite in the opinion of very competent people to prevent risk to health was to remove these pipes further from the windows, and yet that they are not within the statute if they follow this advice. So long as they were perfectly tight they might be under the floor of the house or within the house, but then there is always the risk of leakage at any time. Well attended to drains are tested from time to time to see whether leakages are not occurring, and I suppose most sanitary authorities would concur with the witnesses here, and say that removing the drains, especially when you are relaying the pipes at anyrate, is an act necessary to prevent risk to health. If the sanitary authorities do so, are we to say they are not within the statute, which provides for the very thing if it be necessary to prevent risk to health, or are we to decide this case on the footing that that is not necessary to prevent risk to health? There may be conflicting evidence on this point, but I do not think there is. All the witnesses for the sanitary authority are very clearly of opinion that the removal was necessary to prevent risk to health, and I have noted a passage in the opinion of the principal witness for the defender, Mr Glenister, on this subject,—"As to whether or not it is objectionable to have a sewer such as this old sewer was within two feet of a building line—I say, any drain so close to houses is objectionable even although it is for waste water, but it is a very common thing in Glasgow to have ventilating traps on soil-pipes within two feet of windows. I do not, as a sanitary authority, approve of that, and I ask the sanitary authority if they approve of it." Well, they did not, and in acting upon the reasonable advice which they received, and in laying pipes of better material and proper construction, and in removing them further from the window—I say they were acting in accordance with clause 16 of the statute.

Therefore, upon the whole matter I am of opinion that the whole proceedings of the sanitary authority here were right and unobjectionable; that there is no ground of complaint on the part of the objector; that we cannot

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with propriety interfere with what has been done by the sanitary authority, and that there was nothing done by them which was not authorised and required to be done by clause 16 of the statute. I think, therefore, that the judgment of the Sheriff here ought to be affirmed, and this appeal dismissed.

LORD TRAYNER.—The pursuers in this case sue the defenders for payment of the cost of certain drainage operations executed by the pursuers on or in connection with the defenders' property. Several considerations were urged upon us in the course of the argument why the defenders should not be held liable in the sum sued for, but regarding which I shall make no observation, thinking them, if not irrelevant, at all events not necessary to the decision of the question before us. That question really is whether the pursuers' proceedings (under which the amount sued for was incurred) were or were not authorised by section 16 of the Glasgow Police Act of 1890, the section under which alone the pursuers proceeded, and upon which alone they base their present claim. The facts out of which this question arises are of the simplest, and may be stated in a sentence or two. The pursuers having reason to believe that the drains connected with the defenders' property were defective, gave notice of this to the defenders, and required and ordered them "to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health," within seven days from the date of notice. This notice was dated 25th September 1894, and in express terms bore that it was issued "by virtue and in terms of section 16 of the Glasgow Police (Amendment) Act, 1890." The defenders did nothing to the drains of their property in response to this order, and the pursuers proceeded to execute the works, the cost of which is now sued for. They did not, however, proceed to remedy or remove defects of structure in the existing drains, but disregarding the existing structure altogether, laid down an entirely new drain in a different site, and with a different outflow. Now, if what the pursuers did is authorised by the section of the statute under which they gave their notice, they must prevail; if otherwise, they fail, their entire proceedings being unwarrantable. Accordingly, the question to be now decided is, as I have already stated, whether the pursuers' proceedings were authorised by that section or not. In my opinion that question must be answered in the negative. It appears to me that the section of the Act referred to only authorises the pursuers to call for repairs on an existing drain in order to remove or remedy defects therein. No doubt the section also authorises the pursuers to call upon the owners of the defective drains to do "such acts as may be requisite to prevent risk to health"; but I read that along with what goes before, and regard it as authorising a demand on the owner of the drain to do such acts of the kind,—that is, acts of the nature of repair or other remedy in connection with the existing drain as will prevent risk to health. In short, the statute appears to me to authorise the pursuers to order such repairs or alterations on an existing drain as will make it efficient and safe. But it does not authorise the pursuers to require the owner to make an entirely new drain, or on his failure, to make such a drain at his expense.

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It is not without importance, in considering the construction to be put upon section 16 of the Act of 1890, to keep in view that the pursuers had authority to call upon the defenders to build a new drain, if that was what they thought necessary in the public interest, under the 335th section of their Police Act of 1866. Accordingly, it is not presumable that the Legislature, by section 16 of the Act of 1890, was conferring a power on the pursuers which they already possessed, or was merely repeating a clause formerly enacted. It is more reasonable to suppose that these statutory provisions were intended to provide for different cases—for repairs namely in one case, and construction in another. It is also noteworthy that the conditions attending the exercise of the power conferred by these two clauses are materially different. For repairs or "removing defects of structure," under section 16 of the 1890 Act, may be ordered wherever the pursuers are satisfied that the drains are defective, and there is no appeal provided for against such an order. It must be obeyed under penalty, and if not obeyed, the pursuers are authorised themselves to execute the work and recover the expense thereof as damages from the owners of the property. Under section 335 of the Act of 1866, however, which authorises the pursuers to call on an owner of property to construct new drains, the pursuers are not left sole judges of the propriety of such an order. Taking sections 337, 321, and 322 of the Act of 1866 together, it appears that when a new drain is deemed necessary, and is required by the pursuers to be constructed, the owner called on to do this work must be convened before the Dean of Guild, who may, as seems just to him, either enforce by his order the notice which the pursuers have given, or dismiss the application. The judgment of the Dean of Guild is not declared final, and therefore either the pursuers or the owner of property convened would have an appeal against the judgment of the Dean of Guild to this Court. Now, I think the difference in procedure under the two statutes may be accounted for in this way. If repair on existing drains is all that is required, presumably at no great cost—at all events no great cost in comparison with the cost of constructing an entirely new drain—then the pursuers may reasonably enough be allowed to judge of the necessity for such repairs, and to order their execution. But where the greater expense of constructing a new drain is involved, then the owner required to construct it is to have the advantage of being heard by some other judge than the persons who are issuing the requisition upon him. These considerations, taken along with the words of clause 16, appear to me to warrant the construction I have put upon it. It only authorises repairs; the remedy of defects in an existing structure does not authorise (what is elsewhere authorised) a new construction. If my construction of section 16 of the Act of 1890 is right, then the conclusion I have reached, that the defenders are entitled to absolvitor, appears to be the only conclusion possible, consistent with the decision in the case of *Magistrates of Edinburgh* v. *Paterson*.[1]

LORD MONCREIFF.—I should have been glad to have been able to arrive at the same conclusion as the Sheriff-substitute. The drain in question was admittedly out of order, and the expenses incurred by the Police Commis-

[1] 8 R. 197.

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sioners—£80, 10s. 8d.—for which they now sue the appellants, are comparatively small. In holding the defenders not liable, I have been influenced, not only by the character of the works executed, but by the irregular and misleading nature of the procedure followed by the pursuers, which palliates, if it does not wholly excuse, the proprietor's conduct.

Apart altogether from the question of the construction of section 16 of the Glasgow Police Act of 1890, there are serious objections to the pursuers' claim for work executed. In the first place, part of the work, viz., the connection between the drain at the back of the tenements and the main sewer in Garngad Hill, was absolutely unnecessary, because, as the pursuers might and should have ascertained, there was already an exisiting connection, as shewn on the plan, between the letters A and B. The expense of that work could in no view be allowed.

Again, about a fourth of the expense is connected with repairs upon the sink conductors, which were not found to be necessary until December 1894. The pursuers state in cond. 15 that they issued notices to the defenders to remedy the defects in the sink conductors, but it is admitted or proved that those notices, if issued, were not received by the defenders; and if it was necessary to give notices, as the pursuers seem to admit, the pursuers have no claim against the defenders for the expense of that part of the work. If the pursuers had in March 1894 tested these sink conductors and found them defective, and issued their notices stating that fact, and calling upon the defenders in general terms to repair the defects in the drains, the defects in the sink conductors might have been held to be included in the defects in the drains. But in the notices of 4th April 1894 the work ordered to be done was work outside the houses, and did not include the curing of defects in the sink conductors, which, indeed, the sanitary inspector had not at that time discovered.

The remainder of the work charged for was the formation of a new drain several feet further away from the houses than the old drain, and that brings me to the question whether in making that new drain the pursuers exceeded their statutory powers.

When commissioners of police or other public body are empowered by statute to order repairs to be executed or work to be done, and on the proprietor's failing to comply, to do the work themselves at his expense, the measure of their claim for recompense, if they do the work, is that the repairs or works for the cost of which they charge are such as the proprietor was himself bound to execute under the clause of the statute founded on. If they execute works of a different description, they cannot recover, although the proprietor as well as the community gets the benefit; and it will not avail them that the proprietor has stood by and done nothing. They must act strictly within their statutory powers—*Magistrates of Edinburgh* v. *Paterson*;[1] *Hillhead Commissioners* v. *Martin & Bruce*.[2]

The only statutory warrant upon which the pursuers found is the 16th section of the Glasgow Police Amendment Act of 1890. On reading that section it appears to me that it is confined to repairs upon drains already in existence which may be in a faulty condition owing to defects such as bad

[1] 8 R. 197. [2] 17 R. 123.

material, bad jointing, or the absence of traps, or from having fallen into disrepair, and does not apply to the construction of a new drain. The sanitary inspector is empowered, with a view to discovering whether defects exist, to apply the smoke test or other test to "such drains,"—that is, to the existing drains. The smoke test will disclose defects (if they exist) in the joints, and also whether owing to the absence of proper trapping, foul air will penetrate into the building. Against this requisition there is no appeal. All this, I think, points not to a new system of drainage as the remedy contemplated, but to the repair of an existing structure, although no doubt the repairs may require to be more or less extensive according to the condition of the drain. This becomes the more apparent when the provisions of section 16 of the Act of 1890 are contrasted with sections 332 and 335 of the Glasgow Police Act of 1866, and the procedure as to notices under section 321, and also the right of appeal given in such cases by section 322, is made applicable to the formation of drains by section 337. In short, I think that section 16 of the Act of 1890 contemplates repairs which, in the interests of public health, admit of being made in an emergency in a comparatively short time, and not the formation of a new system of drainage which, as here, might require a considerable time for its proper execution.

But when, after applying the smoke test in March 1894, in virtue of powers under the 16th section, the sanitary inspector found that repairs were needed, the pursuers did not content themselves with calling upon the proprietor to remedy the defects in the existing drain and connections. They issued the notices, dated 4th April 1894, which are printed in the appendix. Now, these notices were irregular and misleading in several respects. In the first place, they called upon the proprietor not to repair the existing drain and connections, but to "lay down a new drainage system." That was the keynote of the notices. Again, this order to construct a new drainage system proceeded upon two inexcusable mistakes in point of fact. First the proprietor was told in the case of each tenement to carry a new drain through the close under the house and connect it with a public sewer in front of the house, whereas at that time no such sewer had been formed. Secondly, the proprietor was ordered to disconnect his drain from the Monkland Canal, whereas it did not drain into it, but into the main sewer in Garngad Hill to the west of the defenders' properties. This was what the proprietor was called upon to do, and I do not find that the pursuers ever departed from those notices. It is stated in condescendence 8 that on 20th September 1894 the sanitary inspector informed the defenders "that he insisted upon their executing the work specified in said notices dated 4th April 1894"; and in condescendence 12 it is stated that after fresh notices of 25th September had been given, the sanitary inspector "issued estimates for the execution of the work remedying or removing the said nuisance as specified in the notices served by the sanitary inspector on the defenders on 4th April 1894." This shews that although the notices of 25th September bear to be issued under section 16 of the Act of 1890, and do not contain particulars of the work to be done, they were not given in order to remedy the mistakes in the earlier notices; the pursuers did not depart from their original demand for a new system of drainage.

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The result of all this confusion and the nature of the demand made upon the proprietor in the notices was to enable him to say that the pursuers who professed to be acting under section 16 of the Act of 1890, under which there is no appeal, would be satisfied with nothing less than the execution of the works specified in the notices of 4th April 1894.

In holding that the pursuers are not in this case entitled to recover, I do not think that we shall throw any difficulties in the way of the sanitary authorities in Glasgow in the execution of their duties. If they had made the necessary investigation as to the lie and outfall of the drain, and followed the course prescribed by the statutes, the difficulty would not have arisen. While I think that the proprietor should have more actively endeavoured to arrange as to the repairs which were needed, I do not think that, looking to the demands of the pursuers and the case of *Paterson*,[1] his failure to do anything or to suggest an alternative scheme to that proposed by the pursuers forms a sufficient ground for subjecting him in liability.

THE COURT pronounced this interlocutor, which was dated 26th June and signed 11th July:—"Find that the pursuers, having reason to believe that the drains connected with the defenders' property were defective, by notice dated 25th September 1894, issued by virtue and in terms of section 16 of the Glasgow Police (Amendment) Act, 1890, gave notice of this to the defenders, requiring and ordering them 'to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health': Find that the defenders did nothing to the drains of their property in response to this order, and that the pursuers proceeded to put the drains in question into what they considered a safe and proper condition: Find, however, that the pursuers did not proceed to remedy or remove defects of structure in the then existing drains, but, disregarding the existing structure altogether, laid down an entirely new drain in a different site and with a different outflow: Find that the pursuers' proceedings were not authorised by said section 16 of the Glasgow Police (Amendment) Act, 1890: Therefore recall the interlocutor appealed against; sustain the appeal; assoilzie the defenders from the conclusions of the action," &c.

CAMPBELL & SMITH, S.S.C.—SIMPSON & MARWICK, S.S.C.—Agents.

No. 175.

June 27, 1896. Macquisten v. Adam, Sons, & Co., Limited, and Liquidator.

ARTHUR PENRYHN STANLEY MACQUISTEN, Petitioner.—*Salvesen.* ADAM, SONS, & COMPANY, LIMITED, AND LIQUIDATOR, Respondent.—*Lorimer.*

Company—Voluntary Liquidation—Supervision Order—Additional Liquidator—Companies Act, 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 147, 149, *and* 150.—A person alleging himself to be the principal ordinary creditor of a company which had gone into voluntary liquidation presented a petition for a supervision order, and for the appointment of an additional liquidator. The company had prior to the liquidation disputed the peti-

[1] 8 R. 197.

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tioner's claim against the company, and the company and its liquidator in their answers did not admit the claim. If established the petitioner's claim amounted to about four-fifths of the whole debts of the company. The respondents averred that (apart from uncalled capital) the assets would on realisation be sufficient to meet the entire claims against the company, including that of the petitioner. The petitioner denied this.

The Court *granted* a supervision order, but *refused* to appoint an additional liquidator.

2D DIVISION.

ON 23d May 1896, at an extraordinary general meeting of the shareholders of Adam, Sons, & Company, Limited, No. 129 Constitution Street, Leith, it was resolved that that company should be wound up voluntarily, and that Thomas Watson Sime, C.A., Edinburgh, should be appointed liquidator.

The nominal capital was £25,000; and the issued capital £17,000, of which £4320 was paid up.

On 9th June Arthur Penryhn Stanley Macquisten, C.A., Glasgow, presented a petition praying the Court to order the winding-up to be continued, but subject to the supervision of the Court, and to appoint an additional liquidator.

The petitioner further stated that he was a creditor of the company to the extent of £4500, as holder for value of two promissory-notes for £2000, and £2500 respectively, which both became due on 6th June 1896, and had been duly presented for payment, but had not been paid. "It is believed that the petitioner is the largest ordinary trade creditor of the said company, and that several questions may arise in the said liquidation which make it expedient that the liquidation should proceed under the supervision of the Court. . . . There are only seven shareholders of said company, and it is believed that there will be sufficient surplus assets to meet the debts of all the creditors except the petitioner. These shareholders intend, it is believed, to dispute the petitioner's claim, and the liquidator who has been appointed is a nominee of said shareholders. The heritable property of the company has been heavily mortgaged, its entire capital having been used for the purpose of providing the margin between the mortgages and cost price. The stores are too lightly built for any other trade than the wool trade, and if the mortgagees are allowed to realise for their own interests alone, very serious loss will ensue to the petitioner. It is therefore expedient that an additional liquidator should be appointed."

The company and its liquidator lodged answers.

The respondents stated that shareholders of the company representing £3680 uncalled capital were quite able to meet any calls on their shares. "The liquidator has not had an opportunity of dealing with any claim of the petitioner's upon the said promissory-notes, and has formed no opinion in regard thereto. In the meantime he is informed that the directors of the company do not admit that the petitioner is a creditor of the respondent company, or that the promissory-notes in question are ordinary trade bills. . . . The respondent company have very few debts, and these are of small amounts, and it is not expected that any questions will arise in the liquidation in regard to them, or to the realisation of the company's assets. . . . The respondent company's principal assets are the warehouses in . . . Leith, which have been valued since the liquidation . . . at £12,200. . . . These buildings are mortgaged to the extent of £7000. If the amount of the valuation is realised there will thus be

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a surplus from this item alone of £5200. The other assets of the respondent company, apart from unpaid capital, will amount to about £1800; while the liabilities, apart from the said promissory-notes (should the respondent company be liable therefor), will amount to about £1100. The warehouses belonging to the respondent company are suitable for other purposes than storing wool, and have been frequently used for storing grain and other merchandise. It is expected they will be readily disposed of. The interest on the bonds has been paid up to Whitsunday last."

"The shareholders have thus the real interest in the liquidation, and there are are no questions of competing diligence. The question of the respondent company's liability for the promissory-notes will be dealt with by the liquidator, and thereafter be subject to judicial determination. The judgment of the Court can be obtained in the voluntary liquidation, and a supervision order is, the respondents submit, quite unnecessary for that or any other purpose in the liquidation. The respondents further submit that the appointment of an additional liquidator is altogether uncalled for in this case, and would add unnecessarily to the expense of the liquidation. In the whole circumstances, the petition ought to be dismissed, with expenses." *

LORD JUSTICE-CLERK.—I am quite unable to see what possible injury can happen to anyone from the liquidation being placed under the supervision of the Court. If all goes well in the liquidation there will be no additional expense. If anything occurs requiring the Court to intervene the expense will probably be less under a supervision order than otherwise. Certainly it will not be more. Looking to the fact that a very large proportion of the claims against this company are at the instance of a creditor who desires such an order, I do not think we can refuse to grant the motion.

On the other hand, the appointment of an additional liquidator is a procedure which ought not to be taken except upon some special ground. Here there is a liquidator to whom no objection is stated, either personally or to his qualifications, and as regards any supposed possible bias on his part the petitioner will be protected by the liquidation being put under the supervision of the Court. I am therefore of opinion that there are no grounds here for imposing upon this company the expense involved in the appointment of an additional liquidator.

We shall grant the supervision order, but refuse the motion for an additional liquidator.

LORD TRAYNER.—I am of the same opinion. This can scarcely be called a shareholders' liquidation. Taking a reasonable view of the position of this company as represented by the respondents, there is at least room to doubt whether there will be more than sufficient to meet debts, assuming, as we must assume at this stage, that the petitioner's claim is valid. Seeing that four-fifths of the debts of the company are said to be due to this petitioner, I think that he is entitled to have effect given to his views. There will be

* Referred to by the parties.—Companies Act, 1862 (25 and 26 Vict. cap. 89), secs. 138, 147, 149, and 150; by the Petitioner, *In re* Marseilles Extension Railway and Land Company, Limited, 1867, L. R., 4 Eq. 692.

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this advantage in having this liquidation continued under the supervision of the Court, that any disputes which may arise as to the petitioner's claim will be settled in a speedy and inexpensive manner, which would not be available if the liquidation were voluntary.

I think there is no cause for interfering with the liquidator who has been appointed, at all events in the meantime. If such cause arises—I do not suppose it will—the petitioner, under the supervision order, will have the means of readily bringing it before the Court.

It appears to me, therefore, that we should grant the supervision order craved, and remit to a Lord Ordinary, that we should refuse the application for an additional liquidator, and direct the expenses of this petition to be expenses in the liquidation.

LORD MONCREIFF concurred.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Order the voluntary winding-up of Adam, Sons, & Company, Limited, resolved on by the extraordinary resolution of 23d May 1896, to be continued, but subject to the supervision of the Court, in terms of the Companies Acts, 1862 to 1890: Further, direct all subsequent proceedings in the winding-up to be taken before Lord Stormonth-Darling; remit to him accordingly: Find both parties entitled to expenses, and direct the same to be expenses in the liquidation: Remit to the Auditor to tax the same, and to report to the said Lord Ordinary: *Quoad ultra* refuse the petition, and decern."

WALLACE & PENNELL, W.S.—W. I. HAIG SCOTT, S.S.C.—Agents.

No. 176.
July 2, 1896.
Macdonald's Trustees v. Bain's Trustees.

WILLIAM ARBUTHNOT AND OTHERS (Macdonald's Trustees), Pursuers (Reclaimers).—*C. K. Mackenzie—Constable.*
MRS CHARLOTTE E. S. BAIN OR GEDDES AND ANOTHER (Bain's Trustees), Defenders (Respondents).—*Jameson—Cook.*

Succession—Faculties and Powers—Power to select articles of furniture—Testamentary exercise of power.—A testator directed his trustees to deliver to M., his widow, "such articles of jewellery, linen, silver-plate, books, and other household furniture belonging to me as she may choose to select for her own absolute use," and to allow her and his daughter and the longest liver of them the liferent use of his mansion-house of Easter Livelands, "and also such articles of household furniture, plate, . . . and plenishing of every description which shall be found at the time of my death remaining after the said M. shall have made her selection as aforesaid, or the whole in case of no such selection being made."

After the testator's death his widow and daughter lived together at Easter Livelands for a number of years, in joint possession of his plate, jewellery, and furniture. The widow did not during her life exercise the power of selection given her by the testator, but she left a settlement whereby she bequeathed to different legatees certain of the articles to which the power applied.

Held (*aff.* judgment of Lord Kyllachy) (1) upon the construction of the husband's settlement, that the power of selection given to the widow was a power to be exercised within a reasonable time after the testator's death; and (2) that the power had not been exercised within due time, and had lapsed.

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1st Division. Ld. Kyllachy.

Edwin Sandys Bain, of Easter Livelands, Stirlingshire, Sergeant-at-law, died on 30th December 1874, survived by a widow and a daughter.

Mr Bain left a trust-disposition and settlement, whereby he disponed his whole estate, heritable and moveable, to trustees for certain purposes, and, *inter alia*,—"(Second) That my trustees shall hand over and deliver, free of charge, to the said Mary Ann Horsman or Bain [his widow] such articles of jewellery, linen, silver-plate, books, and other household furniture belonging to me, as she may choose to select for her own absolute use, and shall allow her and the said Charlotte Elizabeth Sandys Bain [his daughter], and the longest liver of them, the free and uninterrupted liferent right and use of my mansion-house of Easter Livelands . . . and also such articles of household furniture, plate . . . and plenishing of every description which shall be found at the time of my death remaining after the said Mary Ann Horsman or Bain shall have made her selection as aforesaid, or the whole in case of no such selection being made . . . and that during all the days and years of the lives of the said Mary Ann Horsman or Bain and Charlotte Elizabeth Sandys Bain and the survivor of them." After various provisions, which did not refer to his furniture, plate, books, or jewellery, the testator lastly directed his trustees to convey the residue of his estate to his daughter Charlotte, whom failing, his widow.

After the death of her husband Mrs Bain continued to occupy Easter Livelands with her daughter Charlotte. In 1875 she married Mr Macdonald, who died very shortly afterwards. In 1876 Miss Bain married Major William Lorraine Geddes, who died in 1881, and she then returned to live with her mother. On 18th October 1882 Mrs Macdonald and Mrs Geddes executed a discharge in favour of Mr Bain's trustees containing a formal acknowledgment of delivery of the furniture, &c., in the mansion-house at Easter Livelands in the following terms:—"And further considering that we have been allowed the use of the mansion-house of Easter Livelands . . . and of the whole articles of jewellery, linen, silver-plate, books, and other household furniture which belonged to the said Edwin Sandys Bain deceased, from which I, the said Mary Ann Macdonald, have hitherto refrained from making any selection, and that the said trustees have now delivered to us the said articles of jewellery, linen, silver-plate, books, and other household furniture."

Mrs Macdonald died in December 1893, without having exercised the power of selection given to her by her husband by any *inter vivos* act. She left a trust-disposition and settlement, dated in 1892, whereby she bequeathed to different persons certain of the articles to which the power of selection applied.

In 1895 the trustees under Mrs Macdonald's settlement brought this action against Mrs Geddes and another, as trustees and beneficiaries under the settlement of Sergeant Bain. The pursuers concluded, *inter alia*, for declarator (1) that certain specified articles, which were dealt with by Mrs Macdonald's settlement, were her own property; and (2) that, in terms of the power of selection conferred upon her by her husband's settlement, Mrs Macdonald, by her trust-disposition and settlement, had made a valid and effectual selection of other articles which were specified.

The defenders pleaded, *inter alia*;—(3) The power of selection conferred upon Mrs Macdonald by Mr Serjeant Bain's settlement not

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having been validly exercised by her, and the articles mentioned in the second conclusion of the summons not having been the property of Mrs Macdonald at the time of her death, the defenders are entitled to absolvitor therefrom and from the remaining conclusions of the summons.

On 1st February 1896 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the power of selection conferred upon Mrs Macdonald by her husband's settlement was not validly exercised by the disposition contained in her trust-disposition and settlement in favour of the pursuers: *Quoad ultra*, in respect that the parties desire an opportunity of adjusting the question of fact involved in the cause, continues the cause," &c.*

The pursuers reclaimed, and argued;—No limit of time was imposed by Serjeant Bain, either expressly or impliedly, upon his widow in regard to her power of selection. She could exercise it, therefore, at any time during her life, or by will.[1] The words "absolute use" did not mean that the widow was to use the selected articles per-

* "OPINION.— . . . The questions to be now decided are, I think, two (1) whether the power of selection conferred upon the widow could be exercised by will, and by simply disposing by will of particular articles; (2) whether the power of selection extended to pictures,—that is to say, to portraits and other pictures in oil belonging to Sergeant Bain.† There is a third question, but it involves proof, and cannot be now decided, viz., the question how far the articles disposed of by Mrs Macdonald's settlement were (apart altogether from her husband's settlement) her own separate property.

"As to the power of selection, that power is conferred by a direction to Sergeant Bain's trustees to hand over and deliver to his widow free of charge 'such articles of jewellery, linen, silver-plate, books, and other household furniture belonging to me as she may choose to select for her own absolute use.' And that direction was followed by a further direction by which the truster conferred upon his widow and daughter jointly a liferent of, *inter alia*, 'such articles of household furniture, plate, and pictures as should be left after the testator's widow made her selection, or the whole in case of no such selection being made.'

"At Sergeant Bain's death what happened was this,—the widow made no selection either then or during her survivance, the whole articles remaining all along in possession of herself and her daughter, but on her death it appeared, as I have already explained, that she had bequeathed by will various of the articles in question to different relatives.

"Now, I am not prepared to say that a power of this kind requires to be exercised expressly, or that the absence from the will of a reference to the power is material one way or the other. But the difficulty which the pursuers have to meet is, I think, twofold. In the first place, the power of selection being given for the widow's 'use,' albeit her 'absolute use,' is scarcely suggestive of a selection to take effect only at her death, and thus to operate not in favour of the widow, but in favour of third parties. In the second place, the truster directs that any articles not selected should fall under the joint liferent, and the conclusion is obvious that if the selection by the widow might be postponed until her death, and be made by will, any joint liferent of the unselected articles was an impossibility. It appears to me therefore that the difficulties in the pursuers' way are insuperable, and that I must find in terms of the defenders' contention that the power of selection conferred on Mrs Macdonald was not validly exercised. . . ."

[1] Copinger v. Crehane, 1877, Irish Reports, 11 Equity, 429.

† This question was settled by agreement when the case was before the Inner-House.

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sonally, but only that they should be her absolute property.[1] There was no necessity laid upon her to make her selection until an interest conflicting with her own arose in a third party. The daughter's interest, either as liferentrix or residuary legatee, was not of that character. The widow never renounced her power to select, and the terms of the joint discharge granted by her and her daughter eight years after the testator's death were an implied admission by the daughter that the power still subsisted at that time.

Argued for the defenders;—The trustees were directed to hold the furniture, with the sole exception of such articles as the widow might select, for the liferent use of the daughter and widow and the survivor. The liferent use thus given to the widow was alternative to the absolute right which she could acquire by selection, and if the widow failed to make her selection within a reasonable time, and the trust began to be administered on the footing that there was a joint liferent of the furniture in the widow and daughter, it was then too late for the widow to exercise the power conferred upon her. Further, the right of selection was for her "absolute use," which shewed that, according to the testator's intention, the power was to be exercised by her for her own enjoyment and use. Such a power could not be exercised by will. The discharge proved that no selection had then been made, but did not bar the daughter from objecting to any selection being made thereafter.

At advising,—

LORD ADAM.—Sergeant Bain died in 1874, leaving a widow and daughter. He left a settlement by which he conveyed his whole estate, including certain corporeal moveables, to trustees for certain purposes, and the present question arises under the second purpose of the trust-settlement—(His Lordship then quoted the provisions of the second purpose of the settlement).

What happened upon Sergeant Bain's death was this—Mrs Bain, afterwards Mrs Macdonald, and her daughter Mrs Geddes, had in any view a right to a liferent of these articles, and the trustees allowed them to have the use and possession of them up to the date of Mrs Macdonald's death.

Mrs Macdonald during her life never made any selection, but by her trust-disposition and settlement and codicil, dated in 1892, she directed her trustees to deliver certain of these articles to the parties therein named, and the question is, whether, having regard to the terms of Sergeant Bain's settlement, this was a valid exercise of her power of selection.

I agree with the Lord Ordinary that it was not, and for the same reasons. It appears to me that the intention of the truster was that the selection should be made within a reasonable time after his death, at anyrate during his widow's life.

It will be observed that he directs his trustees to hand over to Mrs Macdonald herself (and not to any assignees or legatees) such articles as she might select for her own absolute use, which appears to me to imply a selection to be made during her life.

He then directs his trustees to allow her and her daughter Mrs Geddes a

[1] Terry v. Terry, 1863, 33 Beavan, 232; Arthur v. Mackinnon, 1879, L. R., 11 Ch. Div. 385.

joint liferent, and a liferent to the survivor of the mansion-house of Livelands, and of such articles of household furniture, plate, &c., as should remain after Mrs Macdonald had made her selection, or the whole in the event of no selection being made. It appears to me that if no selection was made by Mrs Macdonald during her life a joint liferent, which the truster thus contemplated and directed, became impossible.

In my view, accordingly, no selection having been made by Mrs Macdonald during her life, the trustees, in terms of the settlement, are bound to allow Mrs Geddes, as the survivor, a liferent of the whole of the said articles, and for that purpose to hand them over to her.

I therefore think that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN.—I concur in the opinion of Lord Adam.

On the main question which his Lordship has discussed, I think it right to say that my opinion is rested on the special terms of Sergeant Bain's will. I think the power of selection given to his widow could not be exercised by will, because the selection is intended to be exercised before the estate is distributed, it being provided that after Mrs Bain has made her selection the testator's remaining estate is to be shared in liferent between that lady and her daughter. In the general case where an unqualified power of selection or appropriation is given to a liferenter, I should assume in construing it that it depended for its exercise upon the same principles as any power of disposal given to a third party, and that it might be exercised at any time during the life of the donee of the power. But in construing voluntary deeds general rules are liable to be controlled by the intention of the granters as expressed in the deeds. In this case I think Sergeant Bain has sufficiently manifested his intention that the power of selection conferred upon his widow should only be exercised within such reasonable time as is allowed for putting a testator's affairs in order, and that Mrs Bain's will is therefore not a valid exercise of the power.

LORD KINNEAR.—I agree that the decision of this case does not depend upon any question as to the manner in which a power may be exercised, but upon the character of the right which the testator has bequeathed to his widow.

I am of opinion with your Lordships on the construction of the disposition that the testator gives to his widow absolutely such articles as she may select, with a gift over, in the event of her not exercising the right of selection, to her and her daughter in joint liferent and to the survivor in liferent.

Now, I think the gift over took effect in consequence of the failure of Mrs Macdonald to exercise her right, and that it is too late now to disturb arrangements which we must assume to have been made advisedly during her lifetime. Her will is ineffectual to deprive the conditional legatees of the gifts which the testator has made to them, because the condition was purified when the articles in question were delivered to the joint liferenters, in consequence of her having refrained from claiming them for her own absolute use.

The LORD PRESIDENT was absent.

THE COURT adhered.

DUNDAS & WILSON, C.S.—FYFE, IRELAND, & DANGERFIELD, S.S.C.—Agents.

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THE ABERDEEN HARBOUR COMMISSIONERS, Pursuers (Reclaimers).—*Ure—Salvesen.*

THE GRANITE CITY STEAMSHIP COMPANY, LIMITED, Defenders (Respondents).—*C. J. Guthrie—Craigie.*

Statute—Construction—Saving clause in repealing Act—Aberdeen Harbour Act, 1879 (42 *and* 43 *Vict. cap. lxxxviii.*), *Schedule A—Aberdeen Harbour Act*, 1895 (58 *and* 59 *Vict. cap. cxxxvi.*), *sec.* 10.—Under Schedule A of the Aberdeen Harbour Act, 1879, the Harbour Commissioners were empowered to levy certain rates per registered ton upon each vessel in class third entering the harbour. The schedule further bore,—"For any vessel included in class third, which shall have made ten voyages in any one year from January to December inclusive, no rates shall be charged on any additional voyages of the description specified under class third made by it within such year."

In 1895 a new Act was passed whereby the prior Act of 1879 was repealed from 1st October 1895, and it was declared that the new Act should come into operation on that date. By section 75 the Commissioners were empowered, from and after the commencement of the Act, to levy certain rates.

Section 10 of the Act of 1895 provided,—"Notwithstanding the repeal of the recited Acts . . . and except only as is by this Act otherwise expressly provided, everything before the commencement of this Act done or suffered under or confirmed by the recited Acts . . . shall be as valid as if such Acts . . . were not repealed, and the repeal thereof and this Act respectively shall accordingly be subject and without prejudice to everything so done or suffered or confirmed, and to all rights, liabilities, debts, claims, and demands, both present and future, which, if the recited Acts . . . were not repealed and this Act were not passed, would be incident to or consequent on any and everything so done, suffered, or confirmed. . . ."

In an action for rates against the owners of a vessel in class 3, which had made ten voyages prior to 1st October 1895, and several voyages between that date and the end of the year, the defenders denied liability for rates for the voyages between 1st October and the end of the year on the ground that the Act of 1879 conferred a right of exemption from such rates, which was saved by sec. 10 of the Act of 1895. *Held* (*rev.* judgment of Lord Low) that no right of exemption had been conferred by the Act of 1879, but that the non-liability for further rates merely arose from the rating powers of the Commissioners being restricted to ten voyages, and that the rating powers of the Commissioners under the new Act being unrestricted, the vessel was liable for rates for all voyages after 1st October 1895.

1ST DIVISION. Lord Low.

THIS was an action at the instance of the Aberdeen Harbour Commissioners, incorporated under the Aberdeen Harbour Act, 1895 (58 and 59 Vict. cap. cxxxvi.), against the Granite City Steamship Company, Limited, for payment of £78, 4s. 9d.

The pursuers averred that the s.s. "Linn o' Dee,"—a vessel trading between Aberdeen and Hamburg, of which the defenders were owners,—had made eleven voyages to and from Aberdeen between 1st October 1895, when the Aberdeen Harbour Act, 1895,* came into

* By section 75 of the Aberdeen Harbour Act, 1895, the Commissioners are empowered, "from and after the commencement of this Act," . . . to levy for every vessel coming into or going out of the port of Aberdeen the rates specified in Schedule A appended to that Act. . . .

The date of the commencement of the Act was fixed by section 2 as the 1st of October 1895, and from and after that date the previous Acts of 1868 and 1879 were repealed. Under Schedule A the rates leviable for vessels

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operation, and 18th February 1896, and that the sum sued for was the amount of rates and dues owing to the Harbour Commissioners under that Act.

The defenders admitted that the "Linn o' Dee" had made the voyages stated, and that they were due the pursuers the sum of £33, 3s. 6d., but denied liability for the balance, which consisted of rates for the "Linn o' Dee" for voyages between 1st October and 31st December 1895.

The defenders founded upon the provisions of Schedule A of the Aberdeen Harbour Act, 1879 (42 and 43 Vict. cap. lxxxviii.),* and section 10 of the Act of 1895,† and averred that the "Linn o' Dee" had made ten voyages to and from Aberdeen between 1st January 1895 and 28th May 1895, and that they had paid for these voyages the rates due under schedule A of the Act of 1879.

The defenders pleaded;—(2) The defenders, having paid harbour rates to the pursuers for ten voyages performed by their said vessel in 1895, acquired by virtue of the Harbour Act of 1879 a vested

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in class third, to which the "Linn o' Dee" belonged, are,—"For each of the first eight voyages in any year per register ton 6d., for each subsequent voyage in such year per register ton 3d." The schedule also provides that "in reckoning the number of voyages made within any year, the year shall be deemed to run from the 1st day of October to the 30th day of September. . . ."

* Vessels falling under class third of Schedule A of the Aberdeen Harbour Act, 1879 (to which class the "Linn o' Dee" belonged), were rated at 9d. per registered ton.

The Schedule also provided as follows:—"For any vessel included in class third, which shall have made ten voyages in any one year from January to December inclusive, no rates shall be charged on any additional voyages of the description specified under class third made by it within such year; and if any vessel included under class third, being a regular trader to the harbour, shall be lost or sold during any such year, any vessel substituted in the trade for such lost or sold vessel shall, in computing the number of voyages in that year, be deemed to be the vessel for which it is so substituted . . . "

† Section 10 of the Aberdeen Harbour Act of 1895 provides,—"Notwithstanding the repeal of the recited Acts and Order, and except only as is by this Act otherwise expressly provided, everything before the commencement of this Act done or suffered under or confirmed by the recited Acts and Order, shall be as valid as if such Acts and Order were not repealed, and the repeal thereof and this Act respectively shall accordingly be subject and without prejudice to everything so done or suffered or confirmed, and to all rights, liabilities, debts, claims, and demands, both present and future, which, if the recited Acts and Order were not repealed and this Act were not passed, would be incident to or consequent on any and everything so done, suffered, or confirmed; and with respect to all rights, liabilities, debts, claims, and demands which affect or might affect the existing Commissioners, the Commissioners shall to all intents and purposes represent the existing Commissioners, and may enforce and shall be liable in respect of such rights, liabilities, debts, claims, and demands in the same manner and to the same extent as the existing Commissioners could have enforced or have been liable to in respect of such rights, liabilities, debts, claims, and demands."

Section 7 of said Act enacts, *inter alia*, that "all contracts or agreements entered into or adopted by the existing Commissioners and any person, and all obligations and writings granted by the existing Commissioners to any person, should remain valid and effectual as if the Act had not been passed."

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right of immunity from payment of all further rates for that year, except for flags and signals, for all subsequent voyages in that year.

On 18th June 1896 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that the defenders admit being due the pursuers the sum of £33, 3s. 6d., and have already consigned the sum in bank: Therefore decerns against the defenders for payment to the pursuers of the foresaid sum of £33, 3s. 6d., with bank interest thereon since the date of consignation: And as regards the remaining portion of the sum of £78, 4s. 9d. sued for, being £45, 1s. 3d., assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses," &c.*

The pursuers reclaimed, and argued;—Upon 1st October 1895 the old Act ceased to be operative and a new system of rates came into force. After that date the Commissioners were bound to levy the rates expressly imposed by the new Act, and just as they would have had no right to charge the defenders rates under the old schedule had these been higher than under the new, so the defenders could not plead a privilege which the repealed schedule gave them. The 10th section of the Act of 1895 could not be construed as creating an immunity from the rates which the Act expressly imposed. The intention of that clause was to perpetuate the rights and obligations of the existing trust in the person of the new body corporate, and it applied to rights of a contractual nature acquired during the subsistence of the old Act. The defenders, however, had acquired no such right. They had merely paid rates for the voyages they had made. It would have been different if they had paid a composition for the whole year

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* "OPINION.— . . . Whether, notwithstanding the commencement of the Act of 1895 on the 1st of October, the 'Linn o' Dee' was entitled to the immunity from rates given by the Act of 1879, depends upon the scope of the 10th section of the former Act. That section is in the following terms:—'Notwithstanding the repeal of the recited Acts and Order, and except only as is by this Act expressly provided, everything before the commencement of this Act done or suffered under or confirmed by the recited Acts and Order shall be as valid as if such Acts and Order were not repealed, and the repeal thereof and this Act respectively shall accordingly be subject and without prejudice to everything so done or suffered or confirmed, and to all rights, liabilities, debts, claims, and demands, both present and future, which, if the recited Acts and Order were not repealed and this Act were not passed, would be incident to or consequent on any and everything so done, suffered, and confirmed.'

"That is a saving clause expressed in very ample terms, and in my opinion is sufficient to preserve to the 'Linn o' Dee' the immunity from rates for the remainder of the year 1895 which she had earned at the passing of the Act.

"In the first place, it is not expressly provided in the Act that an immunity from rates actually earned under the previous Act shall be forfeited. In the second place, the payment by the 'Linn o' Dee' of the rates specified in the Act of 1879 for the ten voyages after the 1st of January was a thing done under that Act which gave the 'Linn o' Dee' the right, as a consequent on that payment, to continue to trade free of rates until the end of the year. That is, I think, one of the rights saved by the 10th section.

"I am accordingly of opinion that the 'Linn o' Dee' was not liable in payment of rates for voyages made between the 1st of October 1895 and the end of that year, and that she did not come under the operation of the Act of 1895 until the commencement of the year 1896."

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to 31st December 1895. If the defenders' contention were upheld, much complexity would be introduced into the harbour accounts, for the case of each vessel would require separate treatment, as even those which had not made ten voyages prior to 1st October 1895 would have been in process of earning the immunity.

Argued for the defenders;—The defenders had paid the higher rates imposed by the old Act, and had acquired a right to exemption before the new Act came into operation. They had therefore "done or suffered" something in the sense of section 10 of the new Act, and were entitled to the exemption from rates conferred by that clause. Section 10 could not be read as referring merely to rights of a contractual nature, for these were safeguarded by section 7. The immunity, having been already acquired when the new Act came into operation, could not be affected by the provisions of that Act, unless they were to be read as having a retrospective effect. But such a construction of the statute would be contrary to the usual rule.[1] Section 10 practically incorporated section 38 of the Interpretation Act, 1889.[2] The defenders' right to immunity from rates in the remainder of the year 1895 was a right or privilege acquired under a repealed enactment in the sense of section 38.

LORD PRESIDENT.—In my opinion the interlocutor of the Lord Ordinary cannot be supported. His Lordship has held that there was a right vested in this trader to enter the Aberdeen Harbour without payment of any rates until the 1st January of the next year. Now, the series of statutes stands in this position. Under the Act of 1879 the Aberdeen Harbour Commissioners have right to levy the rates set out in the schedule, and from the schedule it appears that after a vessel has made ten voyages in any one year from January to December no rate could be asked for any additional voyage. Now, that seems to me to be in substance, as well as in form, merely a limitation of the powers of the Commissioners to exact rates from vessels entering the harbour. They are allowed to do it ten times; they are not allowed to do it after ten voyages have been made. Well, now, this Act is repealed by the Act of 1895. A new set of rates comes into force; the old are swept away. The rating power of the Commissioners under the old Act ceases; new rating powers are to come into operation, and they come into operation from October of 1895. The result is that the Commissioners are authorised to levy their own rates, and not the rates under the Act of 1879. But the question is, whether the trader now in Court is entitled to resist a demand for payment of the rates under the Act of 1895 on the ground that he had already made ten voyages, and by consequence that the old Commissioners were not entitled to ask from him more rates than he had already paid. It seems to me that there was no contract right—no vested right—in this trader at all, and, accordingly, the 10th section has really no application. All that he could say was, "I am not liable to pay any rates under the Act of 1879, inasmuch as I have already paid for ten voyages." But then the Commissioners who are now in Court are not

[1] Bourke v. Nutt, L. R. 1894, 1 Q. B. 725, *per* Justice Lopes, at p. 737; Gardner v. Lucas, March 21, 1878, 5 R. (H. L.) 105, *per* Lord Blackburn, at p. 117.

[2] 52 and 53 Vict. c. 63.

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asking him to pay anything under the Act of 1879, and they cannot do so. They are founding themselves upon their own powers of rating, which are conferred by the 75th and 77th sections of the Act of 1895 and the relative schedules. Section 75 says,—"You shall levy the rates from every vessel using the harbour," and section 77 says,—"You shall make no distinction between persons who are of the same classes as those defined in the schedule." It seems to me that the Commissioners' position is complete. As I have said, the exemption under the Act of 1879 was less an exemption than a limitation of the power of imposing rates; and the present Commissioners are not seeking to impose rates, and could not do so, under the Act of 1879. Therefore it seems to me that this is merely a case where a person comes under the rating powers of the new Act, and is entirely adrift and set free from all the relations established between him and the rating authority repealed. I am therefore of opinion that the judgment of the Lord Ordinary is wrong, and I think it unnecessary to go in any detail into the illustrations of the unworkableness of the suggested dovetailing of the new Act and the old. From the 1st of October it seems to me that every one is bound to pay, without distinction as to previous trading or not, according to the schedule of the Act of 1895. The present demand is for the rates under that Act, and there is no good defence to that claim.

LORD ADAM.—As I understand the case, the defenders, who are the owners of a ship called the "Linn o' Dee," made certain voyages, and used the harbour of Aberdeen, which is the property of the Commissioners, the pursuers, during the months from October to December, and the Commissioners proposed to levy from them the rates contained in the schedule of the Act of 1895 which is applicable to that period. No objection, as I understand, is taken to the amount of the rate if only the defenders are liable for the rate at all under the Act of 1895, and that is the question which we have to decide. There is no doubt whatever, and it is not disputed, that the Act of 1895 came into operation on 1st October of that year; and there is as little doubt that it specifies in the schedule appended to it certain rates which are to be levied on ships of certain classes, these rates being authorised by the 75th section of the Act. The answer made is that between January and September 1895 the "Linn o' Dee" made ten or more voyages, and had thus acquired an exemption from rates for the remainder of the year prior to the coming into operation of the Act of 1895. Undoubtedly, if the Act in existence prior to 1895 had continued in force, that would have been so, but unless the exemption is to be found in the 10th section of the Act of 1895 there is no such exemption under that Act. The whole defence arises upon that section, and the first question is whether it applies to the circumstances of this case at all, of which I have all along been doubtful.

The section says that, notwithstanding the repeal of the previous Act, "everything before the commencement of this Act done or suffered" shall continue to be valid. Nobody could conceive that that was meant to refer to payment of rates; one would rather conceive, as Mr Ure said, that it was meant to apply to acts of a different kind, namely, acts of a contractual nature.

However that may be, I am of opinion that the charging of these rates

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under the new Act falls under the exception contained in section 10, and that it is expressly provided by the Act of 1895 that all vessels using the harbour subsequent to that Act coming into operation shall pay the rates in the schedule. I cannot read the Act otherwise. It expressly says that from the commencement of the Act vessels of class 3 shall pay certain rates, and I must say that that is inconsistent with any presumed right to exemption altogether. The view which I take of this case is that the interlocutor of the Lord Ordinary is wrong, and that everyone must pay the rates specified in the schedules in terms of the Act of 1895. I therefore agree with your Lordship.

LORD M'LAREN.—Under the Aberdeen Harbour Act of 1879 it is provided that "for any vessel included in class 3 which shall have made ten voyages in any one year from January to December inclusive, no rates shall be paid on any additional voyages." The vessel in question, the "Linn o' Dee," having made ten voyages, as is admitted, in the year 1895, if the Act of 1879 had continued to regulate the collection of rates, then beyond question the vessel would have been entitled to perform as many subsequent voyages in that year as the owners pleased, without payment of harbour rates. But an alteration has been made by Act of Parliament in the financial year for the transactions of the Harbour Trust, and the year now commences on the 1st October instead of beginning on the 1st of January and continuing to the 31st of December. The question is, as I represent it to myself, whether the exemption from rates to which the "Linn o' Dee" was entitled can continue any longer than the 1st day of October, at which time the Act of 1895 came into operation with its appropriate schedule of rates. The Lord Ordinary has given effect to the argument of the defenders that they are entitled to continue to sail their ship free of rates to the end of December in 1895, carrying on, as it were, the Harbour Trust year as if the Act of 1879 had been in operation, and that right his Lordship holds to be acquired under the 10th section of the Act of 1895. Now, that section occurs in the second part of the statute, and without attaching importance to the title of that part or division of the statute, which is probably not included in the text of the Act, I may remark that the 10th section occurs as one of a series of clauses which primarily relate to the legal effect of the transfer of the harbour from one body of Commissioners to another body differently constituted. These clauses are primarily intended to perpetuate the rights, obligations, and liabilities of the Trust in the persons of the new body corporate. But I do not doubt in the least that as regards any consensual contract between the Commissioners and outside parties the obligations of the Trust would, either under section 10, or in virtue of the general parliamentary law, which presumes that statutes are not retrospective in their operation, continue to affect the Harbour Trust. But I agree with your Lordships, differing in this point only from the Lord Ordinary, that the owners of "Linn o' Dee" had no contract right of any kind to a continuance of the privilege of sailing their ship to the end of the year 1895 without payment of rates.

In the first place, the Harbour Commissioners are not a body constituted for profit. They are a public trust authorised and entitled to levy rates for

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the purpose of maintaining the harbour, and, very naturally, the rates are laid upon those who take benefit from the harbour. But it is very clearly explained in section 92 that the harbour rates are only applicable to payment of debt, and maintenance and improvement of the harbour. Therefore we do not begin with a right acquired by means of something in the nature of a contractual payment. The money paid by the owners is strictly a rate assessed on tonnage or on goods for the purpose of maintaining a public work for the benefit of the persons who contribute to it; and the contribution under the Act of 1879 is limited, for vessels of this class, to ten voyages in a year, probably because those who had promoted and obtained the Act of 1879 were satisfied that a rate limited in this way would be sufficient to provide funds adequate to the purposes of the Act. But the right to enter the harbour without payment of rates results merely from the circumstance that the Act of 1879 did not authorise the imposition of any rate except for the first ten voyages. What proves to my mind that there is no contract—at least no consensual contract—is this, that neither the owners nor the Harbour Commissioners had any power to vary the statutory liability by charging a different rate by agreement, or by dispensing with any rate which the statute authorised. If we are not within the 10th section the case, I think, is quite clear, because the new Act of Parliament expressly provides that in place of total exemption there shall come into operation a reduced rate, and that upon the completion of eight voyages; and it is also most clearly expressed that the clause in question shall be applicable to years beginning in October. From this I should infer that the full rate is exigible for every voyage subsequent to 1st October 1895. What confirms me in this view is that if anything different had been intended there would have been provided—what we are familiar with in many Acts of Parliament—temporary provisions which would have regulated the rates during the intercalary period from October to December. But I think, in the contemplation of the Act, there is no intercalary period. The powers of the old Act, which would subsist in perpetuity if Parliament had not interfered, are suddenly cut off in the middle of a year—I mean on the 30th of September 1895—and the new Act takes effect from and after that date. I was at first impressed with the apparent equity of the conclusion which the Lord Ordinary had come to, but, on farther consideration, I am satisfied, for the reasons assigned by your Lordship, that the judgment is not well founded, and that we ought to sustain the reclaiming note.

Lord Kinnear.—I agree. If the defenders had acquired a right under any lawful contract with the former Commissioners, they would not be deprived of it by the new Act. But there is no element of contract in the imposition of the rates in question. They are fixed by statute. The Commissioners were not empowered by the Act of 1879 to charge any further rate on a vessel which had already paid rates on ten voyages during the currency of a single year, until the beginning of a new year. I cannot consider this to be a vested right of the kind which Parliament intended to save from the operation of the new Act. It is not a particular right arising to an individual from contract, or from the conduct of the Commissioners, but a general right of the lieges to use the harbour on paying the statutory

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rates. Accordingly, when the defenders rest their case upon this so-called vested right, it seems to me that the question they really raise is, whether they have acquired a right to use the harbour on payment of the rates provided under the old Act, instead of those under the new. That question does not appear to me to admit of discussion. The Act of 1895 provides a new schedule of rates, and for the computation of the period for which they are to be payable special dates are fixed for the beginning and end of the year. The effect of this is that the Commissioners can levy rates which they were not entitled to charge under the old Act. Section 10 provides as a necessary consequence of the transference of the rights of property and actions to the new Commissioners, that they shall be held as representing their predecessors to the effect of enforcing their rights and being responsible for their liabilities; and, accordingly, any claim which had arisen against the former Commissioners will be equally available against the new Commissioners, and must be determined on the same grounds as if the old Act had not passed. But this cannot mean that in any case the old conditions of rating are to continue in force after the new Act has come into operation.

THE COURT recalled the Lord Ordinary's interlocutor so far as it related to the sum of £45, 1s. 3d., and decerned against the defenders for payment of that sum to the pursuers.

MORTON, SMART, & MACDONALD, W.S.—JOHN RHIND, S.S.C.—Agents.

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Cook v. Sinclair & Co.

ALEXANDER SKENE COOK, Pursuer (Respondent).—*Craigie—Laing.*
WILLIAM SINCLAIR & COMPANY, Defenders (Appellants).—*W. Campbell—Abel.*

Bankruptcy—Illegal Preference—Action by creditor for delivery of estate assigned by bankrupt within sixty days of bankruptcy—Competency—Act 1696, *c.* 5—*The Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 10.—Where a debtor within sixty days of bankruptcy assigns part of his estate in violation of the Act 1696, c. 5, any creditor at the date of the alienation has a title to reduce the assignation, but he has no title to recover the subject of the assignation for behoof of himself and the other creditors.

1ST DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

THIS was an action in the Sheriff Court at Aberdeen at the instance of Alexander Skene Cook "as trustee acting for behoof of the creditors of Marshall Thomson, chemist, Ballater, and as an individual," against William Sinclair & Company, wholesale druggists, Aberdeen, craving the Court "to ordain the defenders—(First) To deliver to the pursuer two bills for £100 each, dated 16th October 1894, at twelve months' date, granted by Alexander Hadden, chemist, Ballater, to Marshall Thomson, chemist, Ballater, and indorsed and delivered by the said Marshall Thomson to the said defenders on or about the 17th day of October 1894, and failing their doing so within such period as the Court shall appoint, to ordain the defenders to pay to the pursuer the sum of £200 sterling, with the legal interest thereof from the date of citation hereon till payment; and (second) to pay to the said pursuer the sum of £8, 1s. 6d. sterling, with the legal interest thereon from the 23d day of October 1894 till payment."

The pursuer averred that he was a creditor of Marshall Thomson in a debt of £12 or thereby incurred prior to 17th October 1894; that he was also trustee for Marshall Thomson under a trust-deed for behoof of creditors, dated 9th November 1894, and that he repre-

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sented *qua* trustee creditors to the extent of £600; and that Marshall Thomson became notour bankrupt on the 24th November 1894.

He further averred that Marshall Thomson had on 17th October voluntarily indorsed to the defenders the two bills in question for £100 each in further satisfaction or security of a debt due to them, and pleaded;—(1) The indorsation and delivery of the two bills in question having been done by the debtor voluntarily within sixty days of notour bankruptcy, in further satisfaction of a pre-existing debt, is voidable at pursuer's instance so far as to his prejudice as trustee foresaid, and as an individual, and decree should pass as craved, with expenses.

The defenders averred that the bills were indorsed to them for value, and in turn indorsed by them to a third party for value received.

The defenders pleaded;—(1) No title to sue. (2) The action is incompetent.

On 11th July 1895 the Sheriff-substitute (Robertson) dismissed the action.*

The pursuer appealed to the Sheriff, and on 16th August 1895 the Sheriff (Crawford) repelled the defenders' first and second pleas in law so far as they applied to the pursuer's title *qua* creditor, but sustained them so far as they applied to his title *qua* trustee, and remitted to the Sheriff-substitute.

A proof having been led, the Sheriff (Crawford) on 26th February 1896 pronounced the following interlocutor:—"Having considered the cause, finds (1) that Marshall Thomson, designed in the petition, became notour bankrupt on or about 24th November 1894; (2) that the two bills in question were indorsed by him voluntarily to the defenders in satisfaction of a prior debt, and within sixty days before his bankruptcy; (3) that the said indorsation constituted an illegal preference under the Act 1696, cap. 5; (4) that at the date when the said preference was granted, the pursuer was a creditor of the bankrupt to the extent of £11, 4s.; (5) that the pursuer is trustee for behoof of the creditors of the bankrupt by virtue of the trust-deed libelled; (6) that it is averred by the defenders, and not disputed, that they have indorsed the said bills to a third party for value: Therefore decerns and ordains the defenders to pay to the pursuer as trustee foresaid the sum of £11, 4s., with interest as con-

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* "NOTE.— . . . It is pleaded in defence that the bills having been indorsed to and negotiated *in bona fide*, and for value, by the defenders, the pursuer should not get decree, but a preliminary plea or pleas are stated of no title and incompetency.

"It seems clear on authority (*Fleming's Trustees* v. *M'Hardy*, 19 R. 542), that the trustee as trustee under the trust-deed has no title to sue, no power being given to him in the deed. It seems equally certain that *qua* creditor he has a right to call the transaction in question, but the point seems to me here to be whether he can combine the two characters in the instance of his summons, and cure the defect in his title as trustee by alleging the character of personal creditor. In my opinion it is inadvisable he should be allowed to do so. I do not think the action could go on with the instance as it stands, and I think it would be equally inadvisable, if not incompetent, to dismiss the action, so far as at the instance of Mr Cook as trustee, and go on with it at his instance as an individual.

"I, of course, reserve his right to bring an action solely at his individual instance as a creditor if he should desire to do so."

cluded for, being the amount of the debt due to him as a creditor of the bankrupt, to be held by him in trust, first for payment of any dividend or dividends upon the said debt to which he may be found entitled, and to the extent of the balance, if any, for behoof of the bankrupt's other creditors." *

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The defenders appealed, and argued;—The pursuer's title to sue as trustee was clearly bad. The action was therefore at the instance of a creditor. A petitory action was, however, incompetent. It was absurd to suppose that a £12 creditor should be entitled to get delivery of bills for £200, and there was no precedent for his getting payment of their contents as trustee for the other creditors. The only competent process was reduction, the effect of a decree in which would put the whole creditors on an equal footing.

Argued for the respondent;—It was admitted that the pursuer had no title to sue as trustee, but *qua* creditor he had a good title. A reduction was excluded, for the bills had passed for value into the hands of third parties. A petitory action was therefore the only remedy available. Though the pursuer might not be entitled to recover the £200, yet the effect of a decree for the amount of his debt would be to set aside the preference and so benefit the whole of the creditors.

At advising,—

LORD M'LAREN.—The ground of action in this case is that a bankrupt trader, within sixty days preceding his bankruptcy, assigned a bill of exchange in satisfaction of a prior debt. The action is instituted in the Sheriff Court of Aberdeenshire, and in it the pursuer, who is a voluntary trustee for creditors, and also a creditor in his own right, claims delivery of the bill. It appears that the bill has been assigned for value, and in the judgment appealed from, the Sheriff, while rejecting the title of the voluntary trustee to sue on behalf of creditors, has sustained the title of the pursuer as an individual creditor, and decerned in his favour for the amount of his debt, subject to the condition that the sum shall be held by the pursuer as trustee for distribution.

To a right understanding of the conditions of the case it is necessary to consider the effect of the statute of 1696 upon the funds of the bankrupt, which are alienated contrary to its provisions. I think it is consistent with

* "NOTE.—The facts of the case, the bankruptcy, the preference, and the pursuer's title as a prior creditor, are not disputed. But it is maintained that there is no remedy competent to him under this petition. The difficulty about the proper form of decree, so far as it is real, does not in my view arise from the two capacities, easily separable, in which the pursuer has raised his action, but from a different cause. The prayer of the petition for payment of the value of the bills (failing delivery, which is now out of their power) is not expressly restricted to his capacity as trustee, and may fairly cover a prayer for payment of whatever he is entitled to claim as an individual. But as he is a creditor on a bankrupt estate, it is difficult to ascertain how much that is. The pursuer's remedy would have been more simple had reduction been competent, but it is expedient and in conformity with the intention of the statutes that creditors on small estates should have in substance the same means of redress in the Sheriff Court as in the Court of Session. Therefore it would be wrong to be deterred by a technical difficulty which does not seem to be insuperable. The decree which I have given will, I think, meet the justice of the case."

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the language of the statute, and the decisions following upon it, that preferences of the character described are annulled when challenged by a creditor who was entitled to participate in the distribution of the debtor's estate at the time of the alienation, but this and no more is the remedy given by the Act of Parliament. The effect of the nullity is simply to restore the alienated subject to the position in which it was before the alienation. It becomes assets of the bankrupt's estate, and may be attached by the diligence of the creditor who has established the nullity, and also by other creditors whose claims are prior in time to the alienation. The reduction of a fraudulent alienation does not give the creditor any right against the assignee to require payment or delivery of the subject to himself. Such a proceeding would amount to establishing a new preference in place of the one which was cut down, and would be entirely contrary to the spirit and purpose of the statute. I do not doubt the competency of combining with the action of reduction a conclusion directed against the bankrupt for payment of the creditor's claim, but the decree obtained under such a conclusion would only enable the creditor to use diligence against the fund. If his claim were already constituted he might at once proceed to use diligence against the fund which he had restored to the estate; other creditors entitled to the benefit of the reduction might do the same, and the equality of distribution, which is the principle of all bankruptcy legislation, would then be secured by virtue of other statutes establishing *pari passu* preferences amongst arresters and adjudging creditors. The action before us contains no conclusion against the bankrupt for payment of the pursuer's claim, and accordingly, if this were a competent action for enforcing the nullity established by the Act of 1696, the only decree which the pursuer could obtain would be a decree annulling the indorsation of the bill in question, and restoring the pursuer and all other creditors in the same position against the injury which had been done to them by the withdrawal of this part of their debtor's estate.

But I am unable to concur in the opinion of the Sheriff that this is a competent action, even to the limited effect which I have explained. The 10th section of the Bankruptcy Act, 1856, provides that "deeds made void by this Act, and all alienations of property by a party insolvent or notour bankrupt which are voidable by statute or at common law, may be set aside either by way of action or exception." The effect of this provision is that, if the title of the alienee is pleaded in defence to an action otherwise competent, the Act of Parliament or the rule of the common law may be pleaded in reply. For example, if goods are alienated by a fraudulent contract, but are undelivered in the hands of the bankrupt, the Act of 1696 may be pleaded in answer to the defence, that the bankrupt or anyone holding in his right is under contract to deliver to the favoured creditor. Or, again, the Act may be pleaded in defence to an action for delivery at the instance of the favoured creditor. But, in the circumstances of the present case, the challenging creditor has no action against the indorsee of the bill for payment or delivery of the bill to himself, nor has he any action to compel payment to a voluntary trustee unless such trustee represents the whole body of the creditors interested, in which case only a trustee duly authorised to reduce preferences might be entitled to claim the fund. But the

creditor's right is to have the indorsation reduced in order that his diligence may not be impeded, and this right can only be made effectual by an action of reduction in the Court of Session. I am therefore of opinion that the appeal should be sustained, and the action dismissed as incompetent.

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The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT sustained the appeal, and dismissed the action as incompetent.

PHILIP, LAING, & Co., S.S.C.—ANDREW URQUHART, S.S.C.—Agents.

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WESTERN DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF STIRLING, Pursuers (Respondents).—*Dickson—D. Dundas.*
NORTH BRITISH RAILWAY COMPANY, Defenders (Reclaimers).—*Balfour—F. T. Cooper.*

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Railway—Construction and maintenance—Level Crossing—Ultra vires—Statute—Incorporation of special Act with general Act—Railway Clauses (Consolidation) Act, 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 16.—The Railway Clauses Consolidation (Scotland) Act, 1845, sec. 16, enacts, that "subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works—that is to say, they may," *inter alia*, "make or construct in, upon, across, under, or over any . . . roads . . . within the lands" described in the plans or mentioned in the books of reference "such . . . roads, ways, passages . . . as they think proper; They may erect such . . . yards, stations, . . . machinery, apparatus, and other works and conveniences as they think proper; They may from time to time alter, repair, or discontinue the before-mentioned works, or any of them, and substitute others in their stead; and they may do all other acts necessary for making, maintaining, altering, or repairing and using the railway."

A special Act obtained by a railway company in 1853 incorporated the Railway Clauses Consolidation (Scotland) Act, 1845, "so far as not hereby altered or varied," and by its 37th section enacted,—"The railway hereby authorised shall be completed within five years from the passing of this Act, and on the expiration of such period the powers by this Act, or the Acts incorporated, granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised except as to so much of the railway as shall then be completed."

The special Act gave compulsory powers to take land for a double line of railway, and to carry the railway over a public road near B. station on the level. The company acquired sufficient land for a double line, but within the five years they only formed a single line.

In 1890 the Board of Trade, under the powers of the Regulation of Railways Act, 1889, required the railway company to interlock the signals at the stations on their line. After the new interlocking arrangements at B. station had been inspected by the Board of Trade inspector, he intimated that they would not be passed unless a loop-line at the station was extended. To effect this alteration it was necessary that a second line of rails should be laid across the road. The District Committee of the County Council thereupon brought an action against the railway company to have it declared that the defenders were not entitled to encroach on the road beyond the line of the existing gates and fences at each side of the level crossing in order to

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lay the new rails, and for interdict. The pursuers did not dispute that the defenders in constructing the line would have been entitled to lay double rails across the road, but maintained that under sec. 37 of the special Act the defenders' power to do so lapsed at the end of five years.

Held (*rev.* judgment of Lord Low) that sec. 37 of the special Act did not, after the lapse of the five years, deprive the company of the power given by sec. 16 of the Railway Clauses Consolidation (Scotland) Act, 1845, to do all acts necessary for using the railway, and that the defenders were entitled to lay a double line of rails across the road, as this had become necessary for using the railway.

2D DIVISION. Lord Low.

BY section 32 of the Forth and Clyde Junction Railway Act, 1853, it was enacted,—"It shall be lawful for the company in constructing the railway hereby authorised to carry the same across and on the level of the following roads."* Among the roads specified was that

* The following sections of the Forth and Clyde Junction Railway Act, 1853 (16 and 17 Vict. cap. cxxv.), were founded on by the parties in the action now reported:—

Section 1—"That the several Acts of Parliament following,—that is to say, 'The Companies Clauses Consolidation (Scotland) Act, 1845,' 'The Lands Clauses Consolidation (Scotland) Act, 1845,' and 'The Railway Clauses Consolidation (Scotland) Act, 1845,' shall, so far as not hereby altered or varied, be incorporated with and form part of this Act."

Section 34—"That it shall be lawful for the Lords of the said Committee (*i.e.*, the Board of Trade), if it shall appear to them to be necessary for the public safety, at any time either before or after the railway hereby authorised to be carried across the said roads on the level thereof shall have been completed and opened for public traffic, to require the company, within such time as the said Lords shall direct, and at the expense of the company, to carry any of the said roads either over or under the railway by means of a bridge or arch, in lieu of crossing the same on the level, or to execute such other works as under the circumstances of the case shall appear to the said Lords best adapted for removing or diminishing the danger arising from such level crossings."

Section 37—"That the railway hereby authorised shall be completed within five years from the passing of this Act, and on the expiration of such period the powers by this Act, or the Acts incorporated herewith, granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the railway as shall then be completed."

The following were also referred to:—

The Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 16, enacts,—"Subject to the provisions and restrictions in this and the special Act and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works—(that is to say),"

"They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they may think proper;

. . . . . .

"They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper;

"They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and

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from Buchlyvie to Gartmore and Aberfoyle. The company under their compulsory powers acquired sufficient land from the various private proprietors to lay a double line of rails, but only a single line was laid, and there was only a single line across the level crossing over the Gartmore and Aberfoyle road, which was situated a few yards to the east of Buchlyvie Station.

In November 1890 the Board of Trade, under the powers conferred by the Regulation of Railways Act, 1889, called on the North British Railway Company (to whom the rights and obligations of the Forth and Clyde Junction Railway Company had been transferred) to interlock the signalling apparatus at their stations. After this work had been completed at Buchlyvie Station it was on 15th February 1894 inspected by Major Marindin, one of the Board of Trade inspectors, with a view to reporting whether the work could be passed by the Board as satisfactory. At the time of Major Marindin's inspection there was only one platform at Buchlyvie Station—on the north side of the line. A loop-line branched off immediately to the west of the level crossing, and rejoined the main line at a point beyond the platform, but had no platform alongside it.

"They may do all other acts necessary for making, maintaining, altering, or repairing and using the railway."

The Railways Clauses Act, 1863 (26 and 27 Vict. cap. 92), after enacting (section 7) practically in terms of section 34 of the Forth and Clyde Junction Railway Act, 1853, quoted above, enacts by section 8 as follows:—"If the Board of Trade certifies that the public safety requires that additional lands be taken by the company for the purpose of the work directed by the Board of Trade to be executed, the company may, subject to the provisions of the Lands Clauses Consolidation Act, 1845, or the Lands Clauses Consolidation (Scotland) Act, 1845, as the case may require, enter upon, take, and use all or any part of the lands specified in the certificate of the Board of Trade as being necessary for the purpose of the work, and the Board of Trade before issuing the certificate shall cause at least three months' notice to be given to any person who may be entitled to claim, under the last-mentioned Acts or otherwise, compensation in respect of the taking of such lands or in respect of such work."

The Railways Construction Facilities Act, 1864 (27 and 28 Vict. cap. 121), which enables, *inter alia*, new works connected with existing railways to be executed under authority of a certificate from the Board of Trade without obtaining a private Act of Parliament, when landowners and others beneficially interested are consenting parties, enacts, section 5,—"Notwithstanding anything in this Act it shall not be necessary for the promoters before applying under this Act for authority to make the railway, to enter into any contract with respect to any part of a turnpike road or public highway intended to be taken or used, or to be diverted or otherwise interfered with, for the purposes of the railway, but the Board of Trade, before they settle a draft of such a certificate as hereinafter provided for, shall be satisfied that due provision is made for the interests of the trustees or other persons having the management of every such road or highway, and for the safety and convenience of the public in relation thereto."

Section 8 enacts,—"The Board of Trade before settling the draft of a certificate, shall take into consideration any representation made to them, and shall duly inquire into the merits of any objection brought before them respecting the application."

Section 54 enacts,—"All the provisions of this Act which relate to the making of a railway shall extend and apply, *mutatis mutandis*, to the making or executing of any work connected with or for the purposes of a railway (as distinguished from the construction of a railway)."

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Major Marindin, as the result of his inspection, intimated to the railway company that the interlocking arrangements could not be passed unless a platform was erected for the loop-line, and unless the loop-line was carried further to the east and across the level crossing.

The Western District Committee of the County Council of Stirling, who had charge of the road at the point where it was crossed by the railway, learning of the proposal to double the rails at that point, petitioned the Board of Trade to prevent the railway company from carrying the proposal into effect, submitting that the time had arrived when the Board ought, in terms of section 34 of the Forth and Clyde Junction Railway Act, 1853,* to require a bridge under or over the railway to be substituted for the level crossing; and the District Committee also requested the Board to suspend or recall whatever requirement or suggestion the Board might have made necessitating the doubling of the line at the point in question until the questions involved could be deliberately considered. In consequence of these representations Major Marindin held an inquiry at Buchlyvie on 30th May 1895.

On 16th June the railway company reconstructed the loop line, laying a second line of rails across the level crossing, and altering the position of the gates and gate posts at each side of the crossing.

Thereafter, in August 1895, the District Committee brought an action against the company, concluding for declarator that the defenders "are not entitled to encroach upon, by laying lines of rails or otherwise, or to occupy or interfere with, for the purpose of their railway or otherwise, the *solum* of the county road or highway" in question, "now vested in and under the control of the defenders, at a point near to, and to the east of Buchlyvie Station, in so far as the *solum* of said road is situated beyond or outside of the line of the gates and fences which existed, at each side of the said crossing previous to the execution of the operations" in question, and for declarator that these operations were illegal, "in so far as the defenders have encroached upon, by laying lines of rails or otherwise, or have occupied or interfered with the *solum* of the said road or highway beyond or outside of the line of the gates and fences which existed on each side of said level crossing previous to the execution of the said operations"; for decree ordaining the defenders "to take down and remove the gates recently erected by them at or near said level crossing, and to take up and remove the rails recently laid down by them at or near said level crossing, in so far as the said gates or rails interfere with or encroach upon the *solum* of the said road beyond or outside the line of the said gates and fences previously existing at said crossing, and generally to restore the *solum* of and accesses to the said road or highway to the condition in which they were at the said level crossing immediately prior to the execution of the defenders' said operations"; and for interdict.

The pursuers averred (cond. 6) that in consequence of the defenders' operations, "not only was the line doubled, but the existing gates and gate-posts at each side of the crossing were removed and new gates erected, with the effect of encroaching seriously upon parts of the *solum* of the said road which was previously outside the gates and fences at the crossing. A plan . . . is produced herewith, which shews the nature and extent of the encroachments thus made upon the road." (Cond. 7) "The said operations, at all events so far as they are executed upon ground outside the line of the previously

* See *supra*, p. 930, note.

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existing gates and fences, are entirely illegal. The period limited by the 37th section of the said Forth and Clyde Junction Railway Act, 1853, for the completion of the works authorised by that Act has long since expired. The defenders are not proprietors of any portion of the *solum* of the said road outside or beyond the line of the former gates and fences. They had and have no right nor warrant whatever entitling them to encroach upon the said road in the manner above explained and shewn upon the said plan. The operations complained of, besides being illegal, are gravely prejudicial to the use and enjoyment of the said road by the public. . . ."

The defenders, in their answers, averred,—(Ans. 6) " . . . The accuracy of the plan produced by the pursuers and the alleged encroachments are disputed . . ." and, in their statement of facts, they further averred,—"Although the position of the gate-posts and gates at the level crossing in question has been altered, the area enclosed within the gates is actually less than formerly, and the gates and gate-posts, as now placed, constitute no encroachment on any right of the pursuers. . . . The use and enjoyment of the road by the pursuers and the public have been in no way interfered with by the defenders' operations. No additional obstruction to free progress along the road has been created, and for the purpose of passage, which is the only purpose in which the pursuers have an interest, the road is in every respect as good as it was before the operations complained of. The *solum* of the road does not belong to the pursuers, but remains vested in the proprietors of the adjacent lands. The pursuers have no title to sue in respect of any interference with the *solum* of the road. . . . There is no limitation in the Act of Parliament confining the railway company's powers to the laying of a single line across the road in question, and the railway company were entitled to double the line at any time they chose, and to enclose with gates such portions of the *solum* of the road crossed on the level under their statutory powers as were required for or in connection with a double line."

The pursuers pleaded;—The operations complained of being illegal and unwarrantable, decree of declarator, removal, and interdict, ought to be pronounced, with expenses, in terms of the conclusions of the summons.

The defenders pleaded;—(1) The pursuers' averments are irrelevant and insufficient in law to support the conclusions of the summons. (2) The pursuers have no title and no interest to sue. (4) The operations complained of having been carried out by the defenders to satisfy the requirements of the Board of Trade, the pursuers have no right to insist in the conclusions of the summons, and the defenders should be assoilzied. (5) The operations complained of not constituting an infringement of the pursuers' rights, and not being an encroachment on the road in question, the defenders should be assoilzied. (6) The operations complained of not having caused any new obstruction on the road, and the road being as suitable as ever it was for the purposes of passage, the defenders should be assoilzied. (7) The operations complained of having been within the defenders' rights, decree of absolvitor should be pronounced.

There was no proof.

On 24th January 1896 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the defenders exceeded their powers and acted illegally in laying the line of rails complained of across the

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county road or highway described in the summons: Therefore, repels the defences, and to the extent and effect of the above finding, finds, decerns, and declares in terms of the declaratory conclusions of the summons: Appoints the cause to be enrolled for further procedure: Finds the pursuers entitled to expenses: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and to report: Grants leave to reclaim." *

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* "OPINION.—By the 32d section of the Forth and Clyde Junction Railway Act, 1853, power was given to the Forth and Clyde Railway Company (now represented by the defenders) to carry their railway across the road in question on the level. The company acquired, under their compulsory powers, sufficient land to lay a double line of railway, but they only, in fact, laid a single line.

"The station at Buchlyvie is situated a little to the west of the level crossing, and, as required by the Board of Trade, the defenders made certain arrangements for interlocking signals at that station. Major Marindin inspected these arrangements on behalf of the Board of Trade, and the defenders aver that he intimated to them that unless they made certain alterations upon a loop-line which there was at the station, to enable trains to pass each other, he could not pass the interlocking arrangements. The alterations upon the loop-line involved carrying it across the level crossing. The defenders did accordingly carry the loop-line across the road, and made the necessary alterations upon the gates and fences, and the question raised in this case is whether they acted within their powers in doing so.

"It may be that if the defenders had not carried out Major Marindin's suggestions the Board of Trade would have refused to pass the interlocking arrangements, and the defenders would thereby have been compelled to do whatever was necessary to enable them to carry the loop-line over the road. I do not, however, think that the alteration of the loop-line can be regarded as having been done under an order of the Board of Trade, and the decision of the case therefore appears to me to depend upon the power of a railway company to lay an additional line over a level crossing after the line has been opened for traffic, and the powers conferred by the special Act have expired.

"A railway company cannot carry their line across a public road on the level unless their special Act gives them power to do so. If, however, power to cross a road upon the level is conferred, the company do not require to purchase any part of the road under their compulsory powers. They simply carry the line across the road, subject to the obligations imposed upon them by the Railways Clauses Consolidation Act, 1845, and other general railway statutes, in regard to gates, fences, and so forth.

"The argument of the defenders was that by the power given to them in the special Act they were authorised to take across the road any railway which they were entitled to construct upon the lands acquired by them upon each side of the road.

"As they have lands sufficient for the purpose, they contended that they are entitled now to lay a double line upon these lands, and that if they have power to do so, they have also power to use the right of transit given to them, and to carry the line across the road.

"It seems to me that the question mainly depends upon the construction of the 32d section of the special Act, which gives the company power to cross certain roads on the level, and the 37th section which fixes the period for the completion of the works"—(His Lordship quoted the sections).

"I do not doubt that notwithstanding the latter section there were many works which the company could execute after the expiry of the five years. I think that they could execute any works for which they did not require

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The defenders reclaimed, and argued;—The parties were at issue as to whether or to what extent the defenders' operations had encroached on the road beyond the line of the original gates; but assuming that there had been an encroachment to some extent (1) the pursuers had no title to sue, or at least in so far as they had a title to sue the action was irrelevant. If the defenders had proposed to acquire an additional piece of the *solum* of the road in property, and if the pursuers had been proprietors of the *solum*, it might have been incumbent on the defenders to shew that they had statutory authority to do what they proposed to do. But the defenders did not propose to acquire any part of the *solum* in property, and the pursuers were not the proprietors of the *solum*. The only right, both of the pursuers and of the defenders, was a right of passage merely, and the only interest and the only title of the pursuers was to see that the defenders in enlarging their right of passage did not prejudice the use of the road by the public. The pursuers had not set forth a relevant case of prejudice. They did not dispute the defenders' right to double the rails over the level crossing; the sum-

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statutory powers, but works for which they required statutory powers they could no longer execute.

"Now, in this case the company required statutory power to make their railway across the road in question. That power was given to them by the 32d section, which authorised them to cross the road 'in constructing the railway hereby authorised.' These words are, I think, important. The power is limited to crossing the road 'in constructing the railway.' These words appear to me to refer to the original construction of the railway, and not to additional works executed after its completion. Further, the power was a special power granted to the company by the Act, without which it is conceded that they could not have carried the railway across the road on the level. But the 37th section provides that after five years the powers granted to the company 'for executing the railway shall cease to be exercised.' A power to cross a road on the level in constructing the railway seems to me to be a power 'for executing the railway,' which after five years the company could no longer exercise.

"It is true that there is a saving clause in the 37th section,—'except as to so much of the railway as shall then be completed'—but I think that that is only intended to make it clear that nothing done during the five years in the exercise of special powers shall be challengeable after the expiry of the powers.

"In this case the saving clause appears to me to apply to the single line originally laid down. The power to cross the road expired except as to that line.

"That view seems to me to be consistent with all the statutory provisions of the general Acts in regard to level crossings. All the provisions in regard to the approaches, fences, and gates at level crossings appear to refer to the time when the railway is first made across the road, and there is not a single enactment, so far as I am aware, which contemplates the laying of an additional line across a road, by a company at their own hand, after the railway has been completed and opened.

"The defenders contended that it could not have been intended that a railway company should not have power, after the period for completion of the line had expired, to construct upon their own land a loop-line requisite for the proper conduct of traffic, because it would cross a road which the Legislature had authorised them to cross, unless they went back to Parliament and got a new Act. Now, I do not see any difference in principle between a company carrying a loop-line across one road, and doubling their line all along, with the result of doubling the number of rails over every

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mons was carefully framed so as to strike only at rails laid on ground which was beyond the line of the original gates, and in point of fact the rails themselves were laid wholly within that line, although there might be certain small encroachments with a view to the proper working of the new rails. Practically, the public using the road were no more inconvenienced by the level crossing in its present state than they had been before. At all events, assuming the relevancy of the action, there ought to be a proof. But (2) the defenders had statutory authority to do what they had done. It was not disputed that under section 32 of their Act they were entitled to have a level crossing over this road; nor was it disputed that they might have had a double line from the first; nor did the pursuers maintain that the defenders were not entitled to double their line now, provided that in doing so they did not encroach on the road. That being so, the doubling of the line over the level crossing was within the powers conferred by section 16 of the Railway Clauses Act, 1845, either as being a substitution in the sense of that section, or as being an act "necessary for maintaining, altering, or repairing and using the railway." The operation of section 16 was not limited to the five years specified in section 37 of the special Act.[1] The certificates provided for in section 8 of the Railway Clauses Act of 1863, and in sections 5, 8, and

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road crossed by the railway, and in both cases I think that (assuming the special Act to be in the same terms as in this case) the company would, prior to 1864, have required to get special powers from Parliament. Now, however, I rather think that the defenders could construct a loop-line by obtaining a certificate from the Board of Trade, under the Railways Construction Facilities Act, 1864. The main object of that Act is to enable railway companies to make branch lines without a special Act, when they can acquire all the land necessary by agreement. But, by the 54th section, the provisions of the Act, which relate to the making of a railway, are extended, and apply to 'the making or executing of any work connected with or for the purposes of a railway (as distinguished from the construction of a railway).'

"By the 5th section it is provided:—(His Lordship quoted the section).

"Now, if the defenders, in order to make the loop-line, had required to purchase land, and had come to an agreement with the owners of the land, I think that it is clear that they could have applied for a certificate from the Board of Trade for the construction of the loop-line, and the carrying it across the road, and I do not think that the fact that they have the land, and only require authority to carry the line across the road, would debar the defenders from taking advantage of the Act. I am inclined to think that the case would be within the scope of the Act, and that the defenders would be entitled to apply to the Board of Trade for a certificate authorising them to cross the road.

"The defenders further contended that the pursuers had no title to sue, as they are not proprietors of the *solum* of the road. I do not think that it is of any consequence that the pursuers are not the proprietors of the *solum* of the road. It is, in my opinion, sufficient that they have right to prevent any unauthorised or illegal encroachment upon, or obstruction of the road. The laying of a line of rails across the road for the use of engines and trains is undoubtedly an obstruction to which, if done without lawful authority, the pursuers are, in my opinion, entitled to object, and I do not think that it is necessary to consider whether, or to what extent, the public would suffer greater inconvenience or danger from two lines crossing the road than they were exposed to when there was only one line."

[1] Emsley v. North-Eastern Railway Co., L. R. [1896], 1 Ch. 418.

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54 of the Railway Construction Facilities Act, 1864, had really no bearing on the present question. These enactments contemplated the case of a railway company which had to acquire additional land in order properly to carry on its work, and provided facilities for such acquisition without the necessity of going to Parliament. Here the company did not need to acquire any additional land in order to double its line throughout its entire length—apart from level crossings over public roads—and it had power to cross this road. The right to double the line across the road therefore followed as a matter of course from the right to double the line *quoad ultra*. If the time had come for making a bridge at this point instead of a level crossing, refusing decree in the present action would not prejudice the rights of the pursuers under section 34 of the special Act.

Argued for the pursuers;—Section 16 of the Railway Clauses Act, 1845, had no application, because it was inconsistent with section 37 of the special Act, and so was not incorporated with that Act.[1] In any case section 16 only applied to the case of works which were necessary to the construction of the railway, and "necessary" meant "physically necessary" not merely less expensive or more convenient.[2] In that sense the doubling of the line was not necessary. *Emsley's*[3] case was a case of a "substitution," which doubling a line could not reasonably be said to be. Further, *Emsley's* case was a decision on the special Act of the company there in question. Major Marindin had intimated what he thought necessary, but no order had been pronounced by the Board of Trade. The proper course was for the defenders to apply to the Board for a certificate under the Act of 1863, or under that of 1864. In that way all parties interested could have an opportunity of being heard on the whole question.

At advising,—

LORD JUSTICE-CLERK.—The North British Railway Company, which have come in place of the Forth and Clyde Railway Company, as owners of the railway line between Stirling and Balloch, have recently executed works at Buchlyvie Station to fulfil the Government requirements as regards safety by the establishment of block and interlocking signals. When these works had been carried out, and were submitted for approval to the Board of Trade inspector, he declined to pass them as being safe and satisfactory for the working of the line unless the company extended a loop-line at the station further eastwards than was then the case. There being at the east end of the station a level-crossing across a public road, the extension of the loop-line could not be made without the rails of the loop being laid across the road. The company already possessed land of sufficient breadth on both sides of the road for making this extended loop, and had, by their gates protecting the old level crossing, shut in, ever since the line was made, the space on which the rails of the extended loop-line would be placed. The railway company proceeded to make the extended loop, and the pursuers have raised this action of declarator and interdict, and concluding for removal of the rails so laid.

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[1] Glasgow District Subway Co. v. Robertson's Trustees, June 26, 1895, 22 R. 790.

[2] Queen v. Wycomb Railway Co., 1867, L. R., 2 Q. B. 310; Pugh v. Golden Valley Railway Co., 1880, L. R., 15 Ch. Div. 330.

[3] Emsley v. North-Eastern Railway Co., L. R. [1896], 1 Ch. 418.

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The question is whether the railway company had power to do this piece of work. The answer must depend upon the construction to be given to statutory enactments, as, of course, the railway company could have no power to interfere with a public road unless it was given by Act of Parliament. In the statute by which the line was authorised, power was given to take the line across this road on the level, and accordingly the road has there been crossed by level crossing since the construction. But although their Act authorised a double line, and the works were constructed for a double line, only one line of rails was laid down. It is maintained by the pursuers that the power to lay down another line has been lost, as the 37th section of the Act authorising the construction declares that the powers of the Act shall cease to be exercised at the end of five years, "except as to so much of the railway as shall then be completed." I cannot say that it is to me at all clear that this restriction applies to the case in question, even as regards the laying down of a second line of rails where that may become necessary for the working of the traffic on a line the works for which have been completed for double running.

The power which under the Railway Clauses Act is given to railway companies "from time to time to alter," and to do all acts necessary for using the railway, might, I think, well apply to the use of two lines on a railway constructed for two lines, but used at first when traffic was small with only one line. To lay down additional rails as they may be required on the lands acquired seems to me not to be a power taken from them at the end of the five years. But I do not express any opinion upon that matter, as I think this case can be disposed of without giving any decision upon it.

The true question here is whether what the railway company have done is a work they are entitled to do after the five years for construction have expired. Now, that they could have done this work on lands belonging to themselves had there been no public road crossing, does not, I think, admit of doubt. If Buchlyvie Station had been at a distance from any level crossing, the making of this loop would have been a work incidental to the working of the line in accordance with Government requirements, and therefore a work "necessary" in the sense of section 16 of the Railways Clauses Act, and if "necessary" in the sense of section 16, then plainly not struck at by the cessation of powers clause in the special Act. It is not easy to imagine a situation to which the words "acts necessary" could more distinctly apply than to the fulfilment of an authoritative order of a Government department for the carrying out of rules fixed by public statute passed subsequently to the making of the line. The railway company in this case are not doing a work they desire to do at all, but a work which is forced upon them by a Government inspector under sanction that until it has been done other works ordered by him cannot be passed as sufficiently done to fulfil the requirements of the department under their statutory powers. Now, if the work could not be said to be beyond the powers of the company if executed entirely within the lands acquired by them for their line, can it be said to be beyond their powers when it is executed, not on their own land, but on a road which their statute gave them the power to use as part of their line, and within the limits of the breadth of the land allowed to be acquired for their line

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on either side of the road. I am unable so to hold. The company, having right to use this portion of the road by crossing it with their line, are entitled to such use within the limits of the lines shewn on their parliamentary plans as the "use of the railway" in the words of section 16 makes necessary. And the responsible official, whose duty it is to regulate certain matters, lays down as "necessary" to the future use of the line the extension of a loop, which as it happens cannot be completed without its being carried across the road. It would be strange if a line necessary for the use of the railway could not be carried across a road at which a level crossing had been authorised in the construction of the railway. If a level crossing is allowed by Act of Parliament, can there be any reason why the words "necessary use" of the line should not apply to that place as much as to any other part of the line? I do not see how there can be.

Of course there may be "acts necessary" to the use of a line, which, if carried out at a level crossing, might make such a change in the conditions that good reason might arise for coming to the conclusion that a level crossing should no longer be suffered to exist at that place. And it is quite possible that this may prove to be the case in the present instance. But such a contingency is amply provided for by the law. Level crossings are permitted by the Legislature when the existing circumstances at the time of the application for authority to make a line seem to make it safe and expedient to allow the line to cross roads in that manner. But if circumstances change, if traffic increases, or high speed traffic is developed, or any new circumstances arise which alter the case, then it is in the power of such a body as the pursuers in this case to apply to the Board of Trade to have an order made on the railway company to substitute a bridge for the level crossing. So in this case, if the establishment of this loop has any such effects as will justify an application for an order to have a bridge constructed, that order can be obtained. Meantime, the only question is whether the pursuers are entitled to the declarator and interdict which they ask for on the ground that the railway company have no power to execute the work declared necessary by the Board of Trade. I think that they are not, and that the interlocutor of the Lord Ordinary should be recalled, and the action dismissed.

LORD YOUNG concurred.

LORD TRAYNER.—I agree. In dealing with this case, I start with the consideration that what the defenders have done has been practically in obedience to an order by the Board of Trade. The Board of Trade, in exercise of a statutory power, called upon the defenders to interlock the whole stations upon their system for signalling purposes. The defenders having complied with this order at Buchlyvie Station, the officer of the Board of Trade refused to approve of or pass as sufficient what had there been done, unless the defenders executed the works now complained of. These works were accordingly carried out. In these circumstances it is presumable that the works complained of were necessary in the public interest, and that no public interest has been injured by their execution. The question remains, however, whether the works so executed were legally within the defenders' power. The complainers maintain that the respondents' operations were

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illegal and unwarrantable, notwithstanding the circumstances under which they were carried out, and whether they were so or not is the question before us. The Lord Ordinary has held that the defenders, in the works complained of, "exceeded their powers and acted illegally." I cannot concur in that opinion.

The railway was constructed under statutory authority, and the private Act which authorised it incorporated the Railway Clauses Act of 1845, section 16 of which enacts,—[His Lordship then read the portions of section 16 quoted above.] The section then provides for compensation being made for any damage that such works may occasion.

It appears to me that the operations complained of come within the authority I have just quoted. At the original construction of the line at Buchlyvie Station, only one line was carried across the public road on the level. Another line has now been added, but I think that is within the fair meaning of the statute as a substitution—the substitution, namely, of a double for a single line, just as much as the erection of the increased parcel office for a smaller one was held to be a substitution in the case of *Emsley*.[1] But supposing it to be doubtful that the work complained of is a substitution, it does not appear to me to be doubtful that it is a work and convenience similar to those authorised by the before-quoted section of the Act of 1845. Nor can it be doubted that the new accommodation work (for that is its character) is "an act necessary . . . for using the railway," for the Board of Trade has required it. I would be slow to interfere with what the railway company has done, seeing that the work has been ordered and executed in the public interest, and that the public interest has not and cannot suffer thereby. That the public interest—that is, the public safety and convenience—has not been injured appears from the fact that the two lines now laid across the road on the level are fenced and guarded just as the single line formerly was, and practically the public road has not been diminished, or made less serviceable by the laying of the second line. That such public interest will not suffer in the future is clear enough from this, that the Board of Trade, under the Act of 1863, can order the defenders to build a bridge under or over their level crossing if convinced that the public interest requires the adoption of such a measure. The pursuers, in fact, seem to be using this action as a compulsitor upon the defenders to build such a bridge. But no action is necessary for that purpose. They have only to satisfy the Board of Trade of the necessity or propriety of such a bridge in order to get it.

LORD RUTHERFURD CLARK was absent.

THE COURT recalled the interlocutor reclaimed against, and assoilzied the defenders.

DUNDAS & WILSON, C.S.—JAMES WATSON, S.S.C.—Agents.

[1] L. R. [1896], 1 Ch. 418.

ALEXANDER MACDONALD, Pursuer (Respondent).—*Jameson—P. J. Blair.* No. 180.
DONALD MACDOUGALL AND OTHERS, Defenders (Appellants).—*Kennedy.*

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Macdonald v. Macdougall.

Crofter—Right of crofter to take sea-ware—Right in question with singular successors—Crofters Holdings Act, 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 12.—Sec. 12 of the Crofters Holdings Act, 1886, enacts, *inter alia*, that "it shall be competent for the Crofters Commission to draw up a scheme regulating the use by crofters on the same estate of sea-weed, for the reasonable purposes of their holdings, peat bogs, and heather or grass, used for thatching purposes, and to include the charge for all these in the fixed rent."

In 1894 the proprietor of lands within a crofting parish sold part of these lands, and thereafter the purchaser brought an action against crofters on the remaining portion of the seller's lands praying to have the defenders interdicted from gathering sea-ware on the sea-shore *ex adverso* of the lands sold. In defence the crofters averred that from time immemorial they and their predecessors in the crofts had been in use and had right to gather sea-ware from the sea-shore in question, and that in 1887 their rents were fixed by the Crofters Commission on the footing that they had that right.

Held that the defenders were entitled to proof of their averments as to their right to gather sea-ware.

2D DIVISION. Sheriff of Inverness-shire.

IN February 1896 Alexander Macdonald of Balranald, in the parish of North Uist, brought an action in the Sheriff Court at Lochmaddy against Donald Macdougall and others, praying the Court to interdict the defenders from "collecting or carrying away or interfering with any sea-ware, tangle, or other growth or substance which may be growing or thrown upon any part of the farms and lands of Balranald, Paiblesgarry, and Penimore, in the parish of North Uist and county of Inverness, belonging to and occupied by the pursuer, or upon the sea-shores *ex adverso* thereof; and secondly, from entering upon, passing through, or using any part of said farms and lands, or the roads or paths thereon, or the sea-shore *ex adverso* of said lands for the purpose of collecting, carrying away, or interfering with any such sea-ware, tangle, or others foresaid."

The following were the material averments of the pursuer and answers of the defenders:—(Cond. 1) "The pursuer is proprietor of the lands and estate of Balranald, extending along the sea-shore a distance of six miles, and comprehending the farms of Balranald, Paiblesgarry, and Penimore, in the parish of North Uist and county of Inverness, with the pertinents thereto belonging, having purchased the same from Sir John William Powlett Campbell Orde of Kilmory and North Uist, Baronet, with entry at the term of Whitsunday 1894; and the defenders are crofters and cottars in the township of Knockantorran, on the estate of North Uist, belonging to the said Sir John William Powlett Campbell Orde. The pursuer's said lands and estate form part of the barony of Macdonald, and he has, in virtue of his titles, sole and exclusive right to the sea-ware and tangle, whether growing or drifted, on the shores *ex adverso* of his lands." (Ans. 1.) "Admitted that the defenders are crofters and cottars in the township of Knockantorran, on the estate of North Uist, belonging to Sir John William Powlett Campbell Orde. *Quoad ultra* denied, and pursuer is called upon to produce his titles in support of his averment."

(Cond. 2) "The township of Knockantorran is immediately to the south of, and adjoins the farm of Paiblesgarry, and the crofters and cottars of the township are in the habit every season of collecting sea-ware and tangle from the shores *ex adverso* of their township lands,

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for the purpose of manuring their arable lands. In like manner the pursuer, first as tenant, and afterwards as proprietor, of the farm of Paiblesgarry, has been in the habit from time immemorial of collecting sea-ware and tangle from the shores *ex adverso* of the lands of Paiblesgarry with a like object. The explanations and averments in the answer to this statement are denied. Explained that at one time, while the township of Knockantorran and the farm of Paiblesgarry belonged to the same proprietor, his factor, with the view of making the distribution of sea-ware as equal as possible, made an arrangement that the crofters of Knockantorran should be allowed to take a certain quantity of sea-ware from a part of the shore *ex adverso* of the farm of Paiblesgarry, while, on the other hand, the tenant of Paiblesgarry should be allowed to take sea-ware from a part of the sea-shore *ex adverso* of the townships' lands of Knockantorran and Balemore. This was merely a temporary arrangement affecting tenants on the same estate, and was brought to an end when the pursuer became proprietor of the estate of Balranald . . ." (Ans. 2) "Admitted under reference to answer 1 hereof. It is explained and averred that the defenders have from time immemorial, or at least for a period of over sixty years, been in the habit of collecting and removing sea-ware, tangle, and other substances from the shores *ex adverso* of the lands of Paiblesgarry, and as far north as that part of Balranald lands called Hunglam, for the purpose of manuring their arable lands, and for other purposes, to which, as tenants of the township lands of Knockantorran and otherwise, they had and have a joint right along with the tenant of the farm of Balranald; and, in like manner, the pursuer and his predecessors in the lands of Balranald have for a like period been in the habit of collecting and removing sea-ware, tangle, and other substances from the shore *ex adverso* of the lands of Knockantorran for similar purposes, in which they had and have a joint right along with the crofter defenders. Said joint rights of the pursuer and the crofter defenders have always existed in certain ancient and well-established and recognised shares in the sea-ware useful and necessary for manurial purposes. . . . They have an undoubted lawful joint right, along with the pursuer, to the sea-ware, tangles, and other substances cast on the said shore *ex adverso* of the lands of Balranald as stated, and have uninterruptedly exercised and enjoyed said right from time immemorial, and for at least over and beyond the last sixty years, without hindrance or molestation in any manner of way . . ."

(Cond. 3) "Immediately after Whitsunday 1894, and as part of the arrangement made between the pursuer and the said Sir John William Powlett Campbell Orde, when the former purchased the estate of Balranald, the said Sir John William Powlett Campbell Orde gave notice, through his local factor, of the sale of the said lands to the pursuer, and that the defenders would in future be only allowed to take sea-ware from the shores of their own farms. . . The averments in answer 3 are denied, in so far as they state that the defenders have any right whatever to the sea-ware and tangle cast ashore *ex adverso* of Paiblesgarry." . . (Ans. 3) "The notice referred to is referred to for its terms. *Quoad ultra* denied, and averred that, at the date of the alleged sale of the lands of Balranald from Sir John William Powlett Campbell Orde to the pursuer, the crofter defenders were all crofters holding their lands under and in virtue of the Crofters Holdings (Scotland) Act, 1886, from the said Sir John William Powlett Campbell Orde, and having an inalienable right to cer-

tain shares in the sea-ware and tangle cast on the shore *ex adverso* of Paiblesgarry on Balranald lands as far north as Hunglam, as parts and pertinents of their holdings, and they still hold their lands, and the right to gather, collect, and take away the drift sea-ware and tangle from *ex adverso* the shores of Paiblesgarry and Balranald, with right of access to the sea-shore there, across the lands of Paiblesgarry, by themselves or their servants, and with carts and horses, for exercising said right, and they cannot be deprived thereof so long as they continue tenants of their said holdings under said Act. It is also averred that, when having fair rents fixed for their holdings by the Crofters Commission in the year 1887, it was expressly stated to the Commissioners, and admitted as correct by Sir John William Powlett Campbell Orde, the then proprietor of both Balranald and Knockantorran lands, that the crofter defenders had the rights to sea-ware and tangle as here set forth on Paiblesgarry shore, and as far north as Hunglam on Balranald shore, as part of their holdings, and their rents were accordingly fixed on that footing, and still remain as then fixed. . . . It is averred that, without the right to the sea-ware and tangle in question, the holdings of the crofter defenders would be valueless."

The pursuer pleaded, *inter alia*;—(1) The pursuer, having, as proprietor and occupier of the estate of Balranald, exclusive right to the sea-ware and tangle on the shores *ex adverso* of his lands, is entitled to interdict against the defenders.

The defenders pleaded, *inter alia*;—(3) The defenders, having, from time immemorial, exercised the right of gathering, collecting, and carrying away the sea-ware, tangle, and other substances *ex adverso* of the lands of Paiblesgarry, on the estate of Balranald, as set forth, as a right attached to their holdings, and said right being vested in them in virtue of the provisions of the Crofters Holdings (Scotland) Act, 1886,* they are entitled to continue the exercise thereof, and to use the roads or tracks across the lands of Paiblesgarry, on the estate of Balranald, in use to be used by them for that purpose.

On 22d April 1896 the Sheriff-substitute (Webster) granted interdict against the cottar defenders; allowed the pursuer a proof of his averments, and to the crofter defenders a conjunct probation, and further allowed these defenders "a proof of their averments as to their rights as tenants of the township farm of Knockantorran to collect and carry away sea-ware, tangle, or other growth or substance of a sea-weed nature, which may be growing or thrown upon the lands of pursuer, and of entering or passing over said lands for these purposes, and to the pursuer a conjunct probation: Appoints said proof to take place on a day to be afterwards fixed."

On appeal the Sheriff (Ivory) on 28th May pronounced this interlocutor:—"Recalls the interlocutor appealed against: Finds that the defenders have not averred any relevant right to collect or carry away sea-ware or tangle from the lands of Balranald, Paiblesgarry, and Penimore, belonging to the pursuer, or from the sea-shore *ex adverso* thereof: Therefore interdicts the defenders," &c.

The defenders appealed, and argued;—They were entitled to prove

* The Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), under the head "Enlargement of holdings," enacts, sec. 12, *inter alia*,—"It shall be competent for the Crofters Commission to draw up a scheme regulating the use by crofters on the same estate, of sea-weed, for the reasonable purposes of their holdings, peat bogs and heather or grass, used for thatching purposes, and to include the charge for all these in the fixed rent."

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that they had right to sea-ware at common law, and that the Commissioners, in fixing the rent, had taken the right to sea-ware into account.

Argued for the pursuer;—Under his titles the pursuer had an exclusive right to the sea-ware *ex adverso* of his lands,[1] and the defence founded on the Crofters Holdings Act, 1886, was irrelevant. A right to take sea-ware was not part of a holding within the meaning of that Act,* and apart from special stipulation it was not part of a tenant's right at common law,[2] and in any case it was not binding against singular successors.[3] Section 12 did not apply. It dealt only with the enlargement of holdings, and the procedure for the enlargement of holdings had not been followed here.

LORD JUSTICE-CLERK.—The decision of both the Sheriffs is against the cottars, and I have no doubt that it is right. They are not under the Act. They may have privileges, but I do not think that these privileges are of such a character as to entitle them to a proof here.

The other defenders here aver that under an arrangement with their landlord they have a right to take sea-weed from the shore opposite the pursuer's land as long as their tenancy exists. Of course if they could be removed from their holdings their rights would expire. But under the Crofters Acts they have obtained fixity of tenure, and they cannot be turned out as long as they pay the rent fixed by the Crofters Commission. Now, in considering what rent to fix, it was part of the duty of the Crofters Commission, under section 12 of the Act of 1886, to deal with sea-ware to be used by crofters for the reasonable purposes of their holdings, and to include the charge for this in the fixed rent. It is quite obvious that if crofters are to be held entitled to get sea-ware for the reasonable purposes of their holdings, this question cannot be settled by merely saying that the sea-ware is not *ex adverso* of their holdings. Some holdings may not be opposite the sea at all, others may be so situated that the drift of the sea will not allow the sea-ware to settle upon the shore opposite the holding. It was in view of all this that section 12 was passed. The defenders aver that they have a right to the sea-ware, and that their rent is fixed on that footing. They are entitled to have this submitted to proof. I therefore think we should recall the interlocutor of the Sheriff and revert to that of the Sheriff-substitute.

LORD YOUNG.—I am of the same opinion. At present, whatever may be the result after the evidence is taken, the case appears very clear. Sir John Orde was proprietor of the whole island, including Balranald and Knockantorran. In 1894 he sold Balranald to the pursuer Macdonald. Macdonald thereafter raised these proceedings before the Sheriff complaining of trespass

[1] Pirie v. Rose, Feb. 1, 1884, 11 R. 490.

* The Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 34, enacts, *inter alia*,—"'Holding' means any piece of land held by a crofter consisting of arable or pasture land, or of land partly arable and partly pasture, and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone or in common with others) immediately preceding the passing of this Act, including the site of his dwelling-house and any offices or other conveniences connected therewith, but does not include garden ground only, appurtenant to a house."

[2] Parr v. Maclean, June 19, 1889, 16 R. 810.

[3] Duncan v. Brooks, May 17, 1894, 21 R. 760.

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by Sir John Orde's crofter tenants in Knockantorran, across the lands of Balranald, giving access to the sea-shore, and of their taking away the sea-ware *ex adverso* of these lands. If the pursuer establishes that trespass without right on the part of the defenders he will succeed, and interdict will be granted. But the alleged trespassers say that the right to take sea-ware *ex adverso* of these lands is a part of their croft, with reference to which their rents as crofters were fixed, and that this part of their croft cannot be taken away any more than any other. This is the dispute, and the Sheriff-substitute very properly allowed a proof, on the one hand to the pursuer to prove the trespass by shewing that the defenders were in use to take this sea-ware by permission of the proprietor—a permission which could be withdrawn—and on the other hand to the defenders to prove that what they did was really in exercise of their rights.

LORD TRAYNER.—*Prima facie*, the pursuer, by reason of his title, has the exclusive property of the sea-ware opposite his lands. But the defenders have averred—and this, I think, the Sheriff must have omitted to notice—that the right to take sea-ware from the shore opposite the pursuer's lands was a part of their holdings as crofters, and was regarded as such by the Crofters Commission in fixing their rents. If that is so, Mr Macdonald cannot take away any right which the Crofters Commission has held to be a part of the defenders' crofts, for statute has given to the crofters fixity of tenure. The pursuer and defenders being thus at variance in regard to material facts, this question falls to be decided by proof whether the right to take sea-ware from opposite the pursuer's land was given to the defenders by the former owner of the property and was taken into account by the Crofters Commission in fixing their rents.

LORD MONCREIFF was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, recall the interlocutor appealed against, . . . and remit the case back to the Sheriff-substitute to proceed with the proof in terms of his interlocutor of 22d April last, and decern."

J. & A. PEDDIE & IVORY, W.S.—MALCOLM GRAHAM YOOLL, S.S.C.—Agents.

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July 3, 1896.
Taylor's Trustees v. M'Gavigan.

JAMES TAYLOR Junior AND OTHERS (Taylor's Trustees), Pursuers (Reclaimers).—*Ure—M'Lennan.*
JOHN M'GAVIGAN AND ANOTHER, Defenders (Respondents).—*Sol.-Gen. Dickson—Younger.*

Property—Common Interest—Servitude.—A was the proprietor of the ground floor of a tenement, of which B and C owned the upper flats. The titles of all were derived from a common author, and conferred upon each "the following servitude":—"That no buildings shall be erected on the area behind the said tenement nearer the back side wall thereof than nineteen feet, and that the said space of nineteen feet all along the length of the said tenement shall be kept open and unbuilt upon in all time coming, in order to preserve the back lights of the foresaid shops hereby disponed."

In an action raised by A in 1893 to have B and C ordained to remove certain wooden posts which they had fixed in the court, the Court (*rev.* judgment of Lord Kincairney) *held* (1) that the parties had a right of com-

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mon interest in the back court entitling each to prevent the others from erecting any structure upon it; and therefore (2) that it was not material to inquire to what extent the light of the pursuer's flat was interfered with.

Bennett v. *Playfair*, Jan. 24, 1877, 4 R. 321, *followed*; *Russell* v. *Cowpar*, Feb. 24, 1882, 9 R. 660, *distinguished*.

Process—Sheriff—Reduction of Sheriff Court Decree—Competency—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 64-67—*Act of Sederunt, March* 10, 1870, *sec.* 3, *subsec.* 5—*Held* (by Lord Kincairney and *acquiesced* in) (1) that the provisions of the Court of Session Act, 1868, had not rendered an action for reduction of an extracted Sheriff Court decree incompetent; and (2) that it was not incompetent to include in such action of reduction conclusions additional to those contained in the Sheriff Court process for the purpose of more clearly elucidating the rights of parties.

Expenses—Reduction of Sheriff Court Decree.—The defenders in a Sheriff Court action having obtained decree of absolvitor, with expenses, on 1st December, extracted the decree on 26th December, without waiting for approval of the Auditor's report on their account. The pursuers having brought an action for reduction of the Sheriff's interlocutor, in which they obtained a judgment in their favour in the Inner-House, the defenders submitted that they were entitled to the expenses of the proceedings in the Outer-House, in respect that these had been caused by the pursuers neglecting to appeal against the Sheriff's judgment within fourteen days, before the expiry of which extract could not have been obtained. The Court *found* the pursuers entitled only to expenses in the Sheriff Court and in the Inner-House.

1st Division. Lord Kincairney.

(SUPRA, May 21, 1896, p. 738.)

The trustees of the deceased William Taylor, jeweller, Glasgow, were the proprietors of a shop on the street floor at 64 Argyle Street, Glasgow, the property extending from front to back of the tenement. The first and second flats in the same tenement were owned by John M'Gavigan and James Carrick respectively. The different parties derived their rights under dispositions from a common author in 1803, the dispositions bearing to confer a right of servitude over a court or area at the back of the tenement. The clauses in the different titles were in effect the same. The title of Taylor's trustees contained a conveyance to "the following servitude over the ground and area to the north of the said tenement, viz., that no buildings shall be erected on the area behind the said tenement nearer the back side wall thereof than nineteen feet, and that the said space of nineteen feet all along the length of the said tenement shall be kept open and unbuilt upon in all time coming, in order to preserve the back lights of the foresaid shops hereby disponed."

For a number of years the upper flats had been used for business purposes, and a hoist had been provided for the raising and lowering of goods from the back area. This hoist consisted of a brick structure projecting outwards above the back window of the shop belonging to Taylor's trustees, and supported at one point by an iron column fixed in the ground. When Taylor acquired the ground floor in 1866, this projecting structure was closed at its base by an extension of the flooring of M'Gavigan's property, and the goods were raised and lowered by means of a block and tackle outside of the hoist. About the year 1883 alterations were made on the construction of the hoist by the proprietors of the upper flats. The base of the hoist was taken away, and a wooden upright was fitted at each of the four corners within the hoist for the guidance of a moveable cage, in which the goods

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were raised or lowered inside the hoist, instead of outside as formerly. These uprights were fixed in the back court. Two were placed close against the back wall of the shop belonging to Taylor's trustees, one on each side of the window of the back shop, and the other two at a distance of between four and five feet from the wall.

In 1893 Taylor's trustees raised an action in the Sheriff Court of Lanarkshire against M'Gavigan and Carrick, concluding for declarator that, as proprietors of the shop, No. 64 Argyle Street, they "are in right of a real servitude attaching thereto, whereby they are entitled to have the court or area of ground, lying immediately to the back . . . of the back wall of the said shop . . . to the extent of nineteen feet . . . from said back wall, kept open and unbuilt upon in all time coming, in order to preserve the back lights of the said shop," and that the structure erected by the defenders *ex adverso* of the pursuers' back wall was a "contravention of the right and property of the pursuers in the said shop . . . and of the servitude right attaching thereto." The summons also concluded for the removal of the hoist so far as *ex adverso* of the pursuers' back wall, and for interdict.

The defenders denied that the alterations which they had made upon the hoist had injured the light of the pursuers' shop, or were in contravention of their rights.

After a proof the Sheriff-substitute (Spens) found that the pursuer had "failed to prove that there has been any material interference with the servitude of light possessed by pursuer on the part of the defenders," and assoilzied the defenders.

On appeal the Sheriff (Berry), on 1st December 1894, adhered to the above interlocutor.

On 26th December the defenders, without having had the Auditor's reports on their accounts approved, extracted this decree.

Appeal being thus rendered impossible, the pursuers raised an action in the Court of Session concluding for reduction of the interlocutors pronounced in the Sheriff Court, and for decree of declarator, removal, and interdict in terms of the Sheriff Court process. The summons also contained other declaratory and prohibitory conclusions bearing on the rights of the parties in the back area, but it is unnecessary to advert to these in detail.

The pursuers repeated the averments and pleas stated by them in the Sheriff Court action, and narrated the proceedings therein.

The defenders pleaded, *inter alia*;—1. The action is incompetent. 2. The action is irrelevant. 3. *Res judicata.* 7. The defenders should be assoilzied in respect (1) the hoist complained of has been erected and used by them and their authors for the prescriptive period; (2) the alterations made in said hoist in 1883 did not in any way injuriously affect the pursuers' light; (3) the said alterations were acquiesced in by the pursuers.

On 9th August 1895 the Lord Ordinary (Kincairney) repelled the first and second pleas in law for the defenders, reserved consideration of their third plea, and appointed the cause to be enrolled for further procedure.*

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* "NOTE.— . . . The defenders' first plea is that the action is incompetent. They maintained that the effect of section 64 of the Court of Session Act of 1868, which abolishes the process of advocation, and sections 65 and 66, which substitute a note of appeal, was by implication to supersede and abolish the process of reduction as a process of review of a

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On 8th January 1896 the Lord Ordinary, having further considered the cause, repelled the reasons of reduction, assoilzied the defenders

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Sheriff Court decree. They founded also on section 67, which makes appeal incompetent after the expiration of six months from the date of a final judgment, and also on the Act of Sederunt, 10th March 1870, section 3, subsection 5, which provides for the finality of a Sheriff Court judgment in the case of an abandoned appeal.

"It may be admitted that a reduction is a very inconvenient process for reviewing a Sheriff Court decree, and I think that for a considerable time back such actions have not been common in practice. Still, of course, the defenders did not dispute that, prior to 1868, an action of reduction was a mode of taking a Sheriff Court judgment to review, just as distinctly recognised as an advocation, and there are several reported cases about such reductions, the chief question in such cases being whether it was competent to review by reduction an unextracted Sheriff Court decree; on which point, it may, I think, be said to have been determined that, in general, a reduction of a Sheriff Court decree which had not been extracted was incompetent (as decided in *Buchanan* v. *Lumsden*, 20th May 1837, 15 S. 958, and *Scouller* v. *M'Lachlan*, 29th March 1864, 2 Macph. 955); but that a reduction might be sustained if the decree was not extractable, as in *Holmes* v. *Tassie*, 19th January 1826, 6 S. 394, and *Jack* v. *Umpherston*, 11th March 1837, 15 S. 833.

"But the defenders contended that this was altered by the Act of 1868. They referred to *Tennants* v. *Romanes*, 22d June 1881, 8 R. 824, and *Thomson* v. *King*, 19th January 1883, 10 R. 469, which were cases in which appeals were disallowed as beyond the dates for appeal, and argued that such questions would have been idle if, after the time for appeal had expired, it was still competent to bring a reduction. I do not need to solve the question whether, after six months from the date of a final decree, and when it was protected by lapse of time from an appeal, it could be brought up by a reduction if it were extracted. I do not suggest any doubt about that, but no such question arises. And with regard to the general point raised by the defenders, I have no difficulty in repelling their argument, and in holding that the substitution of an appeal for an advocation has no effect or bearing on the process of reduction as a mode of review. There are no words in the statute to suggest that it was intended to affect reductions. A right of access to the Court of that kind cannot be taken away by implication, for which, indeed, I see no ground—*Maclachlan* v. *Rutherford & Co.*, 10th June 1854, 16 D. 937; *Marr & Sons* v. *Lindsay*, 7th June 1881, 8 R. 784.

"Further, the competency of a reduction of Sheriff Court decrees has been recognised since the Court of Session Act, in the sense that no doubt has ever been cast on it. In *M'Leod* v. *Collier*, 9th November 1869, 42 Scot. Jurist, 62, Lord Ormidale decided that a reduction was competent in a case where a suspension might also have been competent. The competency of a reduction of an extracted Sheriff Court decree in the general case was recognised in *Watt Brothers* v. *Foyn*, 1st November 1879, 7 R. 126, although it was held that a Sheriff Court judgment final under the Act of Sederunt, 10th March 1870, could not be reviewed in any form. In *Weir* v. *Tudhope*, 14th June 1892, 19 R. 858, no doubt was expressed as to the competency of a reduction, and in *Mackenzie* v. *Munro*, 10th November 1894, 22 R. 45, a Sheriff Court decree by default was reduced. The new Style Book retains a style of a reduction of a Sheriff Court decree on its merits—Juridical Styles, vol. iii. pp. 86, 87.

"I cannot therefore doubt that a reduction of an extracted final judgment of a Sheriff is still competent, although it may be true that it is now rarely met with in practice.

"The repetition in the conclusions of the summons of the prayer of the

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petition is no doubt competent and proper—Juridical Styles, vol. iii. (1828), p. 233, and recent Juridical Styles *ut supra;* and possibly it is necessary—*Ramsay* v. *Bruce*, 30th November 1849, 12 D. 243. So also I have no doubt of the competency of the conclusion for the expenses in the Sheriff Court. It is warranted by the Style Books and was contained in the summons of reduction in *Bisset* v. *Anderson*, 9th March 1849, 11 D. 1015, and *Friend* v. *Skelton*, 2d March 1855, 17 D. 548, to the Session papers of which cases I have been referred.

"The defenders further maintained that the Sheriff Court judgments must be reviewed and considered on the pleadings and proof led in the Sheriff Court, that the introduction of new conclusions and new averments was incompetent, and that there could be no further proof. The pursuers did not refer to any precedent for the form of summons which they have adopted. Even, however, if it should be held that these new conclusions could not be entertained, that would not make the action incompetent. But, as at present advised, I do not see why it should be incompetent to conclude in one summons that the Sheriff Court judgment should be set aside, and then that (they being removed out of the way) further declaratory findings should be pronounced in order to elucidate more clearly, if necessary, the rights of the parties. I think the form of process is competent, although it may not be convenient. I do not know whether any further proof is necessary in order that these conclusions may be dealt with, nor do I decide whether any proof ought to be allowed before the action is exhausted as a process of review. That will be for subsequent consideration. The defenders maintain that there was really nothing new in the additional conclusions and averments, and that these were only inserted in order to fortify the Sheriff Court case, for which purpose it was maintained they could not competently be used. This matter was not fully discussed, nor was the pursuers' demand for a proof precisely formulated; and I think I can do no more at present than decide that the action cannot be dismissed as incompetent. The conclusions of the summons are so verbose that it is not very easy to see what the new point is which is meant to be introduced. It seems to regard a sunk shop and sunk cellar not specially referred to in the Sheriff Court action.

"I am, on the grounds explained, of opinion that the defenders' first plea cannot be sustained. The second plea, that the action is irrelevant, seems out of place in defence to an action brought for the purpose of review. The third plea, *res judicata*, can only come into play if the decrees in the Sheriff Court be not reduced. It must in the meantime be reserved. The pursuers maintained that it should be repelled, on the ground that a decree in the Sheriff Court can never be pleaded as *res judicata* in the Court of Session, founding on a *dictum* by Erskine to that effect (E. 4, 3, 7). But having regard to the cases in note (b) in Mr Nicolson's ed., vol. ii. 1142, and also to ordinary practice, I am not prepared to act on that *dictum* and repel the plea of *res judicata*. If the Sheriff Court judgments be not *res judicata*, there would have been no necessity for bringing this reduction. . . ."

* "NOTE.—By interlocutor of 9th August 1895 I repelled the defenders' first plea that the action was incompetent, holding that in the circumstances the interlocutors in the Sheriff Court might be competently reviewed in an action of reduction, and indicating an opinion or impression that it was not incompetent to append additional conclusions, and to make averments applicable to these conclusions. At the beginning of the winter session the case was restored to the Procedure Roll, and parties have since been heard on the merits.

"I think that in further dealing with the case, I must first of all dispose of the conclusions of reduction,—that is to say, I must review the judg-

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On 25th January 1896 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having resumed consideration of

ments of the Sheriff-substitute and Sheriff; and as the pursuers did not move for any additional proof—as might have been competent in order to the determination of the questions raised in the Sheriff Court—I must consider the judgments now submitted to review with reference to the record and proof in the Sheriff Court. . . .

"At the outset it is necessary to keep in view that the operations of which the pursuers complain are not new, independent operations, but are only modifications of a previous state of matters; and what the pursuers require to shew is, not that the hoist to which they object, as it is used, is contrary to their rights and productive of injury, but that the change which the defenders effected in 1883 is illegal and injurious.

"For a long time before 1883 the defenders and their authors were in the habit of taking their goods into their warehouses by the back windows. They did so by means of a hoist, not extending downwards below the floor of their flats, but supported on an iron pillar resting on the area or court at the street level, and by a block and tackle by which the goods were lifted from the court. This block and tackle projected about five feet from the back wall, but when the defenders' goods were raised by it they passed the back window of the pursuers' shop, temporarily obscuring it to a slight degree as they passed. The defenders say that this method of using the court and their back windows had continued for forty years, but the precise period does not signify in this case, seeing that the right of the defenders to convey their goods to their warehouses in that manner is not challenged. What was the nature of the right which the defenders thus enjoyed? It was a right of ish and entry to their warehouses by the court and by the windows, and just as clearly a right of ish and entry as if the entry had been a door. They made use of this entry without any objection by the owner or owners of the court, and, as must be held, with their tacit acquiescence, and what the defenders did in 1883 was to modify and make more convenient for themselves their mode of exercising their right of entry by their windows. To effect this a two-fold operation was required, the erection of four posts fixed in the court, and the adjustment within the four posts of a cage in which the goods might be raised. The cage, however, in this case passed close by the back wall and by the window of the pursuers' back shop, whereas formerly the bales of goods passed at a distance of five feet from the window.

"This alteration is the whole subject-matter of the complaint by the pursuers in the Sheriff Court. The case must be viewed on the assumption that the defenders had a right to carry their bales of goods past the pursuers' window in conformity with their former practice. If that were not so, the question would have been totally different. The Sheriff and Sheriff-substitute are of opinion that this modification on the defenders' mode of entry does the pursuers no material injury, and I am not prepared to dissent from that opinion. The pursuers represent that the cage may be put to a use which may affect them materially; as, for instance, if the defenders should allow the cage to rest for a period of time against their window. The defenders might have subjected them to a similar annoyance, although certainly less in degree, when they used their block and tackle. But if that should happen the question will arise whether the pursuers cannot prevent an unfair and unreasonable use of the hoist, and nothing in this judgment will prejudice that question.

"The pursuers further say that the four posts with the cage inside is a building, and is in breach of the servitude over the space of nineteen feet from their back wall conferred by their titles. Now, I agree in the opinion of the Sheriff and Sheriff-substitute that the interference of these posts with the access of light to the pursuers' shop is infinitesimal and immaterial

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the cause, and having heard parties on the motion of the pursuers for a proof of their averments in support of the conclusions of the summons additional to or other than the conclusions of the petition in the Sheriff Court, sustains the plea of *res judicata* as against the conclusions of the summons, so far as founded on the pursuers' right of servitude over the back court or area mentioned on record as proprietors of the dominant tenement, and finds that, in so far as the conclusions of the summons against the defenders, and in reference to the operations complained of, are based on a different *medium concludendi*, they are not supported thereby: Therefore refuses the pursuers' said motion, and assoilzies the defenders from the whole conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits it when lodged to the Auditor of Court to tax and to report: Reserving as to modification."

On 7th March the Lord Ordinary approved of the Auditor's report on the defenders' account of expenses, found that the taxed amount was £77, 15s. 9d., modified the same to £67, 5s. 9d., and decerned against the pursuers for payment of that amount.

The pursuers reclaimed, and the defenders having objected to the competency of the reclaiming note, their objection was repelled.—*Supra*, p. 738.

Argued for the pursuers;—The parties had a right of common interest in the back court, and neither party was entitled to interfere in any degree with the right of the other.[1] The case was not the same as if the question had been between a servient and a dominant owner, as in *Russell* and *Boswell*.[2] In such cases there was a presumption of freedom in favour of the proprietary rights of the servient owner; but the defender had no right of property in the back court, and the pursuer had an absolute right to insist that he should leave the back court unbuilt upon within the prescribed limits. While the right was given "in order to" preserve the back lights, the declaration of the purpose was not, as in the case of *Russell*,[2] so expressed as to imply any limitation on the right conferred. It was not legitimate, therefore, to consider, as the Lord Ordinary and Sheriffs had done, the amount of the injury sustained by the pursuers. But as matter of fact the structure erected in 1883 materially diminished the light of the pursuers' back shop.

Argued for the defenders;—The pursuers having no right of property in the court, but merely a right of servitude, could not complain

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There is no evidence that it has ever necessitated more frequent use of artificial light. On the question whether these four posts with the cage inside ought to be regarded as a building, no authority affording any assistance was quoted. But holding that a clause imposing a servitude must be construed strictly, and *in dubio* in favour of freedom, I am of opinion that they did not constitute a building in the sense of the clause in the titles. On these grounds, I am of opinion that the pursuers have failed to shew that the interlocutors in the Sheriff Court are erroneous on the merits.

"Entertaining these views, I do not require to consider the defenders' plea of acquiescence, but I doubt whether the proof is sufficient to support it. . . ."

[1] Mackenzie v. Carrick, Jan. 27, 1869, 7 Macph. 419, 41 Scot. Jur. 233; Bennett v. Playfair, Jan. 24, 1877, 4 R. 321; Stewart, Pott, & Co. v. Brown Brothers & Co., Oct. 15, 1878, 6 R. 35; Argyllshire Commissioners of Supply v. Campbell, July 10, 1885, 12 R. 1255.

[2] Russell v. Cowpar, Feb. 24, 1882, 9 R. 660; Boswell v. Magistrates of Edinburgh, July 19, 1881, 8 R. 986.

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unless the defenders' operations materially interfered with and prejudiced the enjoyment of that right.[1] The prohibition against building was for the sole purpose of preserving light, and therefore unless the injury to light was material, the pursuers had no ground of action.[2] This view of the law was supported by the case of *Stewart, Pott, & Company*,[3] for the ground of decision there was that the operations of the defenders materially obstructed the pursuers' right of ish and entry. The defenders had a prescriptive right of ish and entry for goods to their back windows, and the pursuers' author had purchased his property in the knowledge that this right existed. No material alteration had been made on the mode in which that right was exercised, and the pursuers could not now object to its being exercised.[4]

LORD PRESIDENT.—There has been a great deal of procedure in this case, and the question at issue has to a large extent been obscured by the artificial way in which the questions have been raised. But turning to the rights of the parties, I look at the title of the two litigants. Now, so far as the ground or area behind their houses is concerned, the rights of the pursuers and defenders are identical. They are neither of them proprietors of this back court or area, but they both have interests therein, and substantially the same interests are defined in the two sets of titles. The main point to be attended to is that, on the face of both their titles, the space of nineteen feet all along the length of the tenement is to be kept open and unbuilt on in all time coming, in order to preserve the back lights. Now, down to 1883 the court—by which I mean the surface of the court—was certainly open and unbuilt upon. The operations now complained of make it impossible for anyone to say that the court is open in the part where this structure has been erected. That part of the court is not now open, but is enclosed; and it was admitted that suppose anyone desired to go right up to the pursuers' window he could not do so, because he would be encountered by this wooden erection.

Now, it seems to me that that is the turning point of the case. The person who has erected this structure has, as I have said, no rights of property in the court, and accordingly this is not a case where there is a presumption in favour of a proprietor having a free use of his property against one who is a servitude holder, both the litigants being servitude holders. Accordingly, it seems to me that the principle upon which the case must be decided is that laid down in *Bennet* v. *Playfair*,[5] which I think is very much in point; for there the Court, treating the rights of parties, which were, as in this case, the same, described them as rights of common interest or servitude, and held that neither party had a right to interfere with the enjoyment of the other.

Now, as I have pointed out, the result of the encroachments is that this part

[1] Russell v. Cowpar, Feb. 24, 1882, 9 R. 660; Boswell v. Magistrates of Edinburgh, July 19, 1881, 8 R. 986; M'Gibbon v. Rankine, Jan. 19, 1871, 9 Macph. 423, 43 Scot. Jur. 205.

[2] Russell v. Cowpar, 9 R. 660.

[3] 6 R. 35.

[4] Muirhead v. Glasgow and Highland Society, Jan. 15, 1864, 2 Macph. 420, 36 Scot. Jur. 201.

[5] 4 R. 321.

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of the court has ceased to be open. It must also be observed, though I think this is not essential, that the wooden supports necessarily—though to a small extent—interfere with the light of the pursuers' window. Accordingly, I think the pursuers are entitled to have the structure removed. To summarise, it is put up by a person having no right to do so, it interferes with the openness of the court, and to a corresponding extent it is an invasion of the rights of the pursuers as appearing on their title.

How to apply that view of the rights of parties to the present case is a little difficult, but, first, the interlocutors in the Sheriff Court must be swept aside, because though the case was nominally presented to the Sheriff Court as one of servitude, yet the Sheriff was asked to order the removal of the structure, and so I do not think we could leave that series of judgments standing by which he has refused to do so. Then, as regards the Lord Ordinary's interlocutors, I think they must all go, and the remedy of the pursuer would seem to be a declarator, an order for removal, and an interdict confined entirely to the structure below, which gives rise to the suit.

LORD ADAM.—(After narrating the titles of the parties and the facts as given above, his Lordship proceeded)—The first observation I have to make is that it appears to me that the change which took place in 1883 was a very material one, having this element in it, that whereas prior to that date there was no erection whatever on the area of this ground, subsequently there has been this permanent structure. That change accordingly makes it impossible to say that since 1883 the defenders have been exercising a right previously existing. Now, I am willing to treat the case on the ground that there is no distinction between what has been called the sunk area and the rest of the area behind the tenement, but that they are all to be considered as composing the area described in the titles. We must observe, however, in the first place that this is not a question between the proprietor of the area and someone having a servitude right. The rights of the two parties are identical, and the right of the defenders to set up this structure—if such right there be—is merely one of usage.

But in the next place I think that whether we were dealing here with different proprietors or not the result would be the same, because it is a condition of the title granted to the pursuer that no building should be erected within nineteen feet of this tenement.

It is said that there is a difference, because there is inserted the reason for this stipulation, viz., "in order to preserve the back lights of the foresaid shops." But that does not appear to me to limit in any way the absolute right and obligation to keep the back area open for the space of nineteen feet. I think the obligation is quite a different one from that in the case of *Russell* v. *Cowpar*,[1] where the words used were "so as to," and it was held that if the erection were such as not to interfere with the lights of the dominant tenement, the obligation in the titles was fulfilled.

Accordingly, I think on this ground that no question arises here as to whether the defenders' operations materially interfere with the pursuers' rights. If that be so there is, I think, an end of the case, for the fact

[1] 9 R. 660.

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that the pursuer has allowed the structure to remain for twelve years is nothing more than sufferance and non-interference, and does not make it too late, when the question is raised by a person having the right to do so, to have the structure removed.

LORD M'LAREN.—It may be that the matter of which the pursuers complain resolves itself into a small interference with their comfort or legal rights, but in justice to them it must be observed that they raised the question before the Sheriff, who has jurisdiction either under 1 and 2 Vict. if it is treated as one of servitude, or under the Sheriff Court Act of 1877 if it is one of heritable right of less value than £1000. It is in consequence of the views successfully maintained by the defenders before the Sheriff and the Lord Ordinary that the pursuers have been under the necessity of coming here.

The infringement of right of which they complain arises from the fact that under their title, and that of the defenders, which flow from a common author, they each have equal rights to a back court or area, through which they have access to their respective storeys, and in which they have a certain interest reserved by the title.

Now, on a fair construction of these titles, it seems to me that the proprietor had parted with all his substantial interests in the area, reserving only a naked right of property, and that he gave equal rights to the different persons in the titles flowing from him, which are carefully defined. It is provided that a certain space shall be kept open and unbuilt upon in all time coming, "in order to preserve the back lights." Now the specification of a reason for the obligation does not in my judgment detract from its generality. Therefore it seems plain that the proprietor could not consistently with these rights put up any structure whatever, temporary or permanent, on this area, nor could he give a right to do so to any of his feuars. But the case for the defenders does not rest on any right which they purport to have received from the original owner, nor is it a case of setting up any superior or older title. Their right in the common property is identical with that of the pursuers. I think that in all cases of equal rights any one of the community is entitled to maintain the existing state of possession as against all the others. It is said that the right claimed by the defenders had begun in a lesser right of use—*i.e.*, of raising goods by means of a block and tackle—which had been unchallenged for so long as to deprive the other feuars of their right of interference. That may be so, but then any right which the defenders acquired was nothing more than a right to put forward a plea of bar against others seeking to interfere with them, and such a plea can never be extended, as I think, beyond the original use. The conversion of this simple expedient into a regular mechanical lift occupying a definite space, and at times blocking up the window, seems to me to be a distinct extension of the use, and it is impossible for them to justify it consistently with the rights of the other owners of the joint servitude over the Court.

LORD KINNEAR concurred.

The defenders moved for expenses in the Outer-House (with the exception of the expenses of the discussion on the competency of the

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action), on the ground that these expenses had been caused by the fault of the pursuers in neglecting to appeal within fourteen days against the Sheriff's judgment on the merits.[1]

The pursuers moved for expenses in all the Courts, and argued;—There had been no fault on the part of the pursuers in not appealing before fourteen days had elapsed, for they had no reason to anticipate that the defenders would take the step of obtaining extract, which could afford them no benefit. It was quite within the competency of the Court to find the pursuers entitled to expenses in the Sheriff Court.[2]

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties on the reclaiming note for the pursuers against the interlocutors of Lord Kincairney, dated 8th and 25th January and 7th March 1896, recall the said interlocutors; reduce, declare, and decern, in terms of the reductive conclusions of the summons: Find and declare that neither of the defenders has any right or title to erect a hoist, or to erect guide-posts or other connections for the hoist mentioned in the summons, upon the top of the sunk area or upon any part of the back court on the street level mentioned in the summons, and below the level of the original basement-floor of said hoist as it existed prior to the year 1883, or to attach any such posts or other connections to the back wall of the pursuers' property, saving only the bearing iron column or pillar excepted in the summons: Ordain the defenders, at their own expense, forthwith to take down and remove so much of the said guide-posts and other connections as are contiguous to or *ex adverso* of any part of the said back wall, and are below the said original basement-floor of said hoist, saving the said bearing iron column or pillar: Interdict, prohibit, and discharge the defenders from hereafter placing any erection or structure of whatever kind upon the top of the said sunk area, or upon any part of the said back court, on the street level contiguous to or *ex adverso* of the said back wall and below the level of the said original basement-floor, and from attaching guide-posts or other structures to the said back wall: Find the defenders conjunctly and severally liable to the pursuers in the expenses incurred in the Sheriff Court and in the Inner-House: Appoint accounts thereof to be lodged, and remit the same to the Auditor to tax and to report, and *quoad ultra* find no expenses due to or by either party, and decern."

CUMMING & DUFF, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

No. 182.

July 3, 1896.

Powell v. Long

WALTON POWELL, Pursuer.
HARRY ALFRED LONG, Defender.—*Crabb Watt.*

Process—Expenses—Caution—Action of damages for slander—Bankrupt pursuer.—Circumstances in which, after issues had been adjusted in an action of damages for slander, the Court ordained the pursuer, who was an undischarged bankrupt, to find caution.

[1] Tennents v. Romanes, June 22, 1881, 8 R. 824, *per* Lord Shand at p. 826.

[2] Bisset v. Anderson, March 9, 1849, 11 D. 1015, 21 Scot. Jur. 365.

No. 182.

July 3, 1896. Powell v. Long.

1st Division.

(Supra, Feb. 25, 1896, p. 534.)

This was an action of damages for slander, in which the Court adjusted issues on 25th February 1896. (*Vide supra*, p. 534.)

On 26th June the defender moved the Court to ordain the pursuer to find caution for expenses as a condition of being allowed to proceed. He stated that the pursuer, after incurring debts of a substantial amount in Glasgow, had gone away from that city without leaving any address.

No appearance was made for the pursuer.

The Court ordered intimation of the motion to be made to the pursuer.

Intimation was accordingly made by registered letters directed to the pursuer's last known address, but these were returned unopened.

On 3d July the defender repeated his motion.

Lord President.—The pursuer is an undischarged English bankrupt, and the question is whether he should be allowed to proceed in the action without finding caution. It is necessary for the determination of that question to consider the circumstances of the case and the nature of the action. On a recent occasion we had to give careful consideration to the quality of this action of damages for slander, and we were not favourably impressed with its *bona fides* as intended for the vindication of the pursuer's character from the charges which had been made against him. Taking advantage of his technical right to sue on certain isolated charges, he did not face up to the real attack made upon his character. I mention this in consequence of our obligation to consider the nature of the pursuer's claims in his action. We are also aware of the recent occasions when, on questions as to the time for trying this action, the pursuer has evinced no eagerness to meet the jury. We are now told that he has left Glasgow in debt, and without leaving an address.

Accordingly, in the whole circumstances, I think this is a case in which we should ordain the pursuer to find caution within eight days.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The Court ordained the pursuer to find caution within eight days.

Cuthbert & Marchbank, S.S.C., Agents.

No. 183.

July 3, 1896. Lord Saltoun v. Magistrates of Edinburgh.

The Right Honourable Alexander W. F. Fraser Lord Saltoun and Others, Petitioners.—*Clyde.*

The Lord Provost, Magistrates, and Council of the City of Edinburgh, Respondents.—*Boyd.*

Process—Petition to Dean of Guild—Answers lodged for first time on appeal—Competency—Procedure.—In a petition to the Dean of Guild for warrant to alter a building the Burgh Engineer appeared on behalf of the Lord Provost and Magistrates, who were called as respondents, and objected verbally to the petition being granted. The Dean of Guild having refused the petition, the petitioners appealed, and thereafter answers were tendered for the Lord Provost and Magistrates, embodying the verbal objections previously stated on their behalf. The petitioners objected to the answers being received. The Court *allowed* the answers to be received, and remitted the case to the Dean of Guild to proceed.

No. 183.

July 3, 1896.
Lord Saltoun v. Magistrates of Edinburgh.

1st Division.
Dean of Guild Court, Edinburgh.

LORD SALTOUN AND OTHERS, trustees for the Supreme Council for Scotland of the 33d and last Degree of the Ancient and Accepted Scottish Rite of Freemasonry, applied to the Dean of Guild of Edinburgh for a warrant to construct a room over a portion of the flat roof of a building at the back of No. 74 Queen Street, of which they were proprietors.

In terms of the Edinburgh Municipal and Police (Amendment) Act, 1891, section 49, the plans were remitted to the Burgh Engineer, who returned them with this indorsation,—"The place is already sufficiently built on, having regard to the light and ventilation of existing buildings."

In the course of the proceedings the Burgh Engineer, on behalf of the Magistrates and Council, objected verbally to the petition being granted, on the ground previously stated.

On 11th June 1896 the Dean of Guild, after visiting the ground, refused the petition, on the ground that all the existing open space was required for the proper lighting and ventilation of the premises.

The petitioners having appealed to the First Division, answers to the petition were tendered by the Lord Provost, Magistrates, and Council, in which they maintained that the appeal should be dismissed, on the grounds that the proposed addition would have the effect of seriously diminishing the light and ventilation of the street tenement, and that the question of what open space was required for lighting and ventilation was one for the discretion of the Dean of Guild.

The petitioners objected to the answers being received, and argued;—The answers should have been tendered in the Dean of Guild Court, and should not be received now. In any view, if the answers were allowed to be put in, the case should be remitted to the Dean of Guild Court, for if a record were made up in the Court of Session and the case tried there unnecessary expense would be laid upon the petitioners.

Argued for the respondents;—The course which had been followed was convenient. It was not for the public interest to add to the formal procedure in the Dean of Guild Court, and in many cases it was unnecessary that a record should be made up there. The course here followed was according to practice.[1]

LORD PRESIDENT.—I should be sorry to do anything to impose upon the town expense and trouble to add to the formal procedure in Dean of Guild applications, and probably in the greater number of cases it is unnecessary. But we must consider the rights of proprietors, and according to the shewing of the town what has been done here is that the town having an answer to the application in the Dean of Guild Court withholds it, and the opposite party comes to this Court. If we order a record to be made up here two very undesirable things will happen,—first, we will not have the advantage of a judgment from the Dean of Guild on the question raised by the answers; and second, because the town has thought fit to withhold its answer, its opponent will have to pay the expense of a Court of Session litigation. I am against arriving at a conclusion which involves either of these results. I think the proper course is to allow the answers to be received, and to remit them, with the case, to the Dean of Guild.

[1] Stewart v. Marshall, July 20, 1894, 21 R. 1117; Glasgow Coal Exchange Co. v. Glasgow City and District Railway Co., July 20, 1883, 10 R. 1283, at p. 1287.

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LORD ADAM.—I am of the same opinion.

The Dean of Guild has both administrative and judicial functions, and I can quite understand that in the vast majority of applications the town or the opposite party is entitled to rely on the knowledge of the Dean of Guild, assisted if necessary by the advice of the Burgh Engineer, properly disposing of them, and that it is quite unnecessary for either party to interfere. But that is not the course which has been followed here, because we are informed by counsel for the town that the town did object to the application being granted at the first. If that is so, I agree that it is not fair that the town, having a case to submit, should in the first instance lie by and take the chance of the decision of the Dean of Guild being in their favour, and should not come forward to state their answer to the application until the other party has been obliged to come here.

I agree that we should allow the answers, and I think further that in this class of case we are entitled to have the judgment of the Dean of Guild, and to review it, and that the parties should not come here in the first instance. I asked whether the questions raised could be tried in the Dean of Guild Court, or whether the case was such as would from its nature come back to us, and I was informed that it was not a case of the latter kind.

On the whole matter, therefore, I agree with your Lordship.

LORD M'LAREN.—I should have been content, having regard to the practice of the other Division, to hear this case on the petition and answers as stated, and if a practical question were found to exist, then to remit it for the decision of the Dean of Guild. But the question of making up a record is a matter for the discretion of the Court, and no doubt the course approved by your Lordships is a convenient one to adopt, and will not have the effect of preventing the parties from hereafter obtaining a judgment of this Court on the construction of the statute.

LORD KINNEAR.—I concur. The considerations that have weighed with me are, first, that the answers, as we have been informed by the counsel for the respondents, raise questions for the judicial determination of the Dean of Guild, and within his jurisdiction, so that after the decision in the Court of first instance the case, if it comes here at all, will come only for review; and secondly, that the counsel for the magistrates informs us that the objections taken in the answers were intended to be taken at the original proceedings, and that the respondents appeared and verbally opposed the petition on these very grounds. But I must observe that this verbal opposition does not appear to have been made known to the other party. Accordingly, the magistrates represent themselves as having obtained a judgment on questions which they have abstained from raising in any formal manner until they come to this Court. I agree that this is not a convenient course of procedure, nor altogether fair to the petitioners. The petitioners are entitled to have the Dean of Guild's judgment upon the questions that are raised on the answers, and we on the other hand ought to be informed with more certainty than we are at present whether the deliverance submitted to review was or was not a judgment pronounced after hearing parties.

THE COURT allowed the answers to be received, remitted the cause to the Dean of Guild to proceed as should be just, and found the respondents liable in expenses in the Court of Session.

LINDSAY MACKERSY, W.S.—THOMAS HUNTER, W.S.—Agents.

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July 3, 1896.
Lord Saltoun v. Magistrates of Edinburgh.

WILLIAM BANNERMAN AND OTHERS, Pursuers (Reclaimers).—*Johnston—Sym.*
JOHN OTTO MACQUEEN (Miss Bannerman's Trustee), Defender (Respondent).—*Morison.*
REVEREND ANGUS M. MACKAY, Defender (Respondent).—*Clyde.*
W. K. GLOVER AND OTHERS, Defenders (Respondents).—*Mackay—Pitman.*

No. 184.

July 4, 1896.
Bannerman v. Bannerman's Trustee.

Trust—Charitable Bequest—Church—Conditional Bequest—Forfeiture.—A testatrix, who died in 1876, by a settlement, dated in 1875, directed her trustees to set apart the sum of £3000, and to pay the interest arising therefrom to the incumbent for the time being of St James's Episcopal Church, Aberdeen, "so long as the congregation worshipping in said church shall not be united to, or in connection with, the Scottish Episcopal Church." She further declared that in the event, *inter alia*, of the congregation at any time "uniting or being in connection with" the Scottish Episcopal Church, the trustees should be bound to pay over the £3000 among her residuary legatees.

In an action raised by the residuary legatees in 1895 for declarator that the legacy had become payable to them, on the ground that St James's Church was in connection with the Scottish Episcopal Church, the following facts were proved:—

St James's Church was constituted in 1854. By the deed of constitution it was provided,—"The cure of the said St James's Church shall be held as aforesaid by clergymen having the orders of the said United Church of England and Ireland, and by such only."

The "English Episcopal" congregations in Scotland, of which St James's was one, kept themselves apart from the Scottish Episcopal Church and its bishops. As they had no bishop of their own, candidates for church membership, after being prepared by their own pastor, either went to England and were confirmed by a bishop there, or were admitted to the communion without confirmation.

In 1871, when the incumbency was vacant, a majority of the St James's congregation passed a resolution requiring the future ministers to take a licence from the Bishop of the Scottish Episcopal Church in Aberdeen. The testatrix, and other members in the minority, lodged a notarial protest against this resolution being carried out, and it was abandoned.

In the beginning of 1877 arrangements were made by St James's Church, along with the other English Episcopal congregations in Scotland, to obtain the services of Bishop Beckles, a retired colonial bishop, but, in April 1877, the Convocations of Canterbury and York censured Bishop Beckles for intruding into the dioceses of bishops of the Scottish Episcopal Church without the consent of the bishop of the diocese, that church being in full communion with the Church of England. In consequence of this censure, the incumbent of St James's refused to present candidates for confirmation to Bishop Beckles, and the congregation approved of his action.

The incumbent then, on his own responsibility, applied for and obtained a licence from the Bishop of the Scottish Episcopal Church at Aberdeen, the incumbent at the same time signing the Canons of that Church. No objection was taken by the congregation, and each subsequent incumbent took a licence from the bishop. The incumbent at the date of the action held a licence "to perform all the duties competent to his order in the Church of St James and the district attached thereto in our diocese." During his incumbency intimations were made to the congregation of con-

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firmations to be held by the bishop, and candidates from St James's were confirmed by him, not in St James's Church itself, but in various Scottish Episcopal churches in Aberdeen. Collections for the mission and education funds of the Scottish Episcopal Church were intimated to and made by the congregation.

No change was made in the constitution of St James's Church, and the congregation, as a congregation, entered into no agreement with the bishop.

The Court (*rev.* judgment of Lord Kyllachy, *diss.* Lord M'Laren) *granted* decree, *holding* that no overt act on the part of the congregation as such was necessary to create a connection in the sense of the trust-deed, and that such a connection was instructed by the facts proved, and in particular by the fact that the incumbents openly and in the knowledge of the congregation accepted the licence of the Scottish Episcopal Bishop of Aberdeen, and presented to him candidates for confirmation, thereby obtaining for themselves and the congregation many of the benefits arising from a connection with the Scottish Episcopal Church.

1st Division. Ld. Kyllachy.

Miss Georgina Bannerman, Aberdeen, died in February 1876, leaving a trust-disposition and settlement dated 12th November 1875, by which she conveyed her whole estates to trustees for certain purposes. The third purpose was as follows:—"I direct my trustees, at the first term of Whitsunday or Martinmas after my death, to set apart the sum of three thousand pounds sterling, to be retained and invested by my said trustees in their own names as a capital sum, . . . and the interest and annual profits arising therefrom shall be paid and made over by them, yearly or half-yearly, to the incumbent for the time being of St James's Episcopal Church, in Aberdeen, for the purpose of augmenting his stipend, but that only so long as he continues to discharge the duties of incumbent to the satisfaction of my trustees, and so long as the congregation worshipping in said church shall not be united to, or in connection with, the Scottish Episcopal Church, and so long as the services and mode of worship in St James's Church shall be conducted in a manner which, in the opinion of my trustees, shall be strictly evangelical, and devoid of all practices of a ritualistic description, such as are in use among the party in the Church of England known as the High Church party, declaring that in any of the following events, viz., first, the congregation worshipping in said church at any time uniting or being in connection with the Scottish Episcopal Church; or second, my said trustees being of opinion, and recording that opinion in writing, either that the incumbent has failed to discharge his said duties to their satisfaction, or that the service has been, or is being, conducted in a manner not strictly evangelical, and not devoid of such ritualistic practices—on all which questions my trustees shall be the sole judges, and their opinion final—then and in any of these events the said capital shall no longer be held by them for any purpose connected with the said church; and my trustees shall be bound, and they are hereby directed, forthwith to pay over and divide the same among those of my residuary legatees hereinafter specified, or such of them as shall be alive at the time of any of the events hereinbefore provided for, occurring to forfeit the interest of the said incumbent in said provision of three thousand pounds."

In 1895 General William Bannerman, C.B., and others, the residuary legatees of the testatrix, raised an action against (1) John Otto Macqueen, the sole acting trustee; (2) Rev. Angus M. Mackay, the incumbent for the time of St James's Church; and (3) W. K. Glover and others, the managers of the congregation worshipping in St James's, concluding for declarator that the bequest of £3000 had lapsed and fallen into residue, and that Mr Macqueen was bound forthwith to divide it

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among the pursuers as Miss Bannerman's residuary legatees, and for payment by the trustee.

The pursuers averred that Miss Bannerman was a member of St James's English Episcopal Church, and that during her life it had no connection with the Scottish Episcopal Church. (Cond. 7) "The said church and the congregation worshipping therein have become, and are now, united to, or at least in connection with, the Scottish Episcopal Church. . . ."

The pursuers pleaded;—The congregation worshipping in St James's Episcopal Church in Aberdeen having become united to, or at all events in connection with, the Scottish Episcopal Church, or Episcopal Church in Scotland, and Miss Bannerman's bequest mentioned in the summons having been thereby forfeited, the pursuers, as residuary legatees of Miss Bannerman, are entitled to have decree, in terms of the conclusions of the summons.

All the defenders lodged defences.

The defender the Reverend A. M. Mackay, and the defenders W. K. Glover and others, denied that the congregation was united to or in connection with the Scottish Episcopal Church. In answer 14, the defenders Glover and others stated,—"The congregation of St James's has never taken the necessary steps required by" the code of Canons of the Episcopal Church in Scotland "to become connected or united as a congregation with the Scottish Episcopal Church, and it does not now fulfil the requirements of said canons as a congregation of the said Church. Under the provisions of said code—(*a*) There is a regular form to be gone through when it is desired to admit a congregation into connection with the Episcopal Church in Scotland, including a formal application to the bishop. No such application has ever been made by the congregation of St James's Church. . . . (*b*) The incumbent of every congregation . . . has to be presented to the bishop by the patrons by means of a regular deed of presentation, and instituted by the bishop by means of another formal deed (Canon xiii. and Appendices xiv., xvii.). The incumbents of St James's . . . have been elected without any consultation with, or recognition of, the bishop, and were neither 'presented' to the bishop nor 'instituted' by him. (*c*) Every congregation . . . is required to elect a lay-elector, who takes part in the election of the bishop (Canon iv.), and on failure to do this, is formally required to do so by the bishop (Appendix ix.). The congregation of St James's Church has never elected a lay-elector, nor can it be required to do so. (*d*) Every congregation . . . must be formally 'visited' by the bishop once in three years (Canon viii. 2). The Bishop of Aberdeen has never paid St James's Church such a visitation, nor put forward any claim to do so. (*e*) Every Episcopal church in Scotland is required to deposit its title-deeds, &c., with the diocesan registrar. The congregation of St James's Church has never recognised any such official, nor any obligation to deposit its title-deeds, &c., with the diocesan registrar. (*f*) Every Episcopal church in Scotland now elects a lay representative to act on the Representative Church Council. No lay representative has ever been elected by St James's. . . . (*g*) The congregation of St James's Church has never been represented on the Diocesan Council of the Diocese of Aberdeen, or the Representative Church Council, or in any Synod of the Episcopal Church in Scotland. The Church of St James's has never subscribed to the clergy fund or any private fund of the Episcopal Church in

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Scotland, nor has it claimed or received any grants from the funds of said Church such as it would have been entitled to if united or connected with it." These averments were not denied.

A proof was allowed.

The following facts were admitted or proved:—

In 1854 certain members of St Paul's Episcopal Church in Aberdeen, which was one of the churches known in Scotland as English Episcopal Churches, and had no connection with the Scottish Episcopal Church, resolved to establish another English Episcopal congregation in Aberdeen. A church was subsequently acquired, and named St James's English Episcopal Church.

The deed of constitution contained, *inter alia*, the following provisions:—"The said St James's Church, with the pertinents, shall be used solely and exclusively as and for a church for divine service and the ministration of sacred ordinances, in strict conformity with the articles of the United Church of England and Ireland, as by law established, and ritual conform thereunto, as the same have been heretofore followed and observed by the said United Church, and none other, and especially excluding and prohibiting all innovations by individuals or sects, the cure of which St James's Church shall be held by clergymen only having the orders of the said United Church of England and Ireland. . . . The whole temporal affairs of the church and congregation as herein enumerated shall be conducted by two several bodies of members of the congregation, called 'constituent members' and 'managers' respectively. . . . The cure of the said St James's Church shall be held as aforesaid by clergymen having the orders of the said United Church of England and Ireland, and by such only. No clergyman shall be elected for a longer period than three years, but a clergyman may be re-elected. . . . The constituent members shall have power to elect clergymen, to fix the stipend, &c., and they shall have a right of control over the actings of the managers. . . . The clergyman shall be bound, on the requisition of three-fourths in number of the whole constituent members and others entitled to vote in the election of a clergyman, as aforesaid, for the time to resign the cure of the church on receiving six months' salary from the date of the requisition."

From 1854 down to 1870 the congregation and the incumbent were entirely independent of the Scottish Episcopal Church, and in no way recognised the authority of the Bishop at Aberdeen. The incumbent held no licence from the bishop. Candidates for church membership were prepared and admitted without confirmation.*

At a meeting of the constituent members of the church held on 28th September 1870 it was stated that at a conference with Bishop Suther, the bishop of the Scottish Episcopal Church at Aberdeen, he had agreed "to grant his licence to future clergymen of St James's Church without its being necessary for St James's to join the Scotch Episcopal Church," and a motion "that the meeting resolve to accept the concession which Bishop Suther had consented to grant, and that the clergyman accepting the cure of St James's Church be required to apply to the bishop of the diocese for his licence," was carried by a majority.

A notarial protest against this resolution being carried out was

* The Book of Common Prayer contains the following rubric:—"And there shall none be admitted to the Holy Communion until such time as he be confirmed or be ready and desirous to be confirmed."

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lodged by fifteen members of the church, including Miss Bannerman, and in consequence eight of the nine managers resigned office, and the bishop's licence was not applied for during Miss Bannerman's lifetime.

In the beginning of 1877 (the year after Miss Bannerman died) an association was formed, entitled "The Association of English Episcopalians in Scotland," with the object, *inter alia*, of obtaining a colonial or other bishop who would act as bishop of the English Episcopalians in Scotland. Accordingly an arrangement was entered into with Bishop Beckles, who had formerly been Bishop of Sierra Leone, and now had a living in London, under which that bishop agreed to come to Scotland and administer the rite of confirmation to candidates from the different congregations of the English Episcopal Church.

In April 1877, however, the Convocations of York and Canterbury passed resolutions censuring the "intrusion" by Bishop Beckles into the dioceses of the Scottish Episcopalian Bishops, their Church being in full communion with the Church of England.

In consequence of these resolutions, Mr Allen, then incumbent of St James's, refused to present candidates for confirmation to Bishop Beckles, and St James's Church approved of this course, and withdrew from the association.

On 7th May 1877 Mr Allen addressed the following letter to the congregation of St James's:—"Circumstances have arisen which make it becoming in me to address a few lines to you at the present time.

"It was purposed some time ago that Bishop Beckles should hold a confirmation in S. James's, but a vote of censure having been, all but unanimously, passed upon him, for his conduct in Scotland, by both Convocations of the Church of England, it became my duty to decline to present candidates to him for confirmation. To do otherwise would, I felt, be only placing myself and my congregation in a position of antagonism to the English Church, of which we claim to be members—would be dishonouring S. James's by bringing it into connection with a bishop resting under the gravest of church censures—and would be an injury to the candidates and their friends.

"I need not say that it was a matter of satisfaction to me when the constituent members, on last Wednesday evening, shewed their approbation of my conduct by passing a vote of thanks to me by a majority of 19 votes to 12.

"But it could scarcely have escaped your notice, as it did not escape mine, that the unanimous sentiment of all parties in the Church of England, of Evangelicals and High-churchmen alike (for the question was not one of party) having been declared in convocation, in reference to Bishop Beckles, the position of all English clergymen ministering in English Episcopalian churches in Scotland was quite altered from what it had been before. Before the censure was passed on Bishop Beckles their position was, at least, silently tolerated in the English Church, but afterwards it was openly and authoritatively condemned. For my own part, I felt assured that the congregation of S. James would not (especially when time should allow these things to be fully understood) be content that their minister should rest under the censure of his Church. I am a clergyman of the English Church, and I know you would not wish me to be other than a loyal one. It is, therefore, with perfect confidence on your sympathy that I take this, the earliest opportunity, of informing you that I have, in obedience to the declared will of our common Mother Church, sought and obtained the licence of the Bishop of Aberdeen.

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"I should not have adopted this course had there been anything in the 'Constitution' of S. James's, or any engagement entered into by me, to restrain me from doing so; but no restraint of any kind existed. My action, also, was simply a personal one, done in the exercise of my own individual and lawful liberty, and involving no one in its consequences but myself. At the same time, it is a source of satisfaction to me to know (as I do) that the step I have taken is in accordance with the prevailing sentiment of my congregation.

"I should have greatly desired to invite an expression of their sentiment previously to taking this step, but there were the strongest reasons, in connection with Miss Bannerman's legacy, that the congregation should take no part in the matter, and that the act should be entirely my own.

"For those who take a different view of the subject from myself, I feel the most respectful sympathy. They are not, however, in the least compromised by what I have done; and I hope they will soon be able to understand that I have not only done what was right, but also acted for the best interests and lasting peace of our Church."

In 1880 Mr Black, Mr Allen's successor, obtained a licence from Bishop Suther, and he voted in the election of Bishop Douglas in 1883.* The defender Mr Mackay, who was in English orders, and who was appointed to the charge in 1885, obtained a licence from Bishop Douglas.†

Thereafter candidates from the congregation were presented by the incumbent, after notice to the congregation, for confirmation, and were confirmed by the Bishop of Aberdeen. None of these confirmations took place in St James's Church.

J. R. Jones, treasurer to the vestry of St James's, deponed,—" . . . There were no confirmations of candidates from St James's Church anywhere prior to Mr Allen's time, so far as I am aware. I never heard of them. Candidates for the church were not confirmed at that time. They were simply prepared, and then admitted to Communion without confirmation. I joined the congregation on 18th May 1866. I cannot say why the candidates from St James's have not since Mr Allen's time been confirmed in St James's; that is a matter that is left entirely to the clergyman. That matter was never submitted to the managers, and is not in any way a matter which comes within their sphere. . . ."

James Petrie Kay, one of the managers, and a defender, deponed, —" I have been a member of the congregation for thirty years. (Q.) In your view the congregation have done nothing to connect themselves with the Scottish Episcopal Church? (A.) They have done

* Canon III. (1876),—" The clergy who have a right to vote shall consist of all presbyters instituted to a cure of souls within the diocese, whether to a single or collegiate chapel, and of presbyters who have resided within the diocese and held a formal licence from the bishop, and officiated continuously in the diocese, though not necessarily in the same place, for not less than two years immediately preceding. . . ."

† Mr Mackay's licence was in the following terms:—" The Reverend Angus Mason Mackay, B.A., London University, having this day appeared before us, exhibited his letters of orders, testimonials, and title for nomination, and having, moreover, in our presence subscribed the thirty-nine articles and code of canons of the Church, is hereby licensed to perform all the duties competent to his order in the Church of St James's and the district attached thereto in our diocese. A. G. ABERDEEN AND ORKNEY."

nothing so far as I ever heard. (Q.) Prior to the licence being taken, you say the members of the congregation did not as a rule receive the rite of confirmation? (A.) Not as a rule; in fact I did not know anyone who did. If they did they would have required to go to England in order to receive it. The rule then was that a candidate was prepared for confirmation, but was accepted without confirmation. (Q.) Was the rule, since the licence has been taken, that the congregation have had the services of the Bishop of Aberdeen to confirm these candidates? (A.) Well, the individual members of the congregation have had the advantage."

Bishop Douglas deponed,—"There never was any agreement between me, as representing the Scottish Episcopal Church, and the managers of St James's, or the congregation of St James's. . . . Mr Mackay from the beginning was the person who asked me to grant him the licence. If I had given him, as a clergyman ordained in the English Church, no licence, and he came to discharge duty within my diocese, there would have been great difficulty in his receiving preferment in the Church of England afterwards. . . . I have never confirmed in St James's Church, because it has no connection with the Scottish Episcopal Church at all. My jurisdiction extends over the whole diocese, but the edifice of St James's has never been attached to the Church by any document or deed of any sort or kind; it does not come within my touch. . . . Confirmation is a certificate that the clergyman who has prepared the candidate, and the bishop who has confirmed him, consider he is a fit recipient for the holy sacrament, and it connects him with the whole Anglican communion, not specially with the Scottish Episcopal Church. . . . The constitution of St James's has never been submitted to me for sanction. I don't think I have ever seen it. If it contains a provision by which the clergyman may, by a majority of three-fourths, on certain notice, be deprived of his charge—that is a constitution which would not be sanctioned by the practice of the Scottish Episcopal Church." Witness mentioned other particulars in which St James's Church did not conform to the requirements of the canons. "I regard the position of St James's and of its ministry as perfectly anomalous. It certainly does not come within any description of any kind as a congregation of the Episcopal Church recognised in the canons."

As holder of the bishop's licence Mr Mackay became a member, and acted as a member, of the Diocesan Synod and Diocesan Council, and he also attended the meetings of the Representative Church Council (of the Scottish Episcopal Church) when these meetings were held in Aberdeen.

Mr Mackay also interchanged pulpits with clergymen of the Scottish Episcopal Church, and services were on his invitation not infrequently conducted in St James's by the Bishop of Aberdeen.

Collections also came to be made in St James's for the Home Mission, Foreign Mission, and Education funds of the Scottish Episcopal Church, and these contributions were entered in the list of returns from the diocese of Aberdeen in the "Year Book," which was recognised as its official calendar by the authorities of the Scottish Episcopal Church. In the same book St James's was entered as a congregation of the Scottish Episcopal Church, and its incumbent as one of the clergy thereof, and the members of St James's congregation were included in the statistics of "church population" which were given therein.

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In a leaflet issued monthly to the congregation the incumbent repeatedly urged the claims of the Home Mission and other funds of the Scottish Episcopal Church. In the leaflet for December 1890 he wrote,—"The title 'rector.'—By a recent canon of the Episcopal Church in Scotland, the title incumbent is done away with, and that of rector put in its place. . . . But while I have my doubts as to the advisability of the change, the canon having been passed, I, of course, comply with it, and must hereafter, therefore, be known not as your incumbent but your rector." The leaflet of January 1891 contained the following notice:—"Confirmation Classes.—The Lord Bishop of the Diocese will hold a confirmation at St Andrew's Church about Eastertide, at which candidates from St James's will be presented. Classes will be formed both for younger members and for adults. Candidates should send in the names at once to the rector." Similar notices appeared from time to time.

The constitution of the Church was not altered, and the bishop claimed no authority over the congregation.

On 26th February 1896 the Lord Ordinary (Kyllachy) assoilzied the defenders, finding the defenders other than Macqueen entitled to expenses, but to the expenses of one defence only, subject to modification as regarded the expenses in connection with the proof, which were modified to one-fourth of the taxed amount.*

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* "OPINION.— . . . I may explain at the outset that St James's Episcopal Church was an offshoot (which came off in 1854) from St Paul's Episcopal Church in Aberdeen—that church being at the time one of the so-called 'English Episcopal Churches in Scotland,' which, while using the English liturgy and being in communion with the Church of England, have always held aloof from the Scottish Episcopal Church, and have not recognised the authority of its bishops or canons. It is not necessary to enter into the history of the circumstances under which those English Episcopal Churches came into existence. That history will be found set forth in the report of the case of *Dunbar* v. *Skinner*, 11 D. 945. It only requires to be said that there were originally a number of those churches, but that, as the disabilities attaching to the Scottish Episcopal clergy and their congregations were from time to time relaxed, the number gradually diminished. At the present time, besides the church in question, there are only three such congregations left—one in Edinburgh, one in Glasgow, and one, I think, in Montrose. Each of those congregations has a separate congregational existence, and each has a separate constitution. The constitution of St James's, Aberdeen, is produced, and is No. 14 of process. I do not know that any of its provisions require special notice, except that it requires as an essential article that the incumbent of the church shall always hold English orders.

"The question I have to decide is, as I have said, whether the congregation of St James's has become 'united to or in connection with' the Scottish Episcopal Church. But really the question is—whether it has become connected with that church in the sense of the settlement; for the pursuers do not, I understand, contend or suggest that there has, as yet at least, been anything which could be described as union.

"Now, the term 'connection' is, it must be confessed, a somewhat loose term. It is not a term which is known in ecclesiastical history, or in the history of the Scottish Episcopal Church, or of these particular congregations. In popular language, it is often employed in senses so loose and indefinite as to be quite outside the cognisance of a Court of law. It is, therefore, here necessary to find a sense for the expression which shall satisfy the words of the will, and also be sufficiently tangible to base the forfeiture of a legal right. It was argued for the defenders, and I am

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The pursuers reclaimed.

The arguments of the parties sufficiently appear from the opinions of the Lord Ordinary and of the Court.

At advising,—

LORD PRESIDENT.—The question before us is whether, in the sense of Miss Bannerman's will, the defenders' congregation is now "in connection with the Scottish Episcopal Church."

It is convenient, first, to consider what was the position of this congregation during Miss Bannerman's life, and then to see what it is now.

First of all, then, this congregation held all the tenets and used all the formularies of the Church of England, and none other. By the Constitution St James's Church was to be used "for the ministration of sacred ordinances, in strict conformity with the articles of the Church of England, and by law established, and ritual conform thereto, as the same have been heretofore followed and observed by the said Church and none other, and especially excluding and prohibiting all innovations by

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inclined to agree with them, that in order to reach a connection in this sense several conditions must at least be satisfied.

"(1) The connection must be between the Scottish Episcopal Church and the congregation,—that is to say, the congregation as distinguished from the incumbent.

"(2) It must also be something direct and tangible—something of which a Court of law can take cognisance.

"(3) It must also result in some tie—some *vinculum*—stronger or weaker—fettering *pro tanto* the independence of the congregation.

"In short, the connection may be short of union, but it must be something *ejusdem generis* with union—I mean union temporary or permanent.

"Now, what are the facts brought out by this long and tedious proof—a proof which, I must observe in passing, has only served to shew that there are no facts of importance in dispute, and that there should have been no difficulty in adjusting a minute of admissions sufficient for the decision of the case.

"There are, in the first place, certain things which are not proved, and, indeed, not alleged:—

"1. There has been no change in the constitution of St James's Church. That remains intact.

"2. There has been no agreement of any kind, written or verbal, between the congregation and the Scottish Episcopal Church. Indeed, no communications, written or verbal, have ever, so far as appears, passed between the two bodies or their officials,—excepting always certain statistical statements, and contributions to mission schemes, transmitted to Edinburgh, as I shall afterwards notice.

"The case of the pursuers accordingly is, and must be, that the alleged connection exists, and has been established, not by convention, but by a course of action; and the first matter founded on is the acceptance by each of the incumbents of the church since 1877 of a licence from the Bishop of Aberdeen.

"Now, that, since 1877, licences have been so accepted is quite true, and the history of the matter seems to be this: Prior to 1877 the English churches in Scotland had no bishop to whom they could apply (for example) for confirmation. Their own incumbents had no licences from the Scottish bishops, and could not therefore present candidates to those bishops. On the other hand, no English bishop could be induced to come to Scotland for the purpose. Up, therefore, to 1877, the young people of the different congregations had to be sent for confirmation to England, and, in fact, generally were so; but about that time an arrangement was made with a colonial bishop (Bishop Beckles) that he should perform episcopal

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individuals or sects." The cure of the church was to be held "by clergymen having the orders of the Church of England as by law established, and the Episcopal Church in Ireland, and by such only." The result is that the congregation held exactly what the Church of England holds, with one added restriction, which made it more English than the Church of England has been since 1864,—for this Aberdeen congregation could accept no clergyman who had other than English or Irish orders.

According to its constitution the congregation held to the system of Episcopacy, as that is involved in the English Prayer Book. The practical working of that system in relation to an "English Episcopal" congregation in Scotland at once calls attention to its relations to the Scottish Episcopal Church. Side by side with those isolated "English Episcopal" congregations stood the Scottish Episcopal Church, equipped with an effective Episcopate. Yet from this Church the "English Episcopalians" held aloof. Their children were prepared for confirmation, and were told that they would have either to go to England to be confirmed, or to wait till an English Bishop was in Aberdeen. In the case of St James's this indefinite

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functions within the several congregations; and Bishop Beckles accordingly came down to Scotland. In the interval, however—the English bishops having come to consider that the Scottish Episcopal Church was in full communion with the Church of England, and that it was contrary to ecclesiastical order that any Anglican bishop should officiate within the diocese of any Anglican bishop, whether Scottish or English, without that bishop's consent—a resolution was passed by convocation censuring the arrangement with Bishop Beckles, and in effect condemning as contrary to the law and practice of the Anglican Church the position of the incumbents of the several Episcopal Churches in Scotland, of which St James's, Aberdeen, was one. These incumbents were clergymen in English orders, performing their sacred functions in recognised bishoprics without the licence of the bishop; and when the question was once raised that position was pronounced to be indefensible.

"The result was that towards the end of 1877 Mr Allen, the then incumbent of St James's, declined to recognise Bishop Beckles, and applied for and obtained a licence from the Bishop of Aberdeen; and his two successors, Mr Black and the present incumbent, Mr Mackay, took the same course. By doing so, it cannot, I think, be doubted that they became, while they held their licences, to all effects clergymen of the Scottish Episcopal Church. They became bound to obey its canons, and subject to the jurisdiction of the Bishop of Aberdeen; and personally their relation to the bishop and to the Church was not different from that of the other clergy in the diocese of Aberdeen. The licence might no doubt be renounced, and its renunciation would not affect their incumbency; and, of course, to that extent they were in a different position from other incumbents. But so long as they held the bishop's licence they were beyond doubt connected in the most direct and tangible sense with the Scottish Episcopal Church.

"The question, however is, whether the acceptance by successive incumbents of the bishop's licence established in the sense of Miss Bannerman's settlement a connection between the Scottish Episcopal Church and the congregation of St James's. In a loose sense it no doubt did so. The incumbent had relations with the Church, and the congregation had, of course, relations with the incumbent; but as between the Church and the congregation no direct relation of any kind was established. They stood just as they had stood before. The congregation were not parties to the incumbent's action. The members, no doubt, knew of it and did not object.

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postponement was the course universally followed. The reason was that, owing to a dislike of the Scotch communion office (which is used in some of the congregations of that Church), the "English Episcopalians" held themselves apart from the ministrations of the Scottish Bishops. Not the less, however, did the congregation of St James's adhere in theory (as by its constitution it was bound) to the rubric in the Prayer Book, which directs that "so soon as children are come to a competent age, and can say in their mother tongue the Creed, the Lord's Prayer, and the ten commandments, and can also answer to the other questions of the Catechism, they shall be brought to the bishop."

The next point as to the position of St James's in Miss Bannerman's lifetime is a negative one, but it is of salient importance. The incumbent of St James's held no licence from the Bishop of Aberdeen.

The result was that, in Miss Bannerman's days, St James's congregation had—(I shall not use the contentious word "connection")—no relation whatever to the Scottish Episcopal Church. It turned its back on the

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But if it did not affect their position they had no call to object. The incumbent was not prohibited by the constitution from holding any licence which he thought useful; and all that the congregation could do, if they did object, was to exercise their power under the constitution to dismiss the incumbent. They had that power and, of course, they might exercise it. But the fact that they had such a power and could exercise it at any time is itself really conclusive against any change having been made in the congregation's position. They were as independent as ever, and neither gave nor received anything. Their position simply was that they were connected by a tie dissoluble at their pleasure with a person (viz., their incumbent) who was connected by a tie dissoluble at his pleasure with the Scottish Episcopal Church. Now that, it seems to me, is a connection much too indirect and remote to satisfy the condition expressed in Miss Bannerman's will.

"The pursuers, however, rely upon certain other matters which they say grew out of the incumbent's new position, and directly affected the congregation. I do not refer to the facts that the incumbent from 1877 downwards has been a member of the Diocesan Synod, and the Representative Church Council, and has had all the rights and privileges of a clergyman holding a licence from a bishop, with a definite sphere of duty. I have already dealt with these matters, which, as I have said, I consider personal to the clergyman. But the matters now in question are said to be these:—

"1. That the congregation take the benefit of the incumbent's new position by having their young people confirmed by the Bishop of Aberdeen.

"2. That they take the benefit of the exchange of pulpits now possible between their incumbent and the incumbents of the other churches in Aberdeen.

"3. That in the same way they take the benefit of the bishop's assistance in the services of the church—he being now accustomed frequently to officiate, although always upon invitation.

"4. That returns of statistics of membership, &c., are from time to time made by the officials of St James's Church to the offices of the Scottish Episcopal Church, which returns are published in the year-books and other books published or recognised by the authorities of the Scottish Episcopal Church.

"5. That collections are frequently made for certain schemes of the Scottish Episcopal Church, and particularly its mission schemes and education scheme.

"I am bound to say, that I have had some difficulty as to the combined effect of these several matters. The incumbents and the congregation have certainly so acted as to reduce to a minimum all external manifestations of

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Bishop of Aberdeen, and looked wistfully to England for Episcopal ministrations.

What is its present position in that regard?

Since 1877 the successive incumbents of St James's have subscribed the canons of the Scottish Episcopal Church, and received the licence of the Bishop of Aberdeen, and have become, in consequence, so far as their personal duties and status are concerned, clergy of that Church. Mr Mackay, the present incumbent, like his predecessors, was ordained priest in England, but he holds the Bishop of Aberdeen's licence to officiate in St James's; he is a member of the Diocesan Synod and of the Representative Church Council, and he says, in so many words,—"I hold myself to be a Scottish Episcopalian, personally." His allegiance to the Bishop of Aberdeen is exactly the same as that of any other clergyman in the diocese. Part of his duty is to prepare, and bring to the Bishop those whom he has prepared for confirmation, and since 1877 the young people of St James's have been taken to the Bishop of Aberdeen and confirmed by him. The confirmations have always, and purposely, been held in another of the churches,—or rather, I should say, in one of the churches,—of the Episcopal communion. Thus, through the relation between the clergyman of St James's

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the differences which divide them from the other Episcopal churches in Aberdeen. They have done so, I have no doubt, from the best of motives; so much so, that it occurs to one to ask whether, for the sake of preserving their hold on Miss Bannerman's legacy, it is really worth while to perpetuate those differences. But whatever the motive may have been, the fact remains. And I confess it does seem to me that the congregation entered upon somewhat dangerous ground (with respect I mean to Miss Bannerman's legacy) when they began not only to co-operate with the other Episcopal churches in mission and other work, but to allow their statistics of membership to be included in the statistics of the Scottish Episcopal Church, and their contributions to the schemes of that Church to appear without note of distinction in its publications. Still co-operation is one thing, and union or connection is another; and there is undoubted force in the defenders' argument (1) that they are not responsible for the form in which the accounts of the Scottish Episcopal Church are kept; and (2) that there is nothing which they as a congregation do, or have done, which might not be done by congregations of the Church of England across the Tweed, or by persons accustomed to gather for English service in private chapels or schoolhouses throughout Scotland. There is also, I think, great force in their view that in all essential matters—all matters which affect the independence and autonomy of the congregation—the distinctions which have always existed are still maintained. I do not think it necessary to go over those matters in detail. They are very distinctly and correctly recited in the 14th article of the defenders' statement, and also in the evidence of Bishop Douglas. The general result is that in everything which can be called crucial, the congregation of St James's is as separate and unconnected with the Scottish Church as any church of the Anglican communion can be—I mean any church situated within the diocese of a Scottish bishop. So far, of course, some degree of connection is inevitable, and exists. But it is not, I think, the kind of connection contemplated by Miss Bannerman's settlement.

"On the whole, therefore, I have found myself unable to come to any other conclusion than that the pursuers have failed to establish the forfeiture which they ask the Court to declare; and therefore that the defenders are entitled to absolvitor."

and the Bishop of Aberdeen, those worshipping in St James's enjoy the ministration of the bishop in that ordinance which alone brings the laity into direct relation with the bishop as such.

I have stated generally the position of the incumbent of St James's in relation to the bishop, but it is necessary to examine this more closely.

It is in accordance with the idea of the solidarity of the Anglican Communion all over the world that its bishops should not interfere with one another's dioceses, and that its clergy should subject themselves to the government of the bishop of whatever diocese they propose to minister in. The definitive recognition of this rule by the Church of England in relation to the Episcopal Church of Scotland led to the English clergymen who have successively been incumbents of St James's since 1877 applying for and obtaining the licence of the Bishop of Aberdeen. The terms of the licence of the present incumbent deserve attention.* It will be observed that he is licensed by the bishop to "perform all the duties competent to his order in the Church of St James's and the district attached thereto in our diocese."

It remains to mention certain incidental results of the bishop's licence. The incumbent's tenure of the licence makes it permissible for the clergy of the diocese, as well as for the bishop himself, to officiate in St James's, and in fact bishop and clergy alike officiate.

There are offertories each year in St James's Church for the Mission Fund and for the Education Fund of the Scottish Episcopal Church. Some minor evidences of rapprochement and co-operation between this congregation and the other Episcopal congregations in Aberdeen were pointed to by the pursuers on the principle *juncta juvant*. They also founded on the leaflets periodically issued to the congregation by the clergyman, and the tone in which "the bishop," "the Education Fund," the "Diocesan Council," and various other institutions of the Scottish Episcopal Church, are spoken of in exactly the same way as if St James's were one of the regular congregations of that communion; while, on the other hand, there does not seem to be any mention made of any separate or isolated characteristic of the congregation as distinguished from other Episcopal congregations. The circumstances last enumerated were not dwelt upon by the pursuers as substantively and still less as separately constituting a connection with the Scottish Episcopal Church, but rather as illustrating what is, in the understanding of all concerned, the true and real position of the congregation.

On these facts the Lord Ordinary is constrained to say that, "in a loose sense," there is a "connection"; while in another part of his opinion he had remarked, on the word "connection," that it is "a somewhat loose term." If those two passages taken together mean that, in the colloquial sense of a colloquial term there is a connection, the defenders' case would seem to be in some danger. Their arguments, however, as condensed in the opinion, deserve serious consideration.

Their main point is that Miss Bannerman's condition applies to the congregation, that the congregation, as distinguished from the clergyman, must be found to be in connection with the Episcopal Church, and that this con-

* P. 964, note.

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gregation has done nothing whatever by way of forming a connection. The congregation, they say, stands where it did.

If the formal and overt action of the congregation, acting as such, be necessary to the existence of a connection, then there is none, for no congregational meeting has been held on the subject. But is any such formal and overt action necessary?

It is not unimportant to notice that while the word "uniting" in the will (I quote from the words declaring the events in which devolution is to take place) does point to action, the word "being" (in connection) points to a state, condition, or relation, irrespective of its cause.

The Lord Ordinary says there has been no change in the constitution, but this does not seem to prove much. Without violating any term of the existing constitution that has been pointed out to us, the congregation might have entered into a compact with the Bishop of Aberdeen accepting his supervision. They might, as far as I can see, have entered into such a concordat as was formed between their mother church, St Paul's, and the Bishop Skinner, of the days of Sir W. Dunbar, the terms of which are given in 11 D. 948, or such a concordat as took place, in more recent times, between Bishop Cotterill and St Thomas's, Edinburgh, and is spoken to by the witness Stuart.

Well, now, supposing there had been no Miss Bannerman's legacy, and this congregation had entered into a concordat with Bishop Douglas, agreeing that exactly those things should be done which have been done, and no more, and that the agreement should be terminable at pleasure, would that make a connection? I say yes, and the defenders have difficulty in saying no. And is there any difference when the relation is established not by formal agreement but by the accepted action of the clergyman? The defenders' argument loses sight of the fact that, from the necessary conditions of things, in nine-tenths of the matters affecting a congregation the pastor acts and the congregation does not act at all. He acts, and necessarily acts, not solely for himself but as affecting and for the congregation. The clergyman cannot connect himself with the Scottish Episcopal Church by being one of its clergy without himself constituting a connection between his congregation and that Church. The duties of which his bishop is the overseer are his duties to the people to whom the bishop has licensed him to minister. It is quite true that the people who worship in St James's do not constitute a "congregation" in the sense of the canons of the Scottish Episcopal Church, nor yet a "mission," nor yet a "mission charge." As the Bishop of Aberdeen says, the position of St James's is "anomalous," and it has not in the meantime been regularised. The result is undoubtedly that they retained their independence. The bishop is quite right in law in saying that he could not force his way into the church as he could into those churches whose title-deeds and constitutions provide that they are Scottish Episcopal Churches. But all this—all that is set out in the answer to condescendence 14 (to which the Lord Ordinary refers)—merely negatives union; I do not think that it negatives connection.

We are to put ourselves in the position of Miss Bannerman by attending to the ecclesiastical position of her congregation during her life, and the possible directions in which it might look for alliance in the difficult position in which an "Episcopal" congregation must necessarily stand which

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has no bishop. In her days the "English Episcopal" congregations, whose separate existence was grounded on dislike of the Scottish Episcopal Church, extended to the Church of England an affection which was very sparingly returned. All her life, however, there was still the chance of help and countenance from some Bishop Waldegrave, or even some Bishop Beckles, for Convocation did not speak till the year after her death. Accordingly, even if separation from both Episcopal Churches (of England and Scotland) would have been intolerable to Miss Bannerman, the door was not yet closed on the English side. In forbidding such a connection as now exists, she was therefore not consciously condemning her congregation to independency, although I do not know whether she might not have considered this to be the lesser evil.

I go, of course, so far with the Lord Ordinary, that it is not every casual or incidental co-operation with the Scottish Episcopal Church which was intended to be proscribed. But the connection in which the congregation is now and has been for nearly twenty years is not casual or incidental. The fact that it is terminable does not make it the less a connection so long as it lasts, and the attitude of the congregation in the present action shews that the existing relation between the two bodies is fully known and deliberately adopted by the congregation. While realising that the case is one on which opinion may easily be divided, my judgment is for the pursuers.

LORD M'LAREN.—After repeated consideration of this case, I am not satisfied that the Lord Ordinary's grounds of judgment are wrong, and I am unable to concur in the judgment proposed. I do not think there is any material difference between my colleagues and myself as to the facts established by the proof and the productions. The question is, whether these facts amount to a "uniting or being in connection with the Scottish Episcopal Church" on the part of the congregation, so as to bring into operation the conditional destination of Miss Bannerman's legacy to her next of kin. The expression "uniting with" the Scottish Episcopal Church I take to denote an agreement by the congregation to become to all effects a congregation of that Church, subject to its canons, Church government, and discipline. It was conceded by pursuers' counsel, and it is perfectly clear, that such a union has not in fact taken place. It is more difficult to define what is meant by "being in connection" with a Church. I think the most obvious meaning is that by which the expression is to be read as synonymous with or exegetical of the word "uniting." It is not to be overlooked that the word "unite" is properly descriptive of the incorporation of two churches or assemblages of congregations in one rather than of the absorption of an individual congregation in a larger organisation such as that of the Scottish Episcopal Church; and it is quite intelligible that the complex expression "uniting or being in connection with" might be used by the testatrix to describe such an absorption of the congregation in the larger body for want of a single term precisely descriptive of the change which she deprecated, and which was to be the condition of her gift passing to her next of kin.

I am the more disposed to favour this reading, because I have experienced the difficulty which the Lord Ordinary felt in attempting to affix a definite

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meaning to the word "connection," distinct from that which is implied in the term "union." In construing such expressions, especially as used by a testator who is known to have been an attached member of the congregation to which the legacy is given, I think we may take notice of certain principles of Church government which are common to the Episcopalian churches, and to many other Christian communities, I mean that the ecclesiastical organisation will not in general make terms with a congregation entering its communion. The congregation must accept the constitution of the Church as it exists, or remain independent. I have no conception that the Scottish Episcopal Church would enter into a contract with an individual congregation on different terms from those which govern its relations to other congregations; and I think it unlikely that Miss Bannerman should have contemplated any other kind of union or connection than one under which the congregation should accept the Scottish Episcopal Church as its ecclesiastical superior, and submit to be governed by its canons. I think I may call in aid of this view the circumstance that at the time when Miss Bannerman made her will the doctrines and forms of worship of the Scottish Episcopal Church and the congregation of St James's were really identical. The forfeiture, therefore, was not directed against changes of doctrine or worship, but, as I think, against corporate action, and I have difficulty in seeing how the congregation could approximate to or enter into connection with the Church in any other way than by being legally incorporated with it. I may also observe that while the Lord Ordinary has considered the possibility of there being a connection short of complete union, he has not been able to figure a concrete case of such a connection, and the criteria which he proposes could not, as I think, be satisfied by any action on the part of St James's under its existing constitution.

I wish to avoid entering upon any topics that are not strictly relevant to the construction of this bequest. But we are entitled to look to the history of the two Churches in order to understand the testator's point of view, and, without entering into minute details, what I find is, that the distinction between the Scottish Episcopal Church and the assemblage of congregations in Scotland calling themselves English Episcopalians has been always much more a political distinction than a distinction founded on differences of doctrine or worship. The distinction throughout the eighteenth century was a very real one, inasmuch as the ancient Episcopal Church in Scotland was subjected to civil disabilities because of its refusal to comply with certain tests that were thought necessary for the security of the State, while the congregations forming the other community accepted these tests, and enjoyed the protection of the State. In the early part of this century there was only a difference in the liturgy, and in Miss Bannerman's time that distinction had almost disappeared, owing to the very general use of the English Church service by the congregations of the Scottish Episcopal Church. But it is consistent with experience that historical associations may have an influence in fixing the attachment of members of religious communities to their Churches. Miss Bannerman had been brought up as an "English Episcopalian," and it is to my mind intelligible, and indeed most natural, that she should desire to continue, and if possible to perpetuate, the separate existence of the congregation to which she was

attached, and that she should view with disfavour the prospect of its absorption into a Church which was not her Church, though separated from it perhaps by a somewhat thin partition. It is also conceivable that she may have considered that in the event of St James's joining the Scottish Episcopal communion the congregation would participate in the endowments of that body, and that her gift would not be needed. These considerations lead me to the conclusion that the "union or connection" to which the testatrix referred was neither more nor less than a complete ecclesiastical incorporation of the congregation in the Scottish Episcopal Church.

But if I am to assume that "connection" means something different from incorporation, then I am of opinion that, in this view also, the case of the pursuers fails, because the constitution of St James's Church remains unaltered since the death of the testatrix. In order to bring the substitutionary bequest into operation, I think there must be some transformation of the status or corporate character of the congregation tending in the direction of alliance with the Scottish Episcopal Church. But the acts founded on are, as I conceive, acts of the clergyman chiefly, not proved to proceed from the congregation, and not affecting its autonomy. They are briefly these two: that Mr Mackay accepted a licence from the Bishop of Aberdeen, and that he encouraged or advised the young people of the congregation to present themselves to the Bishop for confirmation. As to the first of these acts, I am not satisfied that the congregation could have obtained the services of a qualified clergyman unless he was permitted to hold the bishop's licence; and it is certain that the clergyman would have exposed himself to the censure of the Church of England (to which this congregation professed allegiance) if he had officiated in Aberdeen without the licence of the bishop. I infer from the evidence of Bishop Douglas himself (the best authority on such a subject) that the acceptance of the bishop's licence was regarded as a customary act of respect to the local ecclesiastical authority, and that it created no ecclesiastical relation between the congregation and the bishop or the Church which he represented, but only a personal relation between the bishop and the clergyman. The bishop in his evidence disclaims all authority over the congregation, and his action during the period of Mr Mackay's ministry is entirely consistent with his disclaimer. On the second point, it is indisputable that the congregation of St James's, having accepted the English Articles and Liturgy, also accepted confirmation as a religious rite; and I think that Mr Mackay might advise candidates for the rite of confirmation to avail themselves of the spiritual services of the Bishop of Aberdeen without thereby bringing the congregation into connection with the Scottish Episcopal Church. The English Episcopal community in Scotland never had a bishop of its own, and if its members desired confirmation they could only obtain it from the bishop of another communion. In this there was no novelty, because the Bishop of Aberdeen, in giving confirmation, did not claim to do so as matter of right, any more than the Bishop of Carlisle had done when he acted in a similar capacity in Miss Bannerman's lifetime.

I do not enter upon such minor elements as the inviting subscriptions to church charities, or the reading of the bishop's pastoral addresses to the con-

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gregation of St James's, because these acts clearly would not of themselves constitute a connection with the church. But I note, in conclusion, that the testatrix distinguishes between acts of the clergyman and acts of the congregation—the former being referred to the judgment of her trustees, while as to the latter the forfeiture is unqualified. I am unable to hold that the forfeiture has in fact been incurred, and I think that the action ought to be dismissed.

LORD KINNEAR.—I have found this to be a question of difficulty, and my difficulty has been increased by the reasoning of Lord M'Laren and the Lord Ordinary. But, upon the best consideration I can give to the case, I have come to the same conclusions as your Lordship in the chair, and for the same reasons.

The difficulty lies in determining what the testatrix meant by the two phrases which she uses in her will, when she says that her legacy is to be applied for the purposes of this Episcopal Church so long as the congregation worshipping in the said church shall not be "united to or in connection with" the Scottish Episcopal Church. Now, these words are in no sense technical. They are words of ordinary language, and I do not think that either of them is susceptible of very exact definition. They are, indeed, metaphorical terms, and they may be applied to an indefinite variety of circumstances. It appears to me therefore to be a very unsafe method of construing the will to begin by attempting to give an exhaustive definition either of the term "union" or of the term "connection," and then to proceed to consider whether the concrete facts of a particular case can be brought within the formula which has been antecedently laid down upon purely abstract considerations. I think the true method of construction is, to ascertain, in the first place, what are the facts of the case, and then to inquire whether the state of things which has been found to exist may or may not be aptly described by one or other of the terms employed by the testatrix.

Now, in considering that question, I agree with your Lordship in the chair that it is essential to begin by inquiring what was the position occupied by this Episcopal congregation at the time when Miss Bannerman's will took effect. As to that there can be no dispute. It was an Episcopal congregation in sentiment and opinion, but a congregation without a bishop. It owed no allegiance to the Bishop of Aberdeen, but on the contrary rejected his authority; and it had no connection of any kind that I can discover with the ecclesiastical organisation of the Episcopal Church in Scotland. It stood entirely aloof from that Church,—if it did not assume a position of some antagonism towards it. Now, it appears to me that in reading a will of this kind and considering its application to a church in that situation, *prima facie* the meaning of the testatrix must be taken to be that the church was to retain the benefit of her legacy so long as it continued to remain in that position of isolation, and no longer; and the question comes to be whether it has or has not retained that position of isolation. I am of opinion with your Lordship that it has not. The clergyman who serves the cure of the church is now a member of the Episcopal Church in Scotland. He is subject to the ecclesiastical authority

and superintendence of the bishop in exactly the same manner and to the same extent as any other clergyman of the Episcopal Church in Scotland. He is a member of the governing body of that Church, and if there were a vacancy in the episcopate he would have a voice in the election of a new bishop. In consequence of having accepted the authority of the Bishop of Aberdeen he is enabled to bring the children of the congregation to the bishop for confirmation, with the right to require the ministrations of the bishop. There are a variety of other consequences following upon this action which your Lordship has enumerated, and which, as I entirely concur in your Lordship's observations upon them, I think it unnecessary to repeat.

That being the position of the church, the question is whether it may or may not with propriety be described as being united to or in connection with the Scottish Episcopal Church. I agree that it is not united to that Church. Nothing has been done to make the two bodies into one; but I am of opinion, on the other hand, that it is in connection with the Church. I think it impossible to say that a congregation whose minister is a member of the Episcopal Church in Scotland, and subject to the ecclesiastical government and superintendence of the bishops of that Church has no connection with the Episcopal Church in Scotland. And, accordingly, I think that the Lord Ordinary, and I believe also Lord M'Laren, do not dispute that, according to the established use of language it would not be an inaccurate description of the position of this church to say that it is not united to the Episcopal Church in Scotland, but that it is in connection with it. But then it is said that that is not the kind of connection which the testatrix contemplated or intended by the use of the term in her will. I have not been able to appreciate, nor have I heard formulated, the reason for so saying. It appears to me to be a very arbitrary limitation of words of ordinary language to say that they are not intended to mean what according to the established use of language they are generally supposed to mean, but must have been used in some special and restricted sense which a Court of law may think fit to impose upon them. We have no authority to guide us in the construction of words of ordinary language excepting common usage, and when a testator uses ordinary language he must be taken to have intended its ordinary meaning. In this sense, I cannot assent to the opinion that the words "connected with" are synonymous with, or exegetical of, the word "united," and it seems to me a very unfortunate form of exegesis which interprets a more definite and precise term by a wider and more indefinite term. I am of opinion with your Lordships, for the reasons you have given, that this congregation must be considered as having a connection with the Episcopal Church in Scotland. But there are two considerations of great importance which are urged to the contrary.

It is said in the first place that this is a merely temporary connection which might be severed at the will of the congregation. But then, however temporary, it is still while it lasts a connection between the congregation and the Church, and it is a connection which the congregation has indicated no intention or desire to sever.

In the second place, it is said that, such as it is, it is a connection between the clergyman and the bishop, and not between the congregation and the Church. I think your Lordship's answer is conclusive. If the congrega-

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tion has in fact been brought into connection with the Church, it appears to me immaterial that this has not been done by a formal resolution of the congregation, because I agree with your Lordship that we have in this case a complete equivalent for a formal resolution. Everything which the clergyman has done in bringing himself, and through himself those to whom he ministers, into association with the Church, has been done with the consent and acquiescence of the congregation. They do not now repudiate his conduct in any way whatever. It appears to me that they could not more formally have established the connection which I think subsists between themselves and the Church than they have done by the attitude which they take up in the defence to this action.

I appreciate the force of one consideration which I think has had weight with both of my brethren, who have arrived at a different opinion, viz., that according to the present relations between the Church of England and the Episcopal Communion in Scotland, it would be extremely difficult for this congregation to obtain the services of a clergyman who refused to accept the bishop's licence. I do not think it would be impossible, but it is a fair observation that the congregation would be placed in a position of embarrassment and difficulty if they were to reject the bishop's licence. But then, I cannot say that that appears to me a relevant consideration in the construction of this will. The legacy is not forfeited as a penalty for any misconduct on the part of this congregation, but it is one of the conditions of the legacy that the congregation shall remain in a position of complete separation from the Scottish Episcopal Church. If that condition is not satisfied, it appears to me to make no difference whether the failure to satisfy it arises from the voluntary act of the congregation, or becomes inevitable from circumstances over which the congregation has no control.

I desire only to add that I concur in all your Lordship's reasons.

Lord Adam was absent.

The Court pronounced the following interlocutor:—"Recall the said interlocutor: Find, declare, and decern in terms of the declaratory conclusions of the summons: *Quoad ultra* continue the cause: Find the defenders, other than the defender Macqueen, entitled out of the trust fund to the expenses of one defence only, subject to the modification set forth in the Lord Ordinary's interlocutor: Find the defender Macqueen also entitled to expenses out of said fund, but only to such as were necessarily incurred by him in watching the cause, and remit the accounts thereof to the Auditor," &c.

Roberton & Wood, W.S.—Alexander Morison, S.S.C.—Bruce & Kerr, W.S.—Agents.

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Fraser's Trustee v. Fraser.

Hugh Hayes Watson (Mrs Jane Fraser's Trustee), Appellant.—*Sol.-Gen. Dickson—Johnston.*

Mrs Jane Fraser, Respondent.—*Salvesen—Lyon Mackenzie.*

Bankruptcy—Sequestration—Right of trustee to delivery of bankrupt's books and papers—Public-house certificate.—Held that the trustee upon the sequestrated estate of a publican was *prima facie* entitled to get delivery from the bankrupt of his permit-book and certificate.

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1ST DIVISION. Sheriff of Forfarshire.

HUGH HAYES WATSON, accountant, Dundee, trustee on the sequestrated estates of Mrs Jane Fraser, wine and spirit-merchant, Dundee, appealed against certain deliverances of the Sheriff-substitute (Campbell Smith) pronounced in the course of the examination of the bankrupt.

The following excerpt from the bankrupt's deposition contains the deliverances complained of:—"At Dundee, 24th June 1896, in presence of John Campbell Smith, Esq., advocate, Sheriff-substitute of Forfarshire, at Dundee. Present, . . . Compeared the bankrupt, Mrs Jane Fraser, who being solemnly sworn and examined, depones, . . . The agent for the trustee moved that the bankrupt be ordained to deliver up the permit-book. Deliverance.—The Sheriff-substitute ordained the bankrupt to allow the trustee to have access to the permit-book on all occasions desired by him when it was necessary that he should have the use of the permit-book in order to obtain information in regard to the estate: *Quoad ultra* refused the motion. . . . (Q.) Are you willing to give up your certificate of licence to the trustee? Deliverance.—Question disallowed. . . ."*

Argued for the appellant;—The question raised was whether the trustee was entitled to the bankrupt's permit-book and certificate, although with regard to the certificate the question was not directly raised owing to the Sheriff having refused to note the trustee's motion for its delivery. A trustee was bound to take possession of the bankrupt's books and papers,[1] and the bankrupt was under obligation to deliver them.[2] An action for exhibition by the trustee was unnecessary.[3] In the present case the trustee had an interest to demand delivery of both permit-book and certificate. The first was necessary to give him information as to the estate. Without the second he could not fulfil his duty of realising the estate. The certificate was a mere accessory of the goodwill of the business,[4] and could be transferred by the trustee, upon a sale of the business, to a new tenant of the licensed premises.[5] The trustee did not admit that, as now stated, the bankrupt was no longer tenant of the licensed premises. That statement contradicted her deposition, and, as matter of fact, she was using the certificate to carry on business there.

Argued for the bankrupt;—(1) *On the competency.*—The appellant was not entitled to raise in the present proceedings the question to

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* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 80, enacts,—"The trustee shall, as soon as may be after his appointment, take possession of the bankrupt's estate and effects, and of his title-deeds, books, bills, vouchers, and other papers and documents. . . ."

Section 93 enacts,—"If the bankrupt . . . shall refuse to be sworn, or to answer to the satisfaction of the Sheriff, any lawful question put to him by the Sheriff or trustee, or by any creditor with the sanction of the Sheriff, or without lawful cause shall refuse to sign his examination, or to produce books, deeds, or other documents in his custody or power relating to the estate, the Sheriff may grant warrant to commit him to prison. . . ."

[1] Bankruptcy (Scotland) Act, 1856, sec. 80.

[2] Bankruptcy (Scotland) Act, 1856, sec. 93.

[3] Selkirk v. Service, Oct. 22, 1880, 8 R. 29.

[4] Selkirk v. Coupland, Jan. 6, 1886, 23 S. L. R. 456.

[5] Home Drummond Act (9 Geo. IV. cap. 58), sec. 19; Brunfaut v. Neilson, May 23, 1893, 20 R. (Just. Cases) 68; Clift v. Portobello Pier Co., Feb. 10, 1877, 4 R. 462.

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whom the right of property in the certificate belonged.[1] All that could be decided was whether or not the question disallowed by the Sheriff should be allowed. In *Selkirk* v. *Coupland*[2] the question who had right to the certificate was not decided in a summary way, but a minute and answers were ordered. (2) *On the merits.*—The obligation imposed upon the bankrupt by section 93 to produce his papers could be satisfied by exhibition, and did not necessarily require delivery.[3] A certificate to trade in exciseable liquors was a personal right, which did not pass to the executor of a deceased publican.[4] It accordingly resembled a *spes successionis*, and though saleable was excluded from sequestration. At any rate a certificate could only be transferred to an occupier of the licensed premises,[5] and in this case the premises, which had fallen out of lease immediately after the sequestration had since been let to the bankrupt's son, who was therefore the only possible transferee.

LORD PRESIDENT.—This appeal is not a very satisfactory proceeding if the object of parties be to ascertain the ultimate rights of the trustee and the bankrupt respectively to this certificate of licence. But we must consider the matter as it is presented to us; and I think that, *prima facie*, the trustee is entitled to have delivered to him the permit-book, as being one of the books of this bankrupt trader, and the licence, as being a document relating to the business of the bankrupt. What right the trustee may have to make use of the certificate of licence, and his power of disposing of it, must depend upon questions which we are not in a position to decide; as thus,—if it be the fact that the bankrupt is the tenant of these premises, and is using the certificate to carry on the trade, the trustee may or may not be in a position to take the business and get the licence transferred to a purchaser of the business from him. If, on the other hand, the bankrupt can make out some such case as that suggested at the bar, that may lead to another result. On that I do not pronounce.

It seems to me that the question is, In whose hands, in the first instance, shall these documents be? And I answer that by saying, they should be in the hands of the trustee.

As regards procedure: The Sheriff has, in the first place, merely ordained the bankrupt to allow the trustee to have access to the book. That seems an inadequate remedy, and an inadequate satisfaction of the trustee's right. And accordingly I think that must be recalled. As regards the question disallowed, that raises the matter of the certificate in a very unsatisfactory way. I must say I do not think the question was necessary at all, except as a matter of mere politeness. The trustee's right to the certificate in no way depended upon the willingness of the bankrupt to give it up. Therefore I think we should go a step further, and save any questions which may arise in the Court below, by remitting to the Sheriff to order the licence to be produced and delivered to the trustee.

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[1] Delvoitte & Co. v. Baillie's Trustee, Nov. 16, 1877, 5 R. 143.

[2] 23 S. L. R. 456.

[3] *Cf.* sec. 91; Selkirk v. Service, Oct. 22, 1880, 8 R. 29.

[4] Philp's Executor v. Philp's Trustee, Feb. 1, 1894, 21 R. 482; Stewart's Trustee v. Stewart's Executrix, May 21, 1896, *supra*, p. 739.

[5] 9 Geo. IV. cap. 58, sec. 19; *cf.* Yuille v. Rushbury, July 4, 1888, 15 R. 828.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred. No. 185.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the deliverances of the Sheriff-substitute, dated 24th June 1896, appealed against: Remit to the Sheriff-substitute to ordain the bankrupt to deliver to the trustee the permit-book and certificate of licence referred to, and decern: Find the bankrupt liable to the trustee in expenses in this Court, and remit," &c. July 8, 1896. Fraser's Trustee v. Fraser.

JAMES PURVES, S.S.C.—J. A. PATTULLO, S.S.C.—Agents.

WILLIAM MURRAY AND OTHERS, Pursuers (Appellants).—*Salvesen—Constable.* No. 186.

MICHAEL JOHNSTONE, Defender (Respondent).—*Johnston—Clyde.* July 8, 1896. Murray v. Johnstone.

Voluntary Association—Sporting Club—Property—Right of majority of members to alienate property of club as a donation.—In 1869 a silver cup was presented to the curling clubs of Dumfriesshire for competition as a trophy, and these clubs (which were not incorporated societies) framed rules, under which the cup was to become the property of the club which won the cup twice in succession. In 1893 the cup was so won by the Upper Annandale Club. Thereafter, at a meeting of that club, it was resolved, by a majority of the members present, to present the cup to M. J., who had been skip of the rink which obtained the highest score on the two successive occasions on which the club had won the cup. In an action brought against M. J. by certain members of the club, who had objected to the presentation, *held* (*dis.* Lord Young) that the club not being an incorporated society the cup was the joint property of all the individual members of the club; that it was *ultra vires* of a majority of the members thus to give away the joint property against the wishes of the minority; and therefore that the presentation to M. J. was ineffectual.

2D DIVISION. Sheriff of Dumfries and Galloway.

IN June 1895 William Murray, gardener, Moffat, and four other persons, "as individual members of the Upper Annandale Curling Club, and also as a committee elected to represent said club at a special general meeting thereof, held on 19th April 1895," brought an action in the Sheriff Court at Dumfries against Michael Johnstone, residing at Ashbank, near Moffat, praying for decree ordaining the defender "to deliver to the pursuers, as representing said club, or to the president or secretary of said club . . . a silver trophy known as the 'Waterlow Cup,' the property of the said club, which was handed over to the defender as custodier for the club for the season 1893 and 1894," or alternatively for decree for £200 as the value of the cup.

The pursuers averred (cond. 1) that in 1869 Sir Sydney H. Waterlow, sometime Member of Parliament for the county of Dumfries, presented a silver cup, thereafter known as the "Waterlow Cup," as a trophy to be played for by the curling clubs in Dumfriesshire . . . The inscription upon the cup was as follows:—"Dumfriesshire Challenge Cup. Presented by Sir Sydney H. Waterlow, M.P., 1869, to be played for annually, and open to all comers resident in the county, the winner three consecutive years to keep the cup," and that this inscription and certain rules were considered as the conditions on which the cup was played for down to 8th October 1890. (Cond. 2) "At the meeting of the 'cup competition,' held in Greyfriars Hall on Wednesday the 3d October 1889, Mr Young, Moffat, gave

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notice" for next annual meeting of a motion to change the conditions on which the cup should be played for. "Intimation of the proposal to change the condition under which the cup was played for was duly sent to Sir Sydney H. Waterlow, who, in reply, intimated that he would be satisfied with any alteration which met with the approval of the majority of the clubs. The motion of Mr Young was adopted, and the rules revised accordingly, and the following rule substituted for the previous conditions:—'The club which has gained the highest number of shots per rink shall be the winners, and the skip of the highest winning rink from the winning club shall be the holder of the cup till next match. The cup shall become the property of the club winning twice in succession, or three times in all after date December 1890.' The Waterlow Cup was won in the years 1887, under the old rules, and in 1891 and 1893, under the new rules, by the Moffat Club [*i.e.*, the Upper Annandale Club]. As there was no play in 1892, the cup became the absolute property of said club, as having been won by them twice in succession. The cup was accordingly handed over by the Dumfriesshire Curling Association to the Moffat Club in the latter season, and was taken charge of by Mr Michael Johnstone, who was the skip of the rink having the greatest majority on the Moffat side, as custodier for the club. The defender, Michael Johnstone, still retains possession of the cup as custodian for the club."

The pursuers further averred;—(Cond. 3) "Shortly after the trophy had been won by the club, an informal movement was set on foot by some of the defender's friends with the view of getting the consent of the club to the presentation of the cup to the defender as his absolute property, he having skipped the rink which obtained the highest score on the Moffat side twice in succession. . . ." (Cond. 5) "The general meeting of the club was held on 3d November 1893, and amongst other business the question of what was to be done with the Waterlow Cup was brought before the meeting. It was moved and seconded that it be presented to the defender. A counter motion to the effect that, 'as this matter had not been put down as part of the business for this meeting, a special meeting should be called, say in a month, to decide as to what should be done with the cup' was carried against the motion by a majority of nineteen to seven. The membership of the club at the date of this meeting was eighty-seven, of whom only twenty-six members were present. . . ." (Cond. 6) "On the 13th November 1893, a circular was issued calling a 'special general meeting' of the club, to be held on the evening of the 16th of that month, the business being stated, *inter alia*, 'to decide as to the disposal of the Waterlow Cup.' At this meeting forty-four members were present, and two motions were submitted to the meeting with regard to the cup, viz.:—(1) That the cup be kept by the club as their own property; and (2) that it be presented to the defender. On taking the vote it was found that there was a majority of votes in favour of presenting the cup to the defender." A protest was lodged, and was subsequently "signed by twenty-eight members, being three more than had voted for presenting the cup. On the result of the vote being communicated to the defender, he intimated his intention to accept of the cup. No presentation of the cup following on the resolution has yet been made to him. . . ." Thereafter in consequence of a requisition signed by forty-five members of the club who were adverse to the defender getting the cup, "a special general meeting of the club was held on 2d February 1894, when the motion to rescind the

resolution gifting the cup to the defender was unanimously carried. At this meeting fifty members of the club were present. . . ."

The pursuers then stated that in consequence of the defender refusing to deliver the cup, a special general meeting of the club was held on 19th April 1895, at which they were appointed a committee with power to take such proceedings as they might think advisable for the purpose of recovering possession of the cup.

The pursuers pleaded, *inter alia*;—(1) The said Waterlow Cup being the property of the whole members of the Upper Annandale Curling Club, the resolution to make a gift thereof to the defender without the unanimous consent of the members was *ultra vires* and illegal. (2) The majority of the club being opposed to giving away a portion of the club's property to the defender, the pursuers, as individuals, and as representing the club, are entitled to decree as craved in the petition. (4) The said resolution having been carried by a small minority of the club in the face of a formal protest by other members present at the meeting, and the protestors being joint owners of said cup, they and the other members of said club who were not present at the meeting are not bound by said resolution. (5) In any event, the said resolution was properly and legally rescinded by a majority of the club before any presentation was made, and before the same was confirmed at the general meeting.

The defender on record did not admit the whole of the foregoing averments, his answer to cond. 2 in particular being as follows:—(Ans. 2) "Admitted that the Waterlow Cup was won by a rink of the members of the Upper Annandale Curling Club, skipped by the defender in the years 1887, 1891, and 1893. Also admitted that the cup is in defender's possession. *Quoad ultra* not known, and not admitted"; and besides pleas to the pursuers' title to sue, he stated pleas in law to the effect that the competitions even after October 1890 took place under the original rules, under which (as he maintained) the cup belonged to him individually as skip of the winning rink for two successive years; but at the hearing before the Second Division, he did not dispute the substantial accuracy, in point of fact, of the pursuers' averments, and his defence came mainly to turn on the soundness of the following plea in law stated by him,—(6) In any event, if the members of said club had right to said cup, it was presented to defender by a majority of members present at the meeting of 16th November 1893, and he is entitled to retain same.

There was no proof, and at the hearing before the Second Division the parties stated that they could give the Court no definite information as to the clubs described as "the curling clubs in Dumfriesshire," or as to the procedure by which these clubs made and altered their rules.

On 16th October 1895 the Sheriff-substitute (Campion) pronounced the following interlocutor:—"Finds (2) that in 1893, the cup having been won by the Upper Annandale Curling Club the requisite number of times, according to the conditions on which it was then played for, became the absolute property of said club: . . . Finds that the members of the Upper Annandale Curling Club had power, at the special general meeting of 16th November 1893, duly called for that purpose, to make a gift of the cup to defender, and that they were not entitled at any subsequent meeting to rescind said gift: Therefore repels the pleas in law stated for the pursuers: Sustains the sixth plea in law stated for the defender: Assoilzies him from the conclusions of the action, and decerns."

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On appeal, the Sheriff (Campbell), on 12th November, adhered.

The pursuers appealed.

The cause was heard originally before a Court consisting of the Lord Justice-Clerk, Lord Young, and Lord Trayner.

Argued for the pursuers;—(1) Clubs such as the present were, with respect to property, midway between incorporated companies and ordinary partnerships. A club had no proper corporate existence, and therefore the property, which could not be *in pendente*, must be in the individual members; but the individual members were not in the ordinary sense proprietors, their right terminated absolutely with their membership; they could transmit nothing, their creditors could attach nothing, and conversely the direct authority of each individual must be proved to infer his liability for the debts of the club.[1] Nevertheless, each member had such a contingent right of property in the assets of the club (as realised in the event of its dissolution) as entitled him to object to the disposal of the property of the club in a manner not reasonably incidental to the purposes for which the club existed. In short, the members were joint proprietors, and like ordinary joint proprietors[2] unanimity was the rule with respect to the disposal of the property of the club. No doubt, as in the case of an incorporated company,[3] a majority of a club, or of its managing committee or directors, might dispose of the property for the purposes of the company, but it was *ultra vires* of an incorporation to alienate the assets of the incorporation, in whole or in part, without consideration,—that was to say, as a gift—even although the gift might indirectly result in the pecuniary benefit of the corporation.[4] That rule applied here. (2) Even if the gift of the cup was not absolutely *ultra vires*—so as to require the consent of every member of the club—the majority necessary was a majority of the whole members of the club,[5] and the defender did not aver that such a majority had consented. (3) Further, assuming that a majority of the members present at a meeting duly summoned was sufficient, the gift was not effectual without delivery. The bare resolution of the club was not sufficient to convert the defender's possession of the cup as custodier on behalf of the club into possession on his own account. The resolution to make the gift (assuming it to be effectual otherwise) had been validly rescinded therefore at the meeting on 2d February 1894.

Argued for the defender;—The arguments derived from the law of incorporations, and the law of common property, had no real application here. This club was certainly not an incorporation, and its members were certainly not, in the ordinary sense of the term, proprietors of the cup. The proprietory title, no doubt, might be in

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[1] *In re* St James's Club, 1852, 2 De G. M. and G. 383; Todd v. Emly, 1841, 8 M. and W. 505.

[2] Stair, i. 7, 15; Rankine, Landownership, 3d ed. p. 510; Lindley on Company Law, 5th ed. p. 315.

[3] Hutton v. West Cork Railway Co., 1883, L. R., 23 Chanc. Div. 654, *per* Bowen, L. J., at p. 671.

[4] York and North Midland Railway Co., 1853, 16 Beav. 485; Tomkinson v. South-Eastern Railway Co., 1887, L. R., 35 Chanc. Div. 675; Howden v. Incorporation of Goldsmiths, June 2, 1840, 2 D. 996; Thomson v. Incorporation of Candlemakers of Edinburgh, March 16, 1855, 17 D. 765, 27 Scot. Jur. 332; Brice on Ultra Vires, 3d ed. p. 180.

[5] Erskine Inst. i. 7, 64; Mason, 1747, M. 1871.

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them, but not the proprietory interest. In effect they were just trustees; and the real question was whether the presentation of the cup to the defender was outwith the purposes of the club. It was not. The purpose of the club was to promote curling, and to this end to give prizes to successful curlers. Did it make any difference that the prize, instead of being announced beforehand, was resolved on only after the competition, and consisted of a trophy which had been won for the club largely through the skill of the person to whom it was to be presented? Such a presentation might be called a gift, but it was nevertheless a perfectly reasonable, and therefore legal, act on the part of the members of a club whose object was the promotion of sport, and not the pecuniary profit of its members. No doubt there might be dispositions of the property of such a club which were *ultra vires*. But the Court would not readily reach the conclusion that a presentation which was approved by a majority of the members of the club, and was in fact a recognition of skill in the particular sport favoured by the club, was an act which was *ultra vires*. (2) Of course if the requisite majority had not assented to the presentation that was another matter. But there was nothing to suggest that a simple majority of the members present at a meeting duly summoned was not sufficient. (3) If the resolution to give the cup was *per se* valid, it had not been effectually rescinded. The defender had possession of the cup, so that formal presentation, which might be a proper enough ceremonial, was not essential as a matter of legal solemnity.

The Court made avizandum on 16th January 1896. Thereafter in the following summer session, the case was further heard before the same learned Judges, together with Lord Moncreiff.

At the second hearing the arguments formerly maintained were resumed, and it was suggested from the bench that argument should also be offered on the questions,—(1) Whether it was within the competency of the Court to determine as to the destination of a sporting trophy; and (2) Whether Sir Sydney Waterlow had ever been divested of the property of the cup. On the former of these questions the pursuers maintained that the question was within the competency of the Court,[1] and on the latter that Sir Sydney Waterlow had been divested. The defender stated that he did not desire to argue to the contrary on either question.

At advising,—

LORD JUSTICE-CLERK.—The pursuers and defenders are not at variance as to any of the material facts of the case. In 1869 Sir Sydney Waterlow presented a cup for competition by the curlers of the county of Dumfries. It was presented as a challenge cup, but one of the conditions—as engraved upon the cup itself—was that "the winner for three consecutive years" was "to keep the cup." The rules for competition were adjusted by representatives of the various clubs in the county, and approved of by Sir Sydney Waterlow, and some alterations were made several years ago, which were adjusted by all the competing clubs, Sir Sydney Waterlow declaring himself satisfied with any rules adjusted by them. Each club, in order to compete, required to send to the competition "not less than one-half of their rinks of four players each," and no club could compete unless it sent at least

[1] Graham v. Pollok, Feb. 5, 1848, 10 D. 646, 20 Scot. Jur. 200; Calder v. Stevens, July 20, 1871, 9 Macph. 1074, 43 Scot. Jur. 543.

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three rinks to the competition, twelve players being thus necessary to enable any club to compete. The following rule was one of those adjusted and acted on,—"The club which has gained the highest number of shots per rink shall be the winners, and the skip of the highest winning rink from the winning club shall be the holder of the cup till next match. The cup shall become the property of the club winning twice in succession or thrice in all." Under this latter part of the rule the Upper Annandale Club became successful in winning the cup finally, and it is common ground between the pursuers and the defenders that the cup became the property of the club, and was so at the time of the transaction which has led to the present proceedings.

The question which has arisen in this case is, whether the Upper Annandale Club having become the owners of the cup, a majority of the club, at a meeting convened "to decide as to the disposal of the Waterlow Cup," had the power, against the objection of a minority of members of the club, to part with the property, and to make a gift of it to an individual, handing over the cup to him as his absolute property. It appears that an actual majority of the whole members of the club afterwards passed a resolution to rescind the gift. Both the Sheriffs have considered this matter, and hold that the gift made could not be rescinded. I do not think it is necessary to consider whether this could be done or not, assuming that the action of the majority of the first meeting in making a gift of the cup was not *ultra vires*, as I think that the case can be decided on the question of the right of the majority to make the gift against the objections of the minority.

The opinion I have come to is that this cup having come to form part of the property of the club, having been won as a prize by the club, members of the club are entitled to object to its being gifted away without their consent, and to insist upon its being restored to the possession of the club. It may be that this cup is of no great intrinsic value. As to that we have no information, but it may also be, and probably is, of considerable value. Such property, often of great value, won in a similar manner and under similar rules, is held by many clubs and associations throughout the country. Such trophies may be held, after being finally won by one competing club, either as trophies without their being used as competition challenge prizes within the club, or they may be—as was proposed to be done here—used in the club competitions as challenge prizes. Every member of the club has an interest in them, and is, I think, entitled to object to their being alienated at the will of a majority. I hold that a majority cannot insist on acting for the club, and doing such an act in name of the club, so as to bind unwilling members. The subject in question is not their property to dispose of, but is only their property along with others, in respect of membership of the club. And there is nothing in the constitution of the club giving such power.

I cannot but express my regret that such a question should have been brought before a Court of law, but as it has come before this Court, and a judgment is insisted on, there is no alternative but to deal with it, and I think we must do so by recalling the judgments of the Sheriffs and pronouncing a decree for delivery.

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LORD YOUNG.—I agree in thinking that this is a deplorable litigation. Two questions are raised in the case—(1) Has this cup been won by the Upper Annandale Curling Club so as to entitle them to keep it according to the rules of the game of curling, and the terms upon which it was presented for competition? and (2) If the cup has been won by the club, have they validly made a gift of it to the skip of their highest winning rink at the competition?

The case has been dealt with by both of the Sheriffs on the assumption that the cup was won by the Upper Annandale Curling Club, and that they were the owners of it. The only question considered by them was whether the cup had been validly gifted to the defender. Both Sheriffs are of opinion that the cup was validly gifted to the defender, and they therefore decided the case in his favour, and held that he was entitled to keep the cup.

I therefore, in the first place, address myself to the question whether the decision of the Sheriffs on this matter is right or not, and I may say at once that I am of opinion that it is. In my judgment the cup was validly presented by the club to the defender, and no revocation of the gift could be made at any subsequent meeting of the club. It was maintained to us by the pursuers that the law of common property applies to this case. In my opinion the law of common property is almost ridiculously inapplicable. The idea of the law of common property applying to the money or the furniture in possession of the officers of a club is, I think, extravagant on the face of it. No club could be carried on on such a footing. This club, I suppose, has no property except the annual subscription of half-a-crown from each of its members. I suppose it would be contended that in accordance with the maxim *melior est conditio prohibentis* if one member objects no use can be made of these half-crowns—that not one penny of them could be spent if a single member objects, because of the law of common property and the maxim *melior est conditio prohibentis*. I do not mean to say that the Courts of law would not restrain members of a club who were dealing corruptly or improperly with the property of the club, but that has nothing to do with the law of common property, and I do not understand that in the present case our opinion is asked upon any question of corrupt or improper conduct. A meeting of the club was held to consider whether the cup should be presented to the skip of the winning rink; a majority of the meeting considered that it should, and the only objection to presenting it is that the law of common property applies. The law of common property applies no more to this cup than to a box of cigars or a dozen of champagne presented as a club prize. Or suppose a meeting of a club was held to consider whether £50 should be given to the Royal Infirmary. One member objects. *Melior est conditio prohibentis.* Is the gift therefore invalid? This would be extravagant. I think that you are in an entirely different department and region from that which is regulated by the law of common property. I am therefore of opinion with the Sheriffs that what was done was legal, and that if the cup was the property of the club they validly presented it to the defender.

But I desire to state an objection which occurred to me, and was argued, I think, mainly on my suggestion, although I do not now press it.

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This cup was presented by Sir Sydney Waterlow in 1869, upwards of a quarter of a century ago, to the curling clubs of the county of Dumfries. Now, to whom did he present it? What are the curling clubs of the county of Dumfries? Are their numbers fixed? I put these questions, but nobody seemed to know. To whom did Sir Sydney Waterlow give the cup? Nobody knows. It is not suggested that he presented it to a trustee or a body of trustees. Then it is said that rules were originally framed to regulate the competition. Who framed them? Again the answer is, "We do not know." The rules to be effectual would require to be made by representatives of the various clubs and to be approved by Sir Sydney Waterlow. There is no evidence to that effect. The statements made by the pursuers that the cup was won by the Upper Annandale Curling Club, and that the cup is in the possession of the defender, are admitted by the latter, but *quoad ultra* "not known, and not admitted." In these circumstances where there is no evidence to shew that the cup ever passed from Sir Sydney Waterlow, it seems to me that he is the proper person to settle this dispute, and to decide who is entitled to the cup—that he is the only proper person. That would end the unseemly litigation in this Court. I do not think it is seemly for this Court to determine as to the winning of a sporting cup or a box of cigars or a gallon of brandy, and we should refrain as far as we with propriety can from interfering in a matter of the kind.

Although I have adverted to this as in my opinion a good reason for our not determining the matter, I am quite willing to decide the case on the ground taken by the Sheriffs, that, at a meeting of the club properly called, the cup was presented to the skip. I agree with the Sheriffs that there was no illegality in this, and no impropriety on account of which we can interfere. If the cup was legally presented, it was impossible for the club to change their mind and revoke the gift.

LORD TRAYNER.—I am unable to regard this case in any aspect of it as one of importance, and I should have been glad if the parties had seen their way to settle their differences otherwise than by an appeal to the Courts of law. I cannot speak in commendation of the conduct of either party. The pursuers might very well, on the one hand, have been content to acquiesce in what was done by a majority of the members of their club present at a meeting specially called to consider and determine as to the disposal of the cup in question; on the other hand, the defender would have taken a course worthier of himself if he had declined to take the cup, seeing that a very considerable number of the members (I believe a majority of them) objected to its being given to him. But as the parties stand upon their legal rights, and ask to have the case determined by a Court of law, I think we are bound to decide the question submitted to us, and that question, as it appears to me, is not a question of sport; it has nothing to do with the rules under which the cup was competed for, or the fairness with which the competition was conducted; it is neither more nor less than a question of property.

It has been suggested that the property of the cup is or may be still vested in the original donor. I cannot take that view. I think his right of property ceased when he handed over the cup to the person to whom he

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gave or sent it, to be held for the benefit of the successful competitors. It was then a delivered gift, and the donor could not recall it. It was no longer his. But as between the parties to this case no such question is raised. It is admitted that the cup was won by the club, and it is at this stage that we are alone concerned with any question of property in it. The club having won the cup, and having thus become the owners of it, could the club by a majority, and against the wishes of the minority, make a donation of the cup to one of its members or to a stranger? That appears to me to be the only question raised by this appeal, and viewing the case in that light, I have felt no difficulty in disposing of it. The cup is the property of the club, but the club not being a corporation cannot hold any property apart from its constituent members. The cup is therefore the property of the members of the club. Each member of the club has as much right and interest in the cup as another. It is quite true that each member has that right only so long as he remains a member, and cannot, even during his membership, sell or transfer his interest. But so long as he remains a member he has a joint right with all other members in everything that belongs in property to the club. This view of the rights of a member of a club is not without authority, some of which were cited at the debate. If I am right so far, I think the question is solved. No one can be deprived of his property except by his consent or by the action of the law, and consequently the majority of the members of this club cannot deprive the minority of what belongs to them. Had it been a question of administration of the property or assets of the club, it would have been a different matter. But it is not administration, it is alienation.

Had I been of opinion that the club by a majority of its members was entitled to give this cup away, I should have agreed with the Sheriff that the resolution passed at the meeting of 16th November 1893 was conclusive, and could not have been gone back upon. But I think the resolution come to at that meeting by a majority was *ultra vires*, and not binding on the club. I think therefore that the interlocutors appealed against should be recalled, and decree granted in terms of the first conclusion in the prayer of the petition.

LORD MONCREIFF.—This case was argued and decided in the Sheriff Court on the assumption that the cup presented by Sir Sydney Waterlow in 1869 was finally won by, and became the property of, the Upper Annandale Curling Club in 1893. That the cup had become the property of the club is one of the findings in the interlocutor of the Sheriff-substitute which the defender asks us to affirm, and I do not think we should go back on that finding, which, so far as I am able to judge, is in accordance with the truth of the case. Whatever may be the true meaning of the conditions under which the gift was made and held, the donor could not and never desired to revoke it. During the twenty-four years between 1869 and 1893 he left it to the competing clubs to regulate the competition. It is not for the defender to object to the regulations under which the cup was played for. He was a member of the Upper Annandale Club. He played for the cup as skip of one of the rinks of that club, and it must be held that he did so in knowledge of and under the rules and regulations which governed the

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competitions. He as an individual did not in any view win the cup; the successful rink won it, and won it as I hold for their club.

The cup having thus become the property of the Upper Annandale Club, the next question is, whether it was effectually gifted to the defender under a resolution passed by a majority of the club. It would have been a handsome act if the club had unanimously voted for giving the cup to the defender. He was skip of the winning rink for two of the years in which it was won for the club, and as probably the club did not possess any local habitation in which to keep it, it was not unreasonable that it should be given to the defender if that course were legal. But the question is, had a majority the power to do so against the wishes of a substantial minority?

I am of opinion that it was beyond the powers of a majority of the club to alienate the trophy. The cup was the common property of all the members although it was won for the club by the exertions of individual members. And although, as I have said, it would in the circumstances have been a graceful act to give it to the defender, it is not surprising that some members of the club, especially those other than the defender who played in the winning rinks in 1887, 1891, and 1893, should prefer that the cup should remain as evidence of their success, and not pass as his absolute property into the hands of an individual member who might any day cease to be a member of the club.

The law of common property is most familiar to us in relation to heritable subjects. The application of the law to moveable subjects is not so well defined or illustrated by decision. But I see no reason to think that in principle the law is not the same. In the case of heritable subjects, while the general rule is that any one proprietor can prevent any extraordinary use of the subject, or alterations upon its conditions, without his consent, there is an exception to the rule, viz., that necessary operations in rebuilding or repairing cannot be so prevented, and if all parties cannot agree, the will of the majority rules. So in regard to moveables, anything necessary for, and properly incidental to, the purposes of the joint proprietorship may be done by a majority.

The right of a member of a club (not proprietary) in the property of the club is of a peculiar description. While the club exists as a going concern, he is not entitled to insist on a sale and a division of the price. When he dies, his right, such as it is, does not pass to his representatives, and if he retires from the club his whole interest therein ceases. But as long as he remains a member of the club his right is one of common property.

The test whether in any particular case the disposal of club property by a committee or by a majority of members is or is not *ultra vires* is to inquire whether the proposed use or disposal of the article or fund is incidental to the purposes and proper management of the association. If it is not, a resolution so to dispose of it will not be sustained. In the present case if they had merely resolved that the cup should be held for the club by the defender as long as he remained a member, the resolution might have been justified as a reasonable act of management. But what is proposed is to alienate the club's property, and this I think cannot be done by the vote of the majority.

In the course of the argument it was urged that in this view it would be

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illegal for a majority of the members of a club to make a present out of the club funds to a secretary on his retiring, or to an old servant, or to present a medal or other prize to a member. Such a question seldom, if ever, arises. If the gift proposed is substantial, it is usually made or eked out by private subscription among the members. If it is trifling, nobody objects. But if objection were taken by a minority, each case would depend upon its own circumstances, and fall to be decided according as the gift was or was not fairly authorised by the constitution and purposes of the club. Here what is proposed to be done is not to buy a prize or souvenir for the defender, but to present him with a valuable trophy, which was presented to the club as a body and intended to remain its property.

On the whole matter I am of opinion that the appeal should be sustained, and that the defender should be ordained to deliver up the cup to the pursuers.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the interlocutor appealed against: Ordain the defender to deliver to Mr John Young, secretary of the Upper Annandale Curling Club the silver trophy known as the 'Waterlow Cup,' the property of the club, which was handed over to the defender as custodier for the club for the season 1893-94, within twenty-one days from the date hereof, and decern."

G. BROWN TWEEDIE, Solicitor—J. & A. HASTIE, Solicitors—Agents.

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July 9, 1896.
Duke of Argyll.

THE DUKE OF ARGYLL AND OTHERS, Petitioners.—*Burnet.*

Process—Petition for reconstitution of District Fishery Board—Intimation.—Petition for the reconstitution of a lapsed district fishery board *ordered* to be intimated on the walls and in the Minute-book, and to the Secretary for Scotland, and to be advertised in certain newspapers.

1ST DIVISION.

THE Duke of Argyll and others, being the upper and lower proprietors of salmon fishings within the district of the Rivers Baa and Glencoilleadar, Mull, qualified in terms of the 18th section of the Salmon Fisheries (Scotland) Act, 1862, presented this petition to the Court in order to have the district board of the district reconstituted. After being constituted, the board had lapsed through the failure of its clerk to call a meeting of proprietors before 3d December 1873, being three years from the date at which the first board assumed office, for the election of a board for the next three years.

The prayer of the petition contained no crave for an order for intimation or advertisement.

The petitioner argued;—There was no necessity for any intimation of the petition, the statute [1] authorising the Sheriff *de plano* to proceed. It was not the practice of the Court to order any intimation.[2] [The Lord President suggested that the petition should be intimated to the Secretary for Scotland and should be advertised.] There was no objection to the petition being intimated to the Secretary for Scotland and advertised.

[1] Salmon Fisheries (Scotland) Act, 1862 (25 and 26 Vict. cap. 97), sec. 18.
[2] Campbells, March 17, 1883, 10 R. 819; Brodie, Jan. 23, 1884, 21 S. L. R. 309.

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THE COURT appointed the petition "to be intimated on the walls and in the Minute-book in common form, and also to Her Majesty's Secretary for Scotland, and to be advertised once in each of the *Scotsman, Glasgow Herald,* and *Oban Times* newspapers," and appointed his Lordship and all parties interested, if so advised, to lodge answers within eight days.

JAMES F. MACKAY, W.S., Agent.

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July 9, 1896. Highgate & Co. v. Magistrates of Paisley.

HUGH HIGHGATE & COMPANY, Pursuers (Reclaimers).—*Johnston—James Clark.*

THE PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF THE BURGH OF PAISLEY, Defenders (Respondents).—*C. J. Guthrie—C. N. Johnston.*

Process—"All parties not called"—Feu with minerals reserved to granter—Lease of minerals—Damage caused to feu by working of minerals—Action by feuar against granter.—A granted a feu of certain subjects, reserving the minerals, and afterwards leased the minerals. Injury having subsequently been occasioned to the surface of the feu by the workings of the mineral tenants, the feuar raised an action of damages against A. The defender, averring that the injury was due solely to the fault of the mineral tenants, pleaded, "All parties not called."

Held (*rev.* the judgment of Lord Stormonth-Darling), that the pursuer was entitled to proceed with his action without calling the mineral tenants.

1ST DIVISION. Ld Stormonth-Darling.

By feu-contract dated July 1872, the Provost, Magistrates, and Town-council of the burgh of Paisley, as representing the community of the burgh, granted to Messrs Hugh Highgate & Company, oil refiners, Paisley, a feu of certain subjects in Murray Street, Paisley, —"But reserving always to the said" granters "and their successors and assignees the whole coal and other metals and minerals within the said steading of ground, and power to work, win, and carry away the same, but not to occupy the surface."

The feu-contract further contained a clause to the effect that the feuars should be bound within two years from the date of entry to erect and maintain upon the subjects buildings capable of yielding a yearly rental of at least triple the feu-duty to be paid.

In terms of the conditions buildings were erected on the subjects, and were used thereafter by the feuars for the purposes of their business.

By lease dated September 1885 the Corporation of Paisley let to Alexander Spiers, fireclay goods manufacturer in Paisley, and John Faill, as trustees for the firm of Spiers, Gibb, & Company, the fireclay under the ground which had been feued to the Messrs Highgate. Under this lease the lessees were taken bound to relieve the corporation of all damage caused by their operations in working the fireclay, and stringent regulations were laid down as to the method of working.

Subsidences having taken place on the lands occupied by the Messrs Highgate in consequence of the working of the fireclay, they, on 17th February 1896, raised this action against the Corporation of Paisley for declarator (1) that the defenders were not entitled either by themselves or by their lessees to work the minerals under their feu in such manner as to cause subsidence; (2) that they were bound to give support to the *solum* of the pursuers' lands, and to

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restore the buildings, &c., upon them to the state in which they were before the occurrence of the subsidence; (3) for damages in respect of the injury caused thereby; and lastly for interdict against future workings.

The defenders averred that the subsidences had been caused by the fault of their mineral tenants, and that they had raised an action (referred to by the Lord Ordinary in his note) against the latter, in which their improper working was set forth. "The defenders took all proper and competent steps to see that the provisions of the lease were observed, and having done that, they are not liable to the pursuers for any damage that may have resulted to them from the subsidence; in particular, they are not liable for the fault of their lessees."

The defenders pleaded, *inter alia*;—(1) All parties interested not called.

On 29th May 1896 the Lord Ordinary (Stormonth-Darling) sustained the first plea in law for the defenders, and continued the cause.*

The pursuers reclaimed, and argued;—The defenders having feued the ground under reservation to themselves of the minerals, must be held to have warranted the surface of the subjects feued against improper mining either by themselves or by those authorised by them. They were accordingly solely liable, and it was therefore unnecessary to call the mineral tenants.[1] Alternatively, the pursuers had set forth fault against the defenders in this respect, and if they elected

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* "OPINION.—The fuller discussion to which I listened in the cognate cases of *Magistrates of Paisley* v. *Spiers, Gibb, & Co.* has led me to reconsider the view which I was disposed to take (but to which I had not given effect by interlocutor) on the plea of 'All parties not called' in this case.

"The main defence of the Corporation is that the letting down of the surface is due to the fault of the lessees, and that for such fault they are not responsible. This defence makes it proper, I think, that the lessees should be called. As a general rule, a landlord is not liable for the consequences of his tenant's act or default unless it be the necessary result of the lease having been granted—*Weston* v. *Incorporation of Tailors of Potterrow*, July 10, 1839, 1 D. 1224; *Lyons* v. *Anderson*, June 25, 1886, 13 R. 1020. Nor is this rule affected by the circumstance that the pursuers here stand in the relation of vassals to the defenders. A superior who feus ground for building without special stipulation may not be entitled himself to do anything that will bring the buildings down, but he does not warrant support to his feuar against the illegal acts of all and sundry. Accordingly in the case of *Tassie* v. *Magistrates of Glasgow*, in 1 S. (June 18, 1822), where the pursuers were the tenants of the Corporation, and complained of operations by other tenants, the Magistrates were assoilzied and the actual wrongdoers were held liable.

"It appears from the defences of the mineral tenants to the action of relief at the instance of the Magistrates against them, that they mean to maintain that the subsidence was caused not by their operations but by the operations of their predecessors. It is right, I think, that they should have the chance of substantiating this defence, if they can, in the present action; otherwise the question might have to be tried over again in the action of relief.

"I shall therefore sustain the first plea in law for the defenders and continue the cause, in order to give the pursuers an opportunity, if so advised, of bringing a supplementary summons against the mineral tenants."

1 Buchanan, &c., v. Anderson, March 10, 1873, 11 Macph. (H. L.) 13, per Lord Selborne, p. 18.

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to take the risk of establishing it, they were not to be compelled to proceed against the mineral tenants, against whom they averred no fault. The cases cited by the Lord Ordinary were inapplicable, as they dealt with damage by workings upon the surface of the ground.

Argued for the defenders;—There was no case in Scotland in which a superior had been found liable to the surface owner for damage caused by his mineral tenant having gone outside the obligations in the lease, unless the superior had explicitly bound himself to indemnify the surface owner against such damage.[1] The law of England was to the same effect.[2] The superior was not here bound to the feuar to uphold the surface. The reservation in his favour of the minerals certainly imported no such obligation. Accordingly, while he might be liable for any damage caused by himself, he was not liable for damage caused by the mineral tenants. It followed then that the latter must be called in this action.[3]

At advising,—

LORD PRESIDENT.—If this were a question of convenience or discretion, I should be at one with the Lord Ordinary. It, no doubt, would be very desirable that all the questions existing between the several parties concerned should be brought together, and the ultimate liability ascertained in one trial.

The question before us, however, is whether the pursuers are to be denied the right to go on with their present action as it stands, for this is the necessary result of sustaining the plea that all parties are not called. Now, the pursuers, rightly or wrongly, sue the defenders on the footing that they, and they only, were answerable to the pursuers in the matters alleged. The action cannot, at present, be assumed to be irrelevant, and I think that the pursuers have a right, if they so choose, to go on with their action. The result may shew that they are ill advised, but that is their concern.

I am for recalling the interlocutor, and remitting to the Lord Ordinary to proceed.

LORD M'LAREN concurred.

LORD KINNEAR.—I agree. The pursuers bring this action against the proprietors of the minerals under their lands, and the main ground of their action rests upon contractual relations between themselves and the defenders as granters of the right by which they hold the surface. There may or may not be a relevant case against these defenders on this or on other grounds, and there may or may not be a relevant case against the defenders' lessees. But a case against the lessees must be based upon some other ground than that alleged against the lessors. Now, I know of no rule of law by which the Court can compel the pursuer of an action which we must at present assume

[1] Neilson v. Wilson, March 12, 1890, 17 R. 608; Bain v. Duke of Hamilton and Others, Nov. 4, 1867, 6 Macph. 1, 40 Scot. Jur. 4; Bald v. Alloa Coal Co., May 30, 1854, 16 D. 870, 26 Scot. Jur. 437; Hamilton v. Turner and Others, July 19, 1867, 5 Macph. 1086, 39 Scot. Jur. 621; White's Trustees v. Duke of Hamilton, March 10, 1887, 14 R. 597.

[2] MacSwinney on Mines, pp. 350 and 351; Atkinson v. King, 1878, 2 L. R. (Ireland) 320.

[3] Hamilton v. Hamilton, March 20, 1877, 4 R. 688; Gardner v. Walker & Donald, July 19, 1862, 24 D. 1430, 34 Scot. Jur. 600.

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to be relevant, to bring another action against persons against whom he at present alleges no ground of complaint. It is impossible to say that the pursuers ought to bring such an action without determining beforehand that if they have a relevant case against the defenders they have called, they must also have a relevant case against the persons they have declined to call. That cannot be decided until the case has been heard on the merits. I see no reason to suppose that the defenders will be prejudiced by the failure to call their lessees, because the means for protecting their right of relief, if they have such a right, are in their own hands. On the other hand, the lessees, whom it is said the pursuers ought to call, cannot be prejudiced, since, whatever our decision may be, the question cannot, so far as concerns them, be *res judicata*. I accordingly see no good ground for refusing the pursuers the right to proceed against those persons whom they aver to be liable.

LORD ADAM was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and remitted to him to proceed.

THOMSON, DICKSON, & SHAW, W.S.—F. J. MARTIN, W.S.—Agents.

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THE REVEREND ANGUS MACDONALD AND OTHERS (Trustees for Roman Catholic Church in Archdiocese of St Andrews and Edinburgh), Complainers (Respondents).—*W. Campbell—W. Thomson.*
JOHN WELSH AND OTHERS, Respondents (Reclaimers).—*Balfour—Clyde.*

Mines and Minerals—Superior and Vassal—Reservation in feu-charter—Power to "search for and work out" coal—"Shank or open the ground"—"Close or garden."—A feu-charter, dated in 1728, contained a reservation in the granter's favour of the coal under the subjects feued, with power "to search for, work out, and dispose of the said coal, . . . and provided that, in searching for or working said coal, we doe not shank or open the ground within the house, office-houses, closs, or gardens to be built or made upon the said lands."

In 1895 a successor of the granter commenced boring operations at a spot which was within thirteen yards of one of the main entrances of the mansion-house built upon the feu, and which was situated in an artificially made and enclosed piece of ground laid out partly in grass and partly in flower beds. The bore was sunk in the part laid out in grass.

In a note of suspension and interdict presented by the feuar to have the boring operations interdicted, *held* (1) that "boring" was covered by the expression "opening the ground"; and (2) that the place where the operations were being carried on was a "closs or garden" in the sense of the charter, and was therefore within the prohibited area.

Opinion by Lord Kinnear, that even if "boring" did not fall within the expression "opening the ground," yet the right to bore being ancillary to and an incident of the right of "searching for and working" the coal, the respondent had no right to exercise it within an area where he was prohibited from searching for and working the coal.

1ST DIVISION. Ld. Moncreiff.

IN October 1895 the Reverend Angus Macdonald, D.D., Roman Catholic Archbishop of St Andrews and Edinburgh, and others, the trustees for the Roman Catholic Church in the Archdiocese of St Andrews and Edinburgh, as heritable proprietors of the house and lands of Mount Vernon, situated at Liberton, near Edinburgh, pre-

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sented to the Court a note of suspension and interdict against John Welsh, S.S.C., Edinburgh, the proprietor of the coal and minerals under Mount Vernon, and two other persons, in which the complainers prayed the Court to interdict the respondents . . . "from boring for coal or in any way opening the ground, and from depositing materials within or upon any portion of the close or gardens of the complainers' mansion-house of Mount Vernon . . . and in particular from boring, opening the ground, depositing materials or in any way trespassing within or upon the lawn opposite to the southern entrance of the said mansion-house; further, to ordain the respondents . . . to remove the boring machinery," &c., deposited by them upon the said lawn.

The lands of Mount Vernon were originally acquired by the complainers' predecessors by feu-charter granted to Joseph Cave by George, Lord Rosse, on 11th September 1728.

The granter reserved the coal of the lands disponed by the following reservation:—"But excepting and reserving always to me" the said George, Master of Ross, "and my heirs and successors the whole coall of the lands hereby disponed, and declaring that it shall be free leisum and lawfull to me and my foresaids to search for work out and dispose of the said coall, we always paying and satisfying all dammadges which the said Joseph Cave, or his said son, or his foresaids shall sustain thereby, and provided that in searching for or working said coall we doe not shank or open the ground within the house, office-houses, closs, or gardens to be built or made upon the said lands by the said Joseph Cave or his said son, or his foresaids, for their own proper dwelling."

In June 1895 the respondents had commenced to bore for coal at a spot within thirteen yards of one of the main entrances of the mansion-house of Mount Vernon.

The complainers averred that the place where the bore was being sunk was within the close or gardens of the mansion-house of Mount Vernon.

This was denied by the respondents, who also pleaded;—(4) The respondents being only restricted from "shanking or opening" the ground, the boring operations complained of do not constitute any infringement of that restriction.

The Lord Ordinary (Moncreiff) granted interim interdict.

After a proof as to the history and character of the ground in which the respondents' borings were made, the import of which fully appears in the opinion of the Lord Ordinary, his Lordship pronounced this interlocutor:—"Recalls the interim interdict formerly granted: Suspends the proceedings complained of; interdicts, prohibits, and discharges the respondents and each of them, or one or more of them, and all others acting by their authority, from boring for coal, opening the ground, depositing materials, or in any way trespassing within or upon the lawn opposite to the southern entrance of the said mansion-house: Ordains the respondents and each of them, or one or more of them, to remove the boring machinery, plant, and other articles deposited by the respondents, or one or other of them, upon the said lawn, and to restore the said ground to the state in which it was prior to the operations of the respondents thereon; *quoad ultra* refuses the prayer of the note." *

* "OPINION.— . . . It will be seen from the terms of the reserva-

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The respondents reclaimed, and argued;—(1) The operation of mineral "boring" was not covered by the excepting words of the feu-charter "shanking and opening" the ground. "Boring" was only pricking the surface, while "shanking" was sinking a shank or pit to reach and bring up minerals, and "opening the ground" was digging a trench and exposing the coal. (2) The operation was not within the prohibited area, as the place was not a "closs or garden." (3) The rights of the parties were defined by the feu-contract, and there was therefore no question arising under the general law of neighbourhood.

Argued for the complainers;—(1) The respondents were under the feu-charter taken bound to refrain from "shanking or opening the ground" within the prohibited area, not only in working the coal, but in "searching" for it. "Boring" was an operation which was clearly covered by the exception. (2) The place where the "boring" was being performed was also clearly within the prohibited area. It was a "garden," and was also within the precincts of the "closs." (3) In any view, the law of neighbourhood demanded that the respondents should exercise their rights of property without undue interference with their neighbours.

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tion that the lands were bought for the purpose of erecting and making a dwelling-house, offices, and gardens.

"The respondents are now proprietors of the coal, and the complainers proprietors of the surface and other minerals. The respondents have recently proceeded to bore for coal at a spot within thirteen yards of one of the main entrances of the mansion-house. The complainers seek to have them interdicted from doing so, on the ground that they are within the excepted area; and the question which I have to decide is whether this is so or not.

"The history and character of the ground in which the borings complained of were made clearly appears from the proof and plan. The mansion-house of Mount Vernon has two main entrances, one to the north or front, and one to the south or back. The one to the back is not the servants' entrance; it is one of the main doors of the house, and some of the windows of the *public* rooms look to the south. Immediately to the south of the house a footpath runs parallel with the house; and on the farther side of the footpath is the piece of ground in question. It is about a quarter of an acre in extent, and has been made up and levelled probably in order to be used as a bowling-green. In former days, as now, such a piece of ground was an *invariable* adjunct to a country house. I should have explained that the green or lawn is surrounded by a fringe of shrubs and trees, among which flowers have been at one time planted, some of which survive. The whole enclosure is surrounded by an old holly hedge. There is no evidence that the ground was ever used except as pleasure ground, except that, when the house was unoccupied by the family, the caretaker seems to have used it as a washing-green for her own purposes. It is said at one time a line of cedars stood between the house and the bowling-green; and it is suggested that they were planted for the purpose of screening the house from the green. I think the truth is, that the cedars were planted for ornament, but, being rapidly growing plants, they grew so high as to darken the windows and obscure the view, and were accordingly cut down by Mr Lockhart Thomson's orders. Lastly, there is no evidence that, until recently, any flowers were ever planted on the bowling-green itself. There are flower beds on a similar plot of ground immediately to the east of the mansion-house; and, recently, one or two flower beds have been formed between the bowling-green and the footpath. The kitchen-garden and vineries, which are walled in, lie a little distance to the east. The green or lawn in question is quite different

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LORD PRESIDENT.—My opinion on this case may be very briefly stated, but this does not at all imply that I deem the questions discussed before us at considerable length to be trivial or plain sailing.

I think that, by the operations complained of, the respondents "opened the ground within the gardens" in the sense of the title.

First, as to the operation, and then as to the place.

It is to be observed that the title prohibits opening the ground in searching as well as in working. Naturally, the opening in searching will be a less opening than the opening in working. Now, the operation of boring may require only a small aperture, but the object being to fetch up what is below the surface, an opening of some size is indispensable, and is, past all doubt, made by breaking the surface. On this simple medium I consider the operation to be within the prohibited acts.

As to the place, I think it is a garden. It is enclosed; it is artificially

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from the fields or paddocks to the north and south of the house, as to which there is no dispute.

"This being the description of the green or lawn in which the respondents claim right to bore, the question is whether it does or does not fall within the terms of the exception in the titles.

"The words within which this piece of ground must be brought are,—'The house, office-houses, closs, or gardens to be built or made on the said lands.' The plain object of the exception was to secure the privacy and comfort of the dwelling-house and its immediate precincts. It is quite plain that to permit boring or shanking at the spot in question would make residence in the house intolerable or impossible. At the same time, it is necessary to see whether the ground in question can, by reasonable construction, be brought within the terms of the exception. The words which are said to cover it are 'closs and gardens.' The Scotch word 'closs' rather suggests a yard enclosed by the offices or the wings of the mansion-house itself, or a back-yard enclosed with a wall. In England the word 'close' or 'curtilage' would probably cover a piece of ground like this, these words meaning and including a courtyard or a piece of ground lying near or belonging to a dwelling-house, such as a back-green or a strip of ground lying between the house and the street. There is a good deal to be said for the view that the piece of ground which I have described is so closely connected with the house as fitly to fall within the description of 'closs.' But it is unnecessary to decide this, because there is another word which perhaps more appropriately applies to the green, and that is the word 'gardens.' It is to be observed, and that is material, that the word is plural and not singular, and therefore I think it must be liberally construed as including all made and ornamental ground in the immediate vicinity of the house, which can fairly be held to come within that description. Now a garden is not necessarily composed entirely of flower beds; it is not complete without a certain extent of ground kept in grass. Indeed, some people instead of planting flowers prefer to keep the ground adjacent to the house entirely in grass. But it does not, I apprehend, for that reason, cease to be garden ground in a reasonable sense of the word. It requires as much trouble and expense, if not more, to keep it mown and in order.

"I therefore think that, giving a fair meaning to the terms of the exception, they must be held to cover the ground in question.

"In coming to this conclusion, I have not disregarded the contention that, in construing the exception, the word 'gardens' must not be taken in its widest signification. The 'gardens' referred to are not public gardens;

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formed; part is in grass and part in flower beds. The circumstance that the bore is in the part which is lawn does not take it out of the garden.

The Lord Ordinary has said all this with much more completeness, and accordingly I desire only to add that I entirely agree with him. I think his Lordship has rested his judgment on the right ground, and I do not go at all on the alternative argument of the complainers that, even if the bore were not in the expressly prohibited area, it might yet be interdicted on the ground that it was an undue interference with the comfort of the proprietors. I doubt whether such an argument is admissible where the title itself defines the area of protection.

LORD KINNEAR.—I agree both that the grounds on which the question must be decided depend on the construction of the particular feu-charter and not on the general law of neighbourhood, and also on your Lordship's construction of the clause in the contract. I think, in the first place, that the area within which the operations complained of are being conducted is a "garden" within the meaning of the clause, and in the second place that these operations fall within the description of "opening" ground within the prohibited area.

But even if this last point were doubtful, I am not satisfied that the respondents have any title to execute operations within the protected area, They have no right of property in the surface of the ground, and such right as they do possess is accessory to their separate estate in the minerals, viz.,

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and I think it must also be conceded that the owner of the surface could not, by laying out and planting flowers on the whole or a large part of the surface, exclude the owner of the coal. 'Gardens,' in the sense of the title, means gardens which are suitable and appropriate to a dwelling-house of the kind, and such I take the piece of ground in question to be.

"The respondents maintain that the exception does not apply to boring; that boring is not 'shanking' or 'opening the ground.' I do not think that this is a fair interpretation of the words as used. What the granter of the charter binds himself not to do is not to shank or open the ground within the excepted premises, not merely in working the coal, but also in searching for it; provided that, 'in searching for or working said coall we doe not shank or open the ground,' &c. Therefore, while the terms 'shanking' and 'opening the ground' may not usually be applied technically to boring, I think that the words as used in this deed are wide enough to cover, and do cover, boring.

"It is said that boring is a simple and inoffensive operation. It is not always so. If coal is not quickly struck, or if the ground is difficult, it may take several months, and cause much inconvenience by noise and the accumulation of rubbish. To conduct this operation within thirteen yards of the main-door of a house must plainly cause much discomfort and inconvenience to the inhabitants, if it does not render their occupation of the house impossible. I apprehend that it was to protect the owner of the house from such a disturbance that the exception was inserted in the feu-charter.

"In the view which I take it is not necessary to consider whether, assuming that the ground in question is not within the excepted area, the respondents did not act emulously in boring where they did.

"The result is that I shall interdict the respondents from boring, opening the ground, depositing materials, or trespassing within or upon what has been called the lawn or green in question opposite the south entrance of the mansion-house. The remainder of the prayer for interdict is too wide and indefinite."

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to make such use of the surface as may be necessary for the purpose of enjoying their mineral estate. Accordingly they are entitled to "search for, work out, and dispose of" the coal, provided that in doing so they do not open the ground within the prohibited area. Now, there is no doubt that where they are entitled to open the ground for working the coal there they have a right to bore for the purpose of ascertaining whether there is workable coal. But the right of boring being ancillary to the right of searching for and working the coal, and an incident of it, I find no basis on any legal right for their claim to enter on the surface and bore at a place where they have no right to work.

LORD ADAM concurred.

LORD M'LAREN was absent.

THE COURT adhered.

CHARLES GEORGE, S.S.C.—WELSH & FORBES, S.S.C.—Agents.

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Nelson's Trustees v. Tod.

WILLIAM HENRY GOOLD AND OTHERS (Nelson's Trustees), Pursuers (Reclaimers).—*Rankine—F. T. Cooper.*
MISS JEAN TOD, Defender (Respondent).—*C. J. Guthrie—Macphail.*
MRS ISABELLA JAMESON OR GALBRAITH AND OTHERS, Defenders.

Superior and Vassal—Right in Security—Maills and Duties.—Held (*aff.* judgment of Lord Stormonth-Darling, *diss.* Lord Young) that the creditor in a bond and disposition in security of a superiority, with an assignation to feu-duties and casualties, has no title to sue an action of maills and duties against the vassal of his debtor for recovery of the feu-duties.

Prudential Assurance Company, Limited, v. *Cheyne*, June 4, 1884, 11 R. 871, *followed.*

2D DIVISION. LdStormonth-Darling.

IN August 1895 the trustees of the late William Nelson, publisher in Edinburgh, as creditors under a bond and disposition in their favour (the debtors in which had been sequestrated), brought an action of maills and duties, the operative conclusions of which were directed against Mrs Isabella Jameson or Galbraith, as vassal in or proprietor of land at Kevock, near Lasswade, and as representing her former husband, the late Dr William Jameson, dentist, London, he having been at the time of his death vassal in or proprietor of the said lands, and against Miss Jean Tod as a vassal in or heritable creditor in possession of Kevockbank House, Lasswade, and garden adjoining thereto, in virtue of a decree of maills and duties in her favour, dated 22d November 1893.

The action arose in the following circumstances:—Among the subjects disponed in security by the bond on which the pursuers sued (which contained an assignation to rents, feu-duties, and casualties) was the superiority of a piece of land forming part of the lands of Kevockmill, Lasswade. This piece of land was feued out in 1827 for a feu-duty of £69, 15s. 9d., and at the date of the action had been subfeued in four portions as follow. The first portion was feued at a feu-duty of £12, and had been acquired by Mr John K. Milne; the second was feued at a feu-duty of £22, 17s. 10½d., and had been acquired by the North British Railway Company; the third, being that in respect of which the defender Miss Tod was sued, had been feued at a feu-duty of £12, and had been acquired by a Colonel Pullen, who had granted a bond and disposition in security over his feu, in respect of

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which Miss Tod was in possession under the decree of maills and duties referred to in the summons. The feu-duty of the remaining subfeu was £22, 17s. 10½d., and this subfeu had belonged to Dr Jameson, the former husband of Mrs Galbraith, the other defender.

The pursuers admitted that Milne's subfeu had been confirmed by the superior, and no question regarding it was raised in the action; but they averred that the three other subfeus had not been so confirmed, and they maintained that each of the portions held under these subfeus remained burdened with the whole original feu-duty, less the £12 allocated to Milne's subfeu. The North British Railway Company, however, were not called as defenders, and there was no conclusion inferring liability for the feu-duty, £22, 17s. 10½d., paid by them, the pursuers explaining that they had obtained decree against the railway company in another action of maills and duties. The summons of the present action concluded for decree against Mrs Jameson or Galbraith and Miss Tod, ordaining them "conjunctly and severally, or severally, to make payment to the pursuers of the maills and duties payable by them, in respect of their possession of the foresaid lands, subjects, and others, and that during their possession thereof respectively, with interest thereon at the rate of five per centum per annum from and after the respective terms at which the same have become or shall become due, and until paid, *videlicet*,—of the sum of £17, 8s. 11½d., being the feu-duty due and payable by them in respect of the said land at Kevock and Kevockbank House, and garden adjoining thereto, at the term of Martinmas 1894, for the half year preceding, and the like sum of £17, 8s. 11½d. due at the term of Whitsunday thereafter, and the like sum half-yearly thereafter, during their possession of the foresaid lands, with interest as aforesaid; at least of so much of the said feu-duties as will satisfy and pay the pursuers the balance" of £6000 remaining due under the bond sued on.

The pursuers pleaded, *inter alia*;—(1) The said balance of £6000 of the principal sum contained in the foresaid bond and disposition in security, with interest and penalty as condescended on, being justly due and resting owing to the pursuers, they are entitled to enter into possession of the said lands and others described in the said bond and disposition in security, and to draw the rents and duties thereof. (2) The defenders Mrs Isabella Currie or Jameson or Galbraith, and Jean Tod, being vassals in or proprietors of feus of portions of the said lands or others, or representing such vassals or proprietors, the pursuers are entitled to decree against them respectively for the maills and duties payable by them. (3) No valid allocation of the *cumulo* feu-duty having been made, except on the holding of Mr Milne, the defenders are liable in terms of the conclusions of the summons.

As regarded the defender Mrs Jameson or Galbraith, it appeared that both she and the heir of Dr Jameson had renounced the feu which had belonged to him, and the pursuers restricted the conclusions of the summons, in so far as directed against Mrs Jameson or Galbraith, to the conclusions against her as representing her former husband Dr Jameson, and did not ask for decree against her personally, and she allowed decree as restricted to pass against her.

Miss Tod lodged defences. She stated that she was willing to pay the feu-duty of £12 exigible under the subfeu, in respect of the subjects of which she was in possession, but she pleaded, *inter alia*;—(1) No title to sue. (2) The action is incompetent, and ought to be dismissed.

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On 27th May 1896 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Finds that the pursuers have no title to sue the action; therefore dismisses the action, and decerns," &c.*

The pursuers reclaimed, and argued;—The Lord Ordinary was in error in holding that this case was ruled by the *Prudential Insurance Company's*[1] case. That was an action by the assignee to the arrears

* "OPINION.—I am of opinion that this case is governed by the case of *Prudential Insurance Company* v. *Cheyne*, 11 R. 871, which decided that neither a superior nor his assignee has any title to pursue an action of maills and duties for recovery of feu-duty. The *ratio decidendi* was that an action of maills and duties is one by which the pursuer seeks to enter into possession of a heritable subject, and that a superior is not entitled to possession so long as the feu subsists. He may irritate the feu, or he may have recourse to the action provided by the Act of 1874 as a substitute for a declarator of non-entry, but he cannot take possession by an action of maills and duties.

"The distinctions which the pursuer attempts to draw between that case and the present are—(1) That he is not the superior or the assignee of the superior, but a heritable creditor of the superior; and (2) that he is claiming not the rents of the subjects payable by tenants, but merely the feu-duty payable by the vassal. It does not seem to me that these are distinctions which affect the principle of the *Prudential* case.

"It is true that the heritable creditor of a proprietor may have a right of action not competent to the proprietor himself. Thus a creditor under a bond and disposition in security may bring an action of maills and duties while his author, the owner of the *dominium utile*, cannot. But that is because the latter does not require such an action to give him a title of possession. In the case of *Scottish Heritable Security Company* v. *Allan*, 3 R. 333, the late Lord President, at page 340, speaking of the pursuers in that case, who were disponees under an *ex facie* absolute disposition, said,—'They required no process of law to enable them to enter into possession, as it is called, and if they had proposed an action of maills and duties, for example, for the purpose of enabling them to uplift the rents, it would have been an idle formality, and, indeed, incompetent, because it is only an incumbrancer that requires to use a process of maills and duties in order to give him a title in a question with the tenant to uplift the rents.' Now, if the *ratio decidendi* in the *Prudential* case had been that a superior required no process of law to give him possession, I could have understood the analogy. But the *ratio* was that he had surrendered possession, and could not resume it, standing the feu-right.

"Neither can it matter that the pursuer, so far as his petitory conclusions go, asks only for feu-duty and not for rents. Equally he claims (as in his first plea in law) that he is 'entitled to enter into possession,' and that is a right which the *Prudential* case negatives.

"There is a real question between the parties, and there must, of course, be some competent mode of raising it, but this form of action, I think, is not. That question is, whether the compearing defender, who is and has been since 22d November 1893 in possession of one of four feus under a decree of maills and duties, is liable as such in the feu-duty of the whole four, so far as not allocated with consent of the superior. The defender has several answers to this demand, one of which is that the vassal in No. 4 (the condition of which gives rise to the question) has renounced his feu, and, consequently, that the relation of superior and vassal as regards that plot of ground no longer exists.

"I heard some argument on these various points, but it would be premature to express any opinion on them, if this be, as I think it is, an action which must be dismissed."

[1] Prudential Insurance Co. v. Cheyne, June 4, 1884, 11 R. 871.

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of certain feu-duties, and it was directed against the tenants of the vassals; this was an action by the heritable creditor of a superior with an assignation to feu-duties in his bond, and it was directed against the vassal, for Miss Tod, so long as she intromitted with the rents, was liable in payment of the feu-duty.[1] What the *Prudential* case decided was that, standing the feu, neither a superior nor anyone in his right, was entitled to derogate from the grant of the feu by drawing the rents of the vassal's tenants, and so entering into possession of the subjects which the superior had warranted to the vassal. Decree in the present action being an action not against the vassal's tenants, but against the vassal herself, would not derogate from the feu; the only effect of the decree would be that the vassal, instead of paying the feu-duty to the superior, would pay to the pursuers. No doubt the superior could not have brought an action of maills and duties against his vassals, but so neither could the granter of an ordinary bond and disposition of a *dominium utile* in security; yet the creditor in that case could bring such an action. There was a complete analogy between the disposition of a *dominium utile* in security with an assignation to the rents, and the disposition of a superiority in security with an assignation to the feu-duties; in each case the debtor assigned what he had a right and title to assign—the rents in the one case, and the feu-duties in the other—and the creditor's remedy in each case ought to be the same. If the present action was incompetent the pursuers had no continuing remedy for the recovery of the feu-duties, to which they had an undoubted right; their only remedy would be a series of petitory actions for the feu-duties as they accrued. There was nothing in principle adverse to the competency of the present action. The expression "maills and duties" included feu-duties.[2]

Argued for the defender;—It was admitted that a personal action for the feu-duties as they fell due would be competent against the defender. Her interest to have such an action instead of the present was that she would have a better defence to the claim for the whole feu-duty. Decree in an action of maills and duties by entitling the pursuers to enter into possession, would—at least it might be so held—entitle them to recover their whole feu-duty as a *debitum fundi*, whereas under a personal action they would be entitled to recover only so much of the feu-duty as the defender was personally liable for, *i.e.*, that due for the portion of the subjects of which she was in possession. The present action could not be regarded as a personal action, but only as an action of maills and duties, and as such it was incompetent. The case was indistinguishable from the *Prudential Company's* case.

At advising,—

LORD JUSTICE-CLERK.—In this case heritable creditors of a superior of certain lands ask for a decree of maills and duties for the recovery of feu-duties payable by the vassal. As stated in the debate, their purpose is to secure for themselves a standing order by which they may exact the feu-duties from time to time until the decree of maills and duties is removed,

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[1] Liquidators of the City of Glasgow Bank v. Nicholson's Trustees, March 3, 1883, 9 R. 689.

[2] Ross v. Governors of Heriot's Hospital, June 6, 1815, F. C., aff. 6 Pat. App. 640.

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and thus save themselves from the necessity of repeated procedure. The question is whether they can competently make this demand, and that would seem to depend upon whether the superior himself could make it. Can a superior competently pursue such an action? Now, that question has been raised before, and has been decided in the case of *The Prudential Insurance Company* v. *Cheyne's Trustees*,[1] in which case the insurance company, as assignees of the superior, raised an action of maills and duties. The Court there held that the pursuers had no title to pursue such an action, and the principles and grounds laid down seem to me to be applicable to the present case, and I agree with the Lord Ordinary that there are no distinctions which should prevent its being held a precedent for the decision here. I would move your Lordships, therefore, to adhere to the Lord Ordinary's interlocutor.

LORD YOUNG.—I differed from the judgment to which your Lordship has referred, and I am bound to say that I still adhere to the grounds on which I differed and to the view which I then expressed. But if that case is a decision in point, and if, however inexpedient the result may be, it cannot be overcome except by Act of Parliament, it is a precedent and must be followed. But I think it right to say that in my opinion the view of the law taken in that case is incorrect.

If I understand the matter rightly it is this. The pursuers are the holders of a security title granted over an estate of superiority, with an assignation to feu-duties embodied therein. They have intimated their security title and their assignation to the feu-duties to the vassals. They are entitled to have the feu-duties paid to them by the vassals. That is not capable of being disputed. This action is called an action of maills and duties, but the name does not signify; its purpose is to have the vassals ordered to pay their feu-duties to the pursuers. The record indicates that there is an important question here, namely, whether the defender, who is in possession of part of the subjects as a creditor of one of the vassals, is liable only for the feu-duty which appertains to the part she occupies, or whether she is liable just as the vassal under a well-known rule of law is liable, not only for her own share but for the whole. That question will have to be decided in some competent action. But as regards this action I do not understand the objection which is taken at this stage by the defender. The pursuers have right to these feu-duties. I asked more than once what the defender thought the pursuers should do, and I was told they must proceed against the vassals annually. But if it will save trouble and expense to give them a decree once for all, why should they not have it? It will be less expensive and more expedient. What interest have they that there should be an action brought against them annually rather than that an action should be brought against them now which would settle the question altogether?

An action of maills and duties no doubt has important effects when brought by a creditor of the owner of the *dominium utile*, and certain technical effects follow upon it. But suppose this action is regarded not as an action of maills and duties, but simply as an action to have the vassals ordained to

[1] 11 R. 871.

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pay their feu-duties to the superior's creditor, as they are bound to do, then I do not see what technical difficulties there are; but even if there were technical difficulties, I should be prepared to overcome technical difficulties to save expense.

The question with the vassal's creditor to which I have referred must arise some time, and it would arise and would have to be determined in this action, if it were allowed to go on, just as well as in the first of the annual actions which it is suggested the pursuers should bring against the vassals.

I think this action is perfectly competent, and ought to be allowed to proceed. I cannot see any legitimate interest in any of the parties which requires that it should be dismissed at this stage.

LORD TRAYNER.—I think the case of *Cheyne*[1] has decided this question, and has decided it adversely to the reclaimer. I am not disposed to go back on that decision, and therefore I agree that this reclaiming note must be refused.

LORD MONCREIFF was absent.

THE COURT adhered.

MILLAR, ROBSON, & M'LEAN, W.S.—H. & H. TOD, W.S.—Agents.

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July 9, 1896.
Stuart v. Great North of Scotland Railway Co.

MRS STUART AND OTHERS, Pursuers.—*Crabb Watt—W. Brown.*
GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Defenders.—*Balfour—Ferguson.*

Process—Proof—Diligence for recovery of writs—Confidentiality—Reports by railway servants to railway company regarding accident—Reparation—Injury to passenger.—In an action against a railway company for damages on account of the death of a passenger, the pursuers moved for a diligence to recover reports by the company's servants to the company regarding the accident. Diligence *refused*, on the ground that such reports were confidential.

2D DIVISION.

MRS STUART, widow of Robert Stuart, farmer, Wraes, Aberdeenshire, and his pupil children, raised an action against the Great North of Scotland Railway Company for damages on account of his death. The pursuers averred that Mr Stuart died in consequence of injuries received by him on 12th October 1895 when about to enter a train at Gartly Station, on the defenders' line, and that these injuries were due to the fault of the defenders' servants in allowing the train to start before he was safely seated, and in inviting and ordering him to enter the train while it was in motion.

Notice of trial having been given for the summer sittings, the pursuers moved for a diligence to recover "the written reports made to the defenders by the stationmaster at Gartly Station, and by the guard and engine-driver of the 1.15 down train from Aberdeen to Huntly on 12th October last, with reference to the accident to the deceased Robert Stuart at Gartly Station caused by said train, and the time of its arrival at, and departure from, said station."

[1] 11 R. 871.

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The railway company objected that the reports sought to be recovered were confidential.

The pursuers maintained that the reports were not confidential.[1]

LORD JUSTICE-CLERK.—This is practically a demand for confidential reports made to the railway company by their own servants. I think that the pursuers are not entitled to a diligence for the recovery of such documents.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

No interlocutor was pronounced.

WILLIAM GEDDES, Solicitor—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

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July 9, 1896. Dawson's Trustees v. Dawson.

PATRICK ALOYSIUS SMITH AND OTHERS (Dawson's Trustees), of the First Part.—*Outram.*

MRS ANN DAWSON, of the Second Part.—*Shaw—Lyon Mackenzie.*

MRS ANNIE WALLACE, of the Third Part.—*Abel.*

CATHERINE DAWSON, of the Fourth Part.—*Sol.-Gen. Dickson—Deas.*

Succession—Heritable and Moveable—Deed of Acknowledgment—Jus relictæ—Act 1661, *c.* 32.—An acknowledgment for a sum of money was granted in the following terms:—"Received from Mr Michael Dawson . . . the sum of £5000 stg. as a deposit for mission purposes, to bear interest at the rate of 4 per cent per annum, payable half-yearly at Martinmas and Whitsunday, and to be repaid on three months' notice." After Mr Dawson's death, *held* in a question between his widow and his testamentary trustees that the sum of £5000 was heritable as regarded *jus relictæ*.

Legitim—Heritable Bond.—Held that when a man leaves a widow and children, and part of his estate consists of a bond which is heritable *quoad jus relictæ*, and moveable *quoad* legitim, the children are entitled to one-half of the fund as legitim.

Succession—Election.—Observations (*per* Lord Kinnear) on the circumstances in which a widow, who has expressly accepted the provisions made for her in her husband's settlement, might still be entitled to recall her election and to claim *jus relictæ*.

1ST DIVISION.

MICHAEL DAWSON, Glasgow, died on 20th February 1895, survived by his widow, Mrs Ann Cannon or Dawson, and by two daughters, Mrs Annie Wallace and Miss Catherine Dawson.

Mr Dawson left a trust-disposition and settlement, whereby he conveyed his whole estate to trustees for certain purposes. *Inter alia*, he directed the trustees to make payment to his widow of a free yearly alimentary annuity of £52, to make payment to his daughter, Mrs Wallace, of an alimentary annuity of five shillings a-week, and to hold the residue of his estate for behoof of his daughter Catherine in liferent and her children in fee, whom failing the Archbishop and Chapter of the Roman Catholic Diocese of the Western District of Scotland in fee.

The net value of the estate left by Mr Dawson amounted to about £5992. The bulk of it, amounting to £5000, was deposited with the treasurer of the Roman Catholic Archdiocese of Glasgow upon the terms

[1] Tannett, Walker, & Co. v. Hannay & Sons, July 18, 1873, 11 Macph. 931, 45 Scot. Jur. 577.

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contained in the following deed of acknowledgment:—"Archdiocese of Glasgow.—Glasgow, 23d February 1892.—Received from Mr Michael Dawson, of 47 King Street, Glasgow, the sum of Five thousand pounds sterling (£5000), as a deposit for Mission purposes, to bear interest at the rate of 4 per cent per annum, payable half-yearly at Whitsunday and Martinmas, and to be repaid on three months' notice." This document was subscribed across a penny stamp by Archbishop Eyre and the diocesan treasurer, and was indorsed as follows:—"The sum acknowledged on the other side has been allocated as follows to the undernoted Missions on loan, but Mr Dawson is to receive his interest half-yearly direct from the Diocesan Treasurer, who is also to repay him the capital when required on three months' notice. JOHN A. MAGUIRE, Diocesan Treasurer."

[Here followed the allocation.]

After the death of the testator the agents for the trustees sent to the agents for Mrs Dawson and Mrs Wallace a copy of the deed of acknowledgment, and on 17th April 1895 received intimation from their agents that Mrs Dawson and Mrs Wallace repudiated their provisions under the settlement, and claimed their legal rights in the testator's estate. The agents for the trustees, in acknowledging this intimation, pointed out that in their opinion the £5000 was such an investment as fell under the provisions of the Act 1661, c. 32, and that therefore the widow had no legal rights in it. The agents for Mrs Dawson and Mrs Wallace thereupon withdrew their intimation until the point had been considered, and the trustees in the circumstances consented to that being done. The agents for Mrs Dawson and Mrs Wallace then took the opinion of counsel, and after consideration on 5th August 1895 intimated that Mrs Wallace claimed her legal rights in her father's estate, and on 4th September 1895 they wrote in regard to the widow's claim a letter in the following terms:—"We have yours of yesterday, and we beg to intimate that Mrs Dawson will accept the provisions in her husband's settlement." Mrs Dawson, in accordance with this intimation, afterwards accepted payment of her provisions under the settlement so far as due.

Questions having arisen as to the amount of the sum of £5000 which fell into legitim fund, and as to whether Mrs Dawson was entitled to recall her election, a special case was presented for Mr Dawson's trustees, of the first part, Mrs Dawson, of the second part, Mrs Wallace, of the third part, and Miss Catherine Dawson, of the fourth part.

The questions submitted to the Court were,—"1. Whether the second party is entitled, on repaying to the first party the amounts received by her from them, with interest at five per cent per annum from the respective dates of payment, to claim her legal rights, or whether she is barred from claiming said rights? 2. Whether the said sum of £5000 is moveable as regards succession in a question between the first and second parties, and whether the second party is entitled to claim one-third thereof as *jus relictæ*? 3. Whether in fixing the legitim fund the division of said sum of £5000 is bipartite or tripartite?"

Argued for the fourth party;—(1) The widow was not entitled to recall her election. The election was express, after she had been duly warned by the agents of the trustees that there might be a question whether the £5000 was subject to the *jus relictæ*. Election was of the

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nature of a contract or quasi-contract, and could only be set aside on the ground of fraud or of essential error induced by a misrepresentation, whether innocent or not.[1] Here the widow had the fullest knowledge. (2) But it was not necessary to decide whether the widow was entitled to resile. She had no interest to do so, for the sum in question fell clearly within the Act 1661, c. 32. That resulted from the clause of interest.[2] The estate therefore fell to be divided between the trustees and children claiming legitim.

The argument for the third party was the same as the second branch of the argument for the fourth party.

Argued for the second party;—(1) Nothing had been done to bar the widow from recalling her election. The estate had not been distributed. No one would be prejudiced.[3] If, on reconsidering her position, she claimed her legal rights, the trustees should have definitely ascertained what were her rights and put these before her.[4] (2) The sum in question did not fall under the Act 1661, c. 32. In *Downie's*[2] case there was a formal mortgage. Here there was nothing but a receipt for money, analogous to a deposit-receipt. A deposit-receipt was clearly not within the Act.

At advising,—

LORD KINNEAR.—The first question put to the Court in this case is, whether the widow of Mr Dawson is barred from claiming her legal rights. It appears that, shortly after the testator's death, she intimated to the trustees that she rejected the provisions in her favour, and claimed her legal rights; but that when it was pointed out to her that there might be a question whether a certain investment of £5000 was subject to the *jus relictæ*, she withdrew that intimation, and six months later, after she had obtained an opinion of counsel, she intimated that she accepted the provisions in her husband's settlement, and received payment of certain sums already due. This amounts to an express election. But if it were shewn that she acted under a false impression as to the relative value of her legal rights and her testamentary provisions, it may be that she might still reconsider her position and revert to her legal rights, because nothing has followed upon her election which might not easily be undone, so as to restore all parties to the same situation as if no benefit had been accepted under the will. But I think the only error suggested—for it is not explicitly set forth in the case—is that she may have been wrongly advised as to her interest in the sum of £5000 already mentioned, and it is therefore necessary to consider the question raised by the second query before determining the answer which should be made to the first.

The second question is whether the sum of £5000 is moveable as regards succession in a question between the first and second parties,—that is, between the testamentary trustees and the widow—and whether the second party, the widow, is entitled to claim one-third thereof as *jus relictæ*. That depends upon whether the fund in question is heritable or moveable,

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[1] Inglis' Trustees v. Inglis, May 31, 1887, 14 R. 740.

[2] Stair, iii. 4, 24; Ersk. ii. 2, 9; Downie v. Downie's Trustees, July 14, 1866, 4 Macph. 1067, 38 Scot. Jur. 554.

[3] M'Fadyen v. M'Fadyen's Trustees, Dec. 2, 1882, 10 R. 285.

[4] Ross v. Masson, Feb. 3, 1843, 5 D. 483, 15 Scot. Jur. 253.

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according to the law as it stood before the passing of the rescinded Act of 1641. At that date personal bonds with a clause of interest were supposed to constitute *feuda pecuniæ*, and were heritable *quoad* succession. The law was changed, first by the rescinded Act, and afterwards by the Act of 1661, cap. 32, which is now in force, and by which contracts and obligations for sums of money with clauses of interest are made moveable as to ordinary succession, but under this declaration, that "all such bonds, *quoad fiscum*, shall remain in the same condition as they were before the 16th of November 1641, nor shall any part thereof pertain to the relict *jure relictæ*, nor to the husband *jure mariti*." The question therefore is whether the document set forth in the 8th article of the case is a contract or obligation for money, which before 1641 must have been held as heritable. Now, it acknowledges receipt of a sum of £5000, to bear interest at the rate of 4 per cent, and to be repaid on three months' notice. It has been determined by many decisions, and it is laid down as settled law by the institutional writers, that it is the payment of interest which fixes the heritable character of a personal bond. The case of *Downie* v. *Christie* [1] is directly in point, except in this one respect, that in that case the loan was for a period of time, and to bear interest periodically before the arrival of a fixed term of payment, whereas in the present case there is no fixed term of repayment, but the money is repayable on three months' notice. But that distinction makes no difference, because the old law was that where the term of payment of a bond was at a distant or uncertain date the bond was accounted heritable after the first term for payment of the interest, because the distance or the uncertainty of the term for payment of the principal afforded evidence that the creditor intended from the beginning to employ his money for a term of years together at interest. Whatever may be thought of the reason of this rule, according to the now established principles of law, the rule itself is fixed. These, like other personal bonds, are now moveable by statute; but the rights of the fisk and of widows are excluded from the operation of the Act. It follows that the second party has no more right to participate in the sum of £5000 in question than if it were still heritable to all intents and purposes; and that she was rightly advised if she made her election upon that assumption.

In these circumstances I presume that she has no interest to claim *jus relictæ* in place of the testamentary provisions in her favour. But I know of no authority for holding that any express election which has been partly carried into effect can be recalled at pleasure if it has been made, not in ignorance or error, but in full knowledge of the existence and value of the abandoned right in comparison with that which has been accepted. Therefore, if we were to answer the first question, I am unable to find in the statement of the case any state of facts which would enable us to decide it in the affirmative. In the view I take, however, of the question raised by the second query it would appear to me that the parties have no interest in the decision of the first, and therefore it is unnecessary to answer it.

The third question is whether, in fixing the legitim fund, "the division of the said sum of £5000 is bipartite or tripartite." As to that I entertain

[1] 4 Macph. 1067, 38 Scot. Jur. 554.

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no doubt. The money is moveable as regards succession, for all purposes except the fisk and the *jus relictæ*. It follows that the executor and the children claiming legitim are entitled to share, and as no one else has a right to participate, the division must be an equal division between these two parties. The law is clearly stated by Mr Erskine,—"Personal bonds due to the husband, because by the Act 1661 they are moveable in respect of succession, and heritable as to the widow, must therefore increase the legitim and the dead's part, but not the *jus relictæ*." I am not aware that the law so laid down has ever been called in question, and I am therefore of opinion that we should answer the third question, that the division must be into two and not into three parts.

LORD M'LAREN.—I agree with Lord Kinnear's opinion upon all the points, and I will only add, with reference to the construction of this old statute of the 17th century, that while it is true that the question as to the widow's rights is not a question under the statute, but is a question under the common law of Scotland which the statute left standing as regards the widow's rights, yet I venture to think that the terms of the statute are the best evidence that we have as to the rule of the common law at that time, which, in regard to the rights of the widow, remains unaltered. The statute is antecedent in date to the writings of our institutional writers, and it is reasonable to suppose that the remedy was co-extensive with the mischief intended to be put right. Now, the law which it was desired to correct was the law under which certain funds that are moveable in their own nature were considered to be heritable by reason of their running for a tract of future time to the effect of diminishing the fund divisible amongst the younger children. I think that the case where property which is now moveable in regard to the rights of the younger children, but heritable as regards the rights of the widow, is just the case described in the statute. Now, applying that description to the particular security with which we have to deal, it seems to me that this security completely answers the description, because it contains a promise to repay the capital, and also a clause of interest or annualrent. Our decision of course would have no application to receipts for money in the ordinary form, which never contain an obligement to pay the principal, and not usually a clause of interest, that being left to stand upon implication or separate agreement.

I agree that the questions should be answered in the way that has been suggested by Lord Kinnear.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT found it unnecessary to answer the first question; found in answer to the second question that the second party was not entitled to claim one-third of the sum of £5000 as *jus relictæ*; and found in answer to the third question that in fixing the legitim fund the division of the sum of £5000 was bipartite.

MORTON, SMART, & MACDONALD, W.S.—ANDREW URQUHART, S.S.C.—J. A. CAIRNS, S.S.C.—Agents.

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Galbraith & Moorhead v. Arethusa Ship Co., Limited.

GALBRAITH & MOORHEAD, Pursuers (Appellants).—*Ure—Younger.*
THE ARETHUSA SHIP COMPANY, LIMITED, Defenders (Respondents).—*Balfour—Salvesen.*

Contract—Agent and Principal—Shipbroker—Construction—Right of party to terminate agreement at pleasure.—A firm of brokers offered to take £500 in shares in the Arethusa Ship Company, "provided that we are appointed sole chartering brokers for the Arethusa, and that all her charters are to be done through us . . . it of course being always understood that we are able to do as well as any other brokers regarding rates and terms. . . ." The offer was accepted by the company. The brokers took the shares, and the agreement was acted on for several years. *Held* that the agreement was not terminable at the pleasure of the company.

1ST DIVISION. Sheriff of Renfrew and Bute.

THIS was an action raised in the Sheriff Court of Renfrew and Bute at Greenock by Galbraith & Moorhead, shipbrokers in London, against the Arethusa Ship Company, Limited, concluding for £600 as damages for breach of contract.

The agreement in question was contained in the following letters passing between the pursuers and Macfarlane & Company, shipbrokers, Greenock, the managers of the Arethusa Ship Company:—1. Galbraith & Moorhead to Macfarlane & Company.—"9th Sept. 1891.—Dear Sirs,—Referring to previous interviews and correspondence, we now beg to say that we are prepared to take £500 in shares in the above company, provided that we are appointed sole chartering brokers for the 'Arethusa,' and that all her charters are to be done through us, the company paying us the usual brokerage of 1¼ per cent on each charter, it of course being always understood that we are able to do as well as any other brokers regarding rates and terms; also we are to have a line of insurance either on hull or freights of not less than £5000 p. voyage, of course also provided that we can do as well as other brokers; and we agree to return Messrs J. M. Macfarlane & Company half of our 5 per cent brokerage. We shall be glad to hear from you by return with your confirmation of this arrangement. Meantime, we remain, dear sirs, yours faithfully."

2. Macfarlane & Company to Galbraith & Moorhead.—"15th Sept. 1891.—Dear Sirs,—Yours to hand, contents noted, and we agree to your proposal to take £500 in this ship in terms of your favour of the 9th inst., which shall be held as the basis of our agreement. . . ."

The pursuers averred;—This agreement was acted on for some years; but lately a change took place in the management, and the defenders have, in breach of their agreement with the pursuers, failed to employ them as their sole chartering brokers.

The defenders pleaded;—(1) The action is irrelevant, and should be dismissed. (2) The defenders not being parties to said agreement, and the letters founded on not having been executed by them, they are not bound thereby, and have committed no breach, and should be assoilzied. (3) *Et separatim*, even assuming the defenders were made parties to said agreement by Messrs Macfarlane—(*a*) it being *ultra vires*, or in restraint of the company's liberty, was void; or (*b*) being terminable at any time, no action lies, and the defenders should be assoilzied.

On 21st January 1896 the Sheriff-substitute (Henderson Begg) dismissed the action.*

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* "NOTE.— . . . The opinion I have formed as to the true meaning of the letters founded on by the pursuers renders it unnecessary for me

No. 193. On 7th March 1896 the Sheriff (Cheyne) adhered.*

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to decide more than the first of the pleas referred to. Under the agreement constituted by the letters of September 1891, the pursuers were appointed sole chartering brokers for the defenders' ship 'Arethusa,' and they aver that the agreement was acted on till lately, when a change took place in the management of the defenders' company. The new managers of the company have failed to employ the pursuers as their sole chartering brokers, and this is averred by the pursuers to be a breach of the agreement, entitling them to the damages sued for. Now, the agreement does not specify any terms of duration, and the pursuers maintain that it must therefore be construed as a perpetual agreement, subject only to such contingencies as would be sufficient in point of law to put an end to even an agreement for a fixed period (see *Rhodes & Forwood*, 4th May 1876, 1 App. Cases, 256, and *Patmore & Company* v. *Cannon & Company*, 14th July 1892, 19 R. 1004). But I do not know of any authority for the proposition that an agreement indefinite as to its duration is equivalent to a perpetual agreement, while authority to the contrary effect may, I think, be found in the cases of *Dunlop & Company* v. *Steel & Company*, 27th November 1879, 7 R. 283; *Fifeshire Road Trustees* v. *Cowdenbeath Coal Company*, 19th October 1883, 11 R. 18; and *Cormack* v. *Keith & Murray*, 15th July 1893, 20 R. 977. In the words of the late Lord President in the second of these cases, 'I do not think that the law recognises an agreement of this kind as perpetual; and where there is no term stated, the general rule is that either party may put an end to it, not on reasonable cause shewn, but on reasonable notice.' In the present case, the pursuers make no averments as to the defenders having failed to give reasonable notice. In the course of the debate before me, I offered the pursuers' procurator an opportunity of amending the record by the addition of such averments, but he declined the offer (quite rightly, I have no doubt), on the ground that any damages which he might so qualify would be too small to be worth suing for in the ordinary Sheriff Court."

* "NOTE.— . . . So far as I can judge, none of the three cases mentioned by the Sheriff-substitute rules the present case.

"The earliest of them—*Dunlop & Company* v. *Steel & Company*, 1879, 7 R. 283—was treated by the Court as a case having to do with a lease of water power, and there being no ish specified, the Court, applying a well-known principle in the law of leases, held the contract not to be binding.

"The contract in the second case—*Fifeshire Road Trustees* v. *Cowdenbeath Coal Company*, 1883, 11 R. 18—might perhaps have been treated as a contract of lease also, but the Court did not so treat it. They dealt with the case as one of the construction of an innominate contract. Two constructions of the deed in which the contract was embodied were possible. One was that the road trustees might at any time, or at least on reasonable notice, call for the removal of a railway which they had on certain conditions allowed the coal company to place across one of the roads under their charge, and the other was that they were not entitled to do so unless and until they were in a position to say that the public safety was being endangered, or that the public were being put to inconvenience. The presumption, as the Lord President stated, was in favour of the former of these two alternative views, and as the Court found nothing in the deed to redargue the presumption, they gave effect to it, Lord Shand pointing out that there were some considerations drawn from the deed itself which favoured the conclusion that the agreement was not meant to be perpetual, viz., that nothing in the shape of a *grassum* had been paid by the coal company for the privilege of having the railway where it was, and that there was no obligation placed upon the company to continue to use the railway or pay the wayleave.

"The remaining case is *Cormack* v. *Keith & Murray*, 1893, 20 R. 977, where a testator in his trust-settlement appointed A. B. to be agent to the

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The pursuers appealed to the Court of Session, and argued;—There was no question of general law involved, but merely of the construction of a particular contract. The pursuers did not maintain, as the Sheriffs seemed to think, that the contract was in perpetuity. On the contrary, it was terminable in many events, *e.g.*, the liquidation of the pursuers' company, the laying up of the ship owing to too low freights, the loss of the ship, or if the pursuers did not do as well as other brokers. The Sheriff had overlooked the clause in the agreement beginning, "it of course being always understood." That was sufficient to safeguard the defenders against the pursuers becoming lax in their efforts to find charters. It was a contract that the pursuers, other things being equal, should have a preference. The contention of the defenders was extravagant, for it came to this, that a week after the agreement was concluded they would have been entitled to terminate it at pleasure. The pursuers had given valuable consideration. The cases cited in the inferior Court had no bearing.

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trust, and at the same time gave his trustees power to appoint law-agents, and where the Court held the trustees entitled to dispense with A. B.'s services when they saw fit, there being nothing in the deed to warrant the inference that the testator intended A. B.'s appointment to be a permanent one.

"From this summary, it will be seen that none of these cases is an authority for the broad proposition that where in a mutual contract, obviously intended to endure for some time, the period of duration is not expressly mentioned, the contract is, in the absence of any recognised usage, to be held to be terminable by either party on reasonable notice. Doubtless there is a presumption to that effect, but it is not a *præsumptio juris et de jure*. In every case the Court will proceed upon a construction of the document or documents constituting the agreement, and will give effect to the intention of the parties as gathered by clear or necessary implication from the terms in which they have expressed themselves.

"Is it, then, as the pursuers contend, a fair and reasonable inference to draw from their letter of 9th September 1891, which really contains the terms of the agreement now in question, that the agreement was to subsist, or in other words, the employment of the pursuers as chartering and insurance brokers for the 'Arethusa' was to continue till either the pursuers' firm was dissolved or the company was wound up? In support of their contention, the pursuers found strongly upon the fact that they gave substantial consideration for the appointment, inasmuch as they agreed to take, and did take, fifty £10 shares in the company, which, it was argued, they would not have been likely to do if the appointment had been terminable at any time, and they point to the clause,—'All her' (*i.e.*, the 'Arethusa's) 'charters are to be done through us,' as shewing that the appointment was intended to be a permanent one. These considerations are certainly not without force, though, as regards the latter of them, it may be observed that it is a possible, though not perhaps the most natural, reading of the clause, to read it as if it ran—'All her charters during the continuance of this agreement,' an interpretation which would of course deprive the clause of all importance in its bearing upon the question now to be determined. There is, however, one consideration which is, as it seems to me, fatal to the view presented by the pursuers as to the inference deducible from the letter of 9th September 1891, and it is this, that, as I read the letter, the pursuers are not put under any obligation to exert themselves in the way of procuring charters for the vessel. If the remuneration mentioned in the letter became at any time, in their opinion, too small, or if for any reason they wished to get rid of the agreement, they would decline to take any trouble to obtain charters. In other words, they had it in their power to

No. 193.

July 9, 1896. Galbraith & Moorhead v. Arethusa Ship Co., Limited.

Argued for the defenders;—This was a contract of service. It was against public policy that such a contract should be perpetual,[1] yet what the pursuers contended for was practically perpetuity. The Court would not regard such a contention with favour, or readily read into a contract such a term.[2] No sufficient consideration had been given for the imposition of such an obligation. Besides, the so-called consideration was really no consideration to the company. Other persons would have taken the shares if the pursuers had not. The Sheriff had rightly read the agreement as not taking the pursuers bound to exert themselves and do their best for the defenders.

At advising,—

LORD PRESIDENT.—The defenders' company was formed for the objects of purchasing, owning, and working the ship "Arethusa," and its operations were, by the memorandum of association, confined to that vessel. By the agreement, for breach of which this action is brought, the pursuers agreed to take £500 in shares of the company, provided they were appointed sole chartering brokers for the "Arethusa," and that all her charters were done through them, it being always understood that they were able to do as well as any other brokers regarding rates and terms.

The defenders claim right to "terminate the agreement at any time," and their way of doing so is simply by giving other brokers their charters, because they so please. The Sheriff-substitute and the Sheriff, on different grounds, have sustained this contention. I am unable to concur in this result, or in the reasoning of either Sheriff.

First of all, what is the fair reading of the agreement so far as duration goes? I think it means simply this: that, so long as the pursuers' firm are in business, and do as well as other brokers regarding rates and terms, they shall get the "Arethusa's" charters. To call this a perpetual contract is surely inaccurate. The conditions are the continued existence of the "Arethusa" and of the pursuers' firm, and also the getting by them of as good rates and terms as other brokers get. The life of a ship is very far from a perpetuity; the joint lives of a ship and a firm of brokers still farther; while the condition about rates and terms still more reduces the stability of the tenure. When the employment, such as it is, is the counterpart for a substantial contribution of capital, the arrangement does not seem to call for remark or to warrant any reluctance in treating a breach of it as a breach of contract.

Accordingly, I do not agree with the Sheriff-substitute in considering this

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terminate at any time the relation constituted by the agreement, and that being so, it appears to me that it would require clearer *indicia* than are to be found within the four corners of the letters founded on to warrant the conclusion that the company meant to come under an obligation to employ the pursuers as their chartering and insurance brokers during the period of their joint existence.

"Accordingly, while I feel more difficulty about the case than the Sheriff-substitute appears to have felt, I feel obliged to concur in the result at which he has arrived. . . ."

[1] Fraser, Master and Servant, p. 56.

[2] Fifeshire Road Trustees v. Cowdenbeath Coal Co., Oct. 19, 1883, 11 R. 18.

contract to be indefinite in its duration, and (agreeing here with the Sheriff) I do not think that the cases cited by the Sheriff-substitute rule the present case, or indeed have the general application which he ascribes to them. On the other hand, I am unable to regard the absence of an obligation on the defenders to exert themselves in the way of procuring charters for the vessel as of decisive importance. I should have thought this necessarily implied. And yet this is the circumstance which has determined the decision of the Sheriff.

If the construction which I put on the contract be sound, there is, so far as I know, no rule of law which refuses it effect. There is nothing illegal in a trader engaging to give all his business, so long as he carries it on, to a broker, for any consideration he likes, if a contract to this effect be made in writing. Again, no valid argument, indeed no argument at all, was offered us to the effect that this "Arethusa Ship Company, Limited," could not enter into such a contract; if an individual could, and if the company could, then the "managers" could, for the "managers" have the most absolute power to do everything competent to the company except what is expressly reserved for general meetings (an exception which, of course, has no application to the present question).

I think that the first and third pleas of the defenders should be repelled, and the case remitted to the Sheriff to allow a proof, and to proceed. It would, I think, be premature to dispose of the defenders' second plea until the facts are ascertained, although this does not imply any undue appreciation of its importance on averment.

LORD ADAM.—I agree with the Sheriff that this case depends solely upon the construction of the agreement contained in the letter of 9th September 1891, by which the pursuers were appointed sole chartering brokers for the "Arethusa," and the question is, whether that agreement could be determined by the defenders on reasonable notice, or on reasonable cause only. Now, it will be observed that the pursuers paid for the appointment of sole charterer's brokers, and the consideration was their taking £500 in shares of the company, which it is not disputed they did. I have great difficulty in holding that an agreement for which consideration had been thus given could be terminated at will by the other contracting party.

I observe that the Sheriff says this:—"There is, however, one consideration which is, as it seems to me, fatal to the view presented by the pursuers, and it is this, that, as I read their letter, the pursuers are not put under any obligation to exert themselves in the way of procuring charters for the vessel." I think the Sheriff is wrong in this, because the agreement bears to be entered into "on the understanding" that the pursuers are able to do as well as any other brokers regarding rates and terms. I suppose the pursuers could not do as well as any other brokers unless they exerted themselves to get charters, and that is equivalent to saying that if the pursuers do not exert themselves in procuring good charters for the vessel, the defenders would be entitled to put an end to the agreement.

On the whole, I am of opinion that the agreement was not terminable at the will of the defenders, but only on cause shewn.

LORD M'LAREN and LORD KINNEAR concurred.

No. 191.

July 9, 1896. Stuart v. Great North of Scotland Railway Co.

The railway company objected that the reports sought to be recovered were confidential.

The pursuers maintained that the reports were not confidential.[1]

LORD JUSTICE-CLERK.—This is practically a demand for confidential reports made to the railway company by their own servants. I think that the pursuers are not entitled to a diligence for the recovery of such documents.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

No interlocutor was pronounced.

WILLIAM GEDDES, Solicitor—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

No. 192.

July 9, 1896. Dawson's Trustees v. Dawson.

PATRICK ALOYSIUS SMITH AND OTHERS (Dawson's Trustees), of the First Part.—*Outram.*

MRS ANN DAWSON, of the Second Part.—*Shaw—Lyon Mackenzie.*

MRS ANNIE WALLACE, of the Third Part.—*Abel.*

CATHERINE DAWSON, of the Fourth Part.—*Sol.-Gen. Dickson—Deas.*

Succession—Heritable and Moveable—Deed of Acknowledgment—Jus relictæ—Act 1661, *c.* 32.—An acknowledgment for a sum of money was granted in the following terms:—"Received from Mr Michael Dawson . . . the sum of £5000 stg. as a deposit for mission purposes, to bear interest at the rate of 4 per cent per annum, payable half-yearly at Martinmas and Whitsunday, and to be repaid on three months' notice." After Mr Dawson's death, *held* in a question between his widow and his testamentary trustees that the sum of £5000 was heritable as regarded *jus relictæ*.

Legitim—Heritable Bond.—Held that when a man leaves a widow and children, and part of his estate consists of a bond which is heritable *quoad jus relictæ*, and moveable *quoad* legitim, the children are entitled to one-half of the fund as legitim.

Succession—Election.—Observations (*per* Lord Kinnear) on the circumstances in which a widow, who has expressly accepted the provisions made for her in her husband's settlement, might still be entitled to recall her election and to claim *jus relictæ*.

1ST DIVISION.

MICHAEL DAWSON, Glasgow, died on 20th February 1895, survived by his widow, Mrs Ann Cannon or Dawson, and by two daughters, Mrs Annie Wallace and Miss Catherine Dawson.

Mr Dawson left a trust-disposition and settlement, whereby he conveyed his whole estate to trustees for certain purposes. *Inter alia*, he directed the trustees to make payment to his widow of a free yearly alimentary annuity of £52, to make payment to his daughter, Mrs Wallace, of an alimentary annuity of five shillings a-week, and to hold the residue of his estate for behoof of his daughter Catherine in liferent and her children in fee, whom failing the Archbishop and Chapter of the Roman Catholic Diocese of the Western District of Scotland in fee.

The net value of the estate left by Mr Dawson amounted to about £5992. The bulk of it, amounting to £5000, was deposited with the treasurer of the Roman Catholic Archdiocese of Glasgow upon the terms

[1] Tannett, Walker, & Co. v. Hannay & Sons, July 18, 1873, 11 Macph. 931, 45 Scot. Jur. 577.

No. 192.
July 9, 1896.
Dawson's Trustees v. Dawson.

contained in the following deed of acknowledgment:—"Archdiocese of Glasgow.—Glasgow, 23d February 1892.—Received from Mr Michael Dawson, of 47 King Street, Glasgow, the sum of Five thousand pounds sterling (£5000), as a deposit for Mission purposes, to bear interest at the rate of 4 per cent per annum, payable half-yearly at Whitsunday and Martinmas, and to be repaid on three months' notice." This document was subscribed across a penny stamp by Archbishop Eyre and the diocesan treasurer, and was indorsed as follows:—"The sum acknowledged on the other side has been allocated as follows to the undernoted Missions on loan, but Mr Dawson is to receive his interest half-yearly direct from the Diocesan Treasurer, who is also to repay him the capital when required on three months' notice. JOHN A. MAGUIRE, Diocesan Treasurer."

[Here followed the allocation.]

After the death of the testator the agents for the trustees sent to the agents for Mrs Dawson and Mrs Wallace a copy of the deed of acknowledgment, and on 17th April 1895 received intimation from their agents that Mrs Dawson and Mrs Wallace repudiated their provisions under the settlement, and claimed their legal rights in the testator's estate. The agents for the trustees, in acknowledging this intimation, pointed out that in their opinion the £5000 was such an investment as fell under the provisions of the Act 1661, c. 32, and that therefore the widow had no legal rights in it. The agents for Mrs Dawson and Mrs Wallace thereupon withdrew their intimation until the point had been considered, and the trustees in the circumstances consented to that being done. The agents for Mrs Dawson and Mrs Wallace then took the opinion of counsel, and after consideration on 5th August 1895 intimated that Mrs Wallace claimed her legal rights in her father's estate, and on 4th September 1895 they wrote in regard to the widow's claim a letter in the following terms:—"We have yours of yesterday, and we beg to intimate that Mrs Dawson will accept the provisions in her husband's settlement." Mrs Dawson, in accordance with this intimation, afterwards accepted payment of her provisions under the settlement so far as due.

Questions having arisen as to the amount of the sum of £5000 which fell into legitim fund, and as to whether Mrs Dawson was entitled to recall her election, a special case was presented for Mr Dawson's trustees, of the first part, Mrs Dawson, of the second part, Mrs Wallace, of the third part, and Miss Catherine Dawson, of the fourth part.

The questions submitted to the Court were,—"1. Whether the second party is entitled, on repaying to the first party the amounts received by her from them, with interest at five per cent per annum from the respective dates of payment, to claim her legal rights, or whether she is barred from claiming said rights? 2. Whether the said sum of £5000 is moveable as regards succession in a question between the first and second parties, and whether the second party is entitled to claim one-third thereof as *jus relictæ*? 3. Whether in fixing the legitim fund the division of said sum of £5000 is bipartite or tripartite?"

Argued for the fourth party;—(1) The widow was not entitled to recall her election. The election was express, after she had been duly warned by the agents of the trustees that there might be a question whether the £5000 was subject to the *jus relictæ*. Election was of the

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July 11, 1896.
Scottish Employers' Liability, &c., Assurance Co., Limited.

The terms in which that should be done are a matter of adjustment with the Board of Trade. As regards the second point, the Court is of opinion that further advertisement should be made.

I may take this opportunity of saying, that in preparing petitions far less attention than is appropriate is paid to the question to whom intimation should be made. It is impossible for the Judge who has charge of the Single Bills to detect or realise the necessity for further advertisement, yet sometimes the inept form, "or such intimation as your Lordships may think proper," is adopted. The only protection is that we have a remit to an accomplished man of business who detects the deficiency in the advertisement, with the consequence of involving parties in greater expense than would have been necessary if the appropriate intimation had been made at first.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"Appoint intimation of article 3 of the original memorandum of association, and of the new article of the memorandum proposed to be substituted therefor, to be made by advertisement once in each of the *Scotsman* and *Aberdeen Daily Free Press* newspapers, and appoint all parties having interest to lodge answers, if so advised, by the first box-day in vacation."

MACPHERSON & MACKAY, S.S.C., Agents.

No. 195.
July 11, 1896.
Parish Council of Rutherglen v. Parish Council of Barony.

PARISH COUNCIL OF THE CITY PARISH OF GLASGOW, Pursuers.
PARISH COUNCIL OF THE PARISH OF RUTHERGLEN, Defenders (Appellants).—*Salvesen—Deas.*
PARISH COUNCIL OF THE BARONY PARISH OF GLASGOW.—*D.-F. Asher—W. Thomson.*

Poor—Recourse against other parishes—Admission of Liability—Proof of residential settlement.—In 1892 Barony Parish gave parochial relief for seven days to three illegitimate children of a married woman who had been deserted by her husband in 1879. Barony having claimed repayment from Rutherglen, the husband's birth parish, Rutherglen resisted the claim on the ground that the woman had acquired a settlement in Barony by continuous residence therein for five years from August 1883. The two parishes then entered into a joint investigation, in the course of which a signed statement was taken from the woman setting forth her successive places of residence during the five years in question. All these places of residence were in Barony. Thereafter Barony withdrew its claim.

In 1895 the question again arose as to the liability of Rutherglen or Barony for the maintenance of the children, the question still depending on whether the mother had by 1888 acquired a settlement in Barony. The mother had died, and the only evidence, in addition to her statement above mentioned, was the children's birth certificates, which corroborated the mother's statement.

Held (1) that the mere fact that Barony withdrew its claim in 1892 did not import an admission of liability; but (2) that the evidence as a whole shewed that the mother had acquired a residential settlement in Barony Parish.

Poor—Residential Settlement—Interruption of acquisition by receipt of parochial relief.—*Held* that the acquisition of a residential settlement had not been interrupted by the pauper having received small sums from a

parochial board for the purchase of medicine, the pauper not having been a proper object of relief at the time she received these sums. No. 195.

July 11, 1896
Parish Council of Rutherglen v. Parish Council of Barony.
2D DIVISION. Sheriff of Lanarkshire.

IN January 1896 the Parish Council of the City Parish of Glasgow raised an action in the Sheriff Court at Glasgow against the Parish Council of the Parish of Rutherglen, or alternatively against the Parish Council of the Barony Parish, Glasgow, for payment of £38, 12s. 10d. as the amount, with interest, expended by the pursuers on the maintenance of two pauper children named David and John Cross from 20th March 1894 till the raising of the action.

The paupers were the illegitimate children of a Mrs Rose Ann Rice or Ferrier, by a man named Cross. Mrs Ferrier was deserted by her husband Ferrier in 1879, his settlement being then in Rutherglen, the parish of his birth, and it was admitted that Rutherglen was liable for the support of the children, unless Mrs Ferrier had acquired a residential settlement in Barony after her husband's desertion.

Rutherglen averred that she had acquired such a settlement by continuous residence in Barony for five years from August 1883, and that in any event Barony had in certain prior proceedings respecting the children admitted liability.

Barony denied that they had made any admission of liability, and averred that Mrs Ferrier had not resided in their parish continuously for the five years in question, and that even if she had they were not liable, in respect that she had on several occasions during that period been in receipt of parochial relief for herself and her children.

A proof disclosed the following facts:—

From certificates of births produced, and admitted by the parties, it appeared that Mrs Ferrier and Cross had had in all four children, of whom three were born in Barony Parish during the five years in question, viz.:—Mary Cross, born on 25th July 1884, at 85 George Street, Mile-end, Barony; David Cross, born on 10th January 1888, at 16 William Street, Mile-End, Barony: and John Cross, born on 31st January 1889, at 85 George Street, Mile-End, Barony. The fourth child, Ann Cross, was born on 1st May 1891, at 8 Duncan Street, in the City Parish, and died in August 1891, at 85 William Street, Mile-End, Barony. Cross died in July 1892.

In August 1892 Mrs Ferrier was sentenced to seven days' imprisonment for assault, and during these seven days her children received relief from Barony. Barony made a claim against Rutherglen for repayment of this relief. Rutherglen resisted the claim, alleging that Mrs Ferrier had acquired a residential settlement in Barony. The two parishes then entered into a joint investigation, in the course of which Mrs Ferrier and her niece made the following written statement:—

"23d March 1893.

"Robert Ferrier's Wife.

"Pauper states she went to E. Rose Street, where she applied to City Parish, 13th July 1883, and left about one month after.

"After leaving above address, I went to 18 William St., M.-E., 30 Coalhill St., 16 William St., M.-E., George St., M.-E., 30 Coalhill St., 16 William St., where daughter Lilly died on 13th April 1888. After she died I went to 85 George Street, where John was born 31/1/89. I then went to Coalhill St., then Duncan Street (lodging for 4 or 5 months with Mrs Dorrans), then to 18 William Street, M.-E., then E. Hill Street, then E. John Street, where I was living when my children were sent to Poorhouse.

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"I cannot specify the exact periods I was in any of the above-mentioned houses, but always had a house in my own or Cross's name.

"J. P. Brand,
"Witness.

ROSE ANN RICE or her × mark FERRIER.

"Allan S. Edmiston,
"Witness.

ROSE ANN RICE or her × mark FULTON.

"Rutherglen, 23d March 1893."

The witness Brand was assistant inspector of Barony, and the witness Edmiston was inspector of Rutherglen.

In May 1893 Barony withdrew their claim against Rutherglen, but gave Rutherglen no written admission of liability.

On this point the books of Barony Parish bore, under date 11th May 1893,—"Claim withdrawn against Rutherglen; settlement alleged to be Barony by residence."

Edmiston, inspector of Rutherglen, deponed,—"I have no written admission by or on behalf of Barony Parish of a residential settlement of the woman in their parish. . . . This final settlement was purely verbal."

Motion, inspector of Barony, deponed,—"It is not the case . . . that I agreed on behalf of Barony Parish to admit certain settlement of residence in that parish; I did nothing of the kind. I am not aware of any verbal arrangement or agreement come to between us personally that I was to admit settlement, nor is it the case that what we then ascertained was to be final for all time and binding on our parish. We came to no such arrangement, and there was no such arrangement that I am aware of."

The evidence regarding the alleged receipt of parochial relief by Mrs Ferrier during the period in which she was said to be acquiring a residence in Barony was to the following effect:—Mrs Ferrier had a legitimate daughter named Lilias Ferrier, who was born on 21st March 1876, and died on 30th April 1888 at 16 William Street, Mile-End, Barony. At various dates between 21st February 1888 and 24th April 1888 Mrs Ferrier received small sums from Barony for medicines for this daughter, and she also received from Barony between the same dates other small sums for the same purpose for herself. The total amount of the former sums was 10s. 9d. and of the latter 6s. 8d.

With reference to these payments Edmiston, the inspector of Rutherglen, deponed,—"I think it was ascertained and established that she had deceived the Barony Parish; she said distinctly that she deceived the inspector of the Barony Parish so that she might receive the attendance of Dr Murdoch, who had a great name for the treatment of consumption. It was also improper relief, because the woman was living in adultery with a man named Cross, who was working as a carter, and she was making cushions, and was not a proper object of relief."

The books of Barony Parish Council, of date 22d April 1893, bore, with reference to the same matter,—"Pauper states she deceived the inspector as to her income, &c. States she had three girls hawking cushions which she had made. It was the neighbours who had told her to apply to the parish to get Dr Murdoch, as they thought he would be better able to pick up her daughter's trouble."

These payments were under the consideration of the two parishes

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in 1892-3, when the question of Mrs Ferrier's settlement was first raised. Barony gave no notice to Rutherglen of these payments at the time they were made.

Mrs Ferrier died on 23d November 1893 in Stirling Poorhouse.

On 28th May 1896 the Sheriff-substitute (Spens) pronounced this interlocutor:—" . . . Finds no proof was led to establish that a residential settlement had been acquired by the said Rose Ann Rice or Ferrier in Barony: Finds it not proved that liability was admitted by Barony Parish *quoad* said children at any time, so as to bar them in this action from disputing liability: Finds therefore the defenders, the Parish Council of the parish of Rutherglen, are liable for the sum sued for, being the fair and reasonable amount for the aliment of said children from the 20th March 1894 until the raising of the present action, with interest thereon from the dates of expenditure: Therefore repels the defences, and decerns against the defenders, the said Parish Council of the parish of Rutherglen," &c.

Rutherglen appealed.[1]

At advising,—

LORD JUSTICE-CLERK.—In this case the question is whether the parish of Rutherglen or the parish of Barony in Glasgow is chargeable for sums given in relief by the City Parish of Glasgow to certain paupers. The questions are (1) whether the Barony Parish made a final admission of liability, and (2) if not, whether the paupers' mother acquired a residential settlement in Barony; and (3) if there was residence for the necessary period, whether the time of residence was interrupted by relief having been applied for and given to her during the period.

As regards the first question, it is not in my opinion made out that there was admission by Barony of liability.

As regards the second the evidence is somewhat peculiar. The mother is now dead, but there is in evidence a statement signed by her, which, if true, shews that she did acquire a settlement in Barony between the years 1883 and 1889. If that statement had been taken from her by the inspector of Rutherglen only, I should not have attached weight to it. Although signed, it would have been in fact nothing but a precognition, which is never admitted as proof, being taken by an interested party, and therefore not necessarily conveying a true deposition of the person examined. But the document is not in that position. It was taken and is authenticated by the signatures of both the representative of Barony and the representative of Rutherglen at the time. It is therefore certified at the time as truly expressing what the deceased had to state in evidence had there been opportunity for examining her. I hold therefore that it is evidence, just as the recollection of what she stated to any person on the matter, not being precognition, would have been admissible. But I think it further to be more weighty than such recollection would have been. It is in truth her written statement of facts, deliberately made and accepted as deliberately made by both the parties. The next question is—Is it corroborated? I think it is substantially corroborated by the birth and death certificates of her children, which are produced, which fix her residence at various times

[1] *Authorities cited.*—Dempster v. Lemon, Nov. 29, 1878, 6 R. 278; Wallace v. Dempster, Oct. 22, 1880, 8 R. 27.

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in the places set forth in the statement. There is no contrary evidence, and I hold it sufficiently established that there was residence for the necessary period in Barony.

But it is said, and that is the third point, that residence was interrupted by parochial relief given in the spring of 1888. If this was the fact, it is strange that Barony should have withdrawn from its claim against Rutherglen. But I am satisfied that there was no true interruption, because although certain medical relief was given, the deceased was not truly a person entitled to parochial relief at the time, and got the medical treatment by deceiving the parochial authorities, and she was working and earning money at the time, and living in family with a man who kept her. All this was before Barony Parish at the time, and they on 11th June 1893 noted "claim withdrawn against Rutherglen." This, though it is not held final, may well account for paucity of evidence, as Rutherglen had no reason to suppose that Barony would raise any further question.

I move your Lordships to recall the interlocutor of the Sheriff-substitute, and to decern against the Inspector of Barony.

LORD TRAYNER.—I think the appellants have failed to shew that any admission was ever made by the Barony Parish of its liability for the relief of the paupers' mother, at least of such a nature as now to bar that parish from maintaining its present defence. On the other hand, I think the appellants have established that the paupers' mother acquired a residential settlement in Barony, between August 1883 and August 1889. Whether the acquisition of that settlement was barred by reason of parochial relief being afforded by Barony to the paupers' mother in the early part of the year 1888, is a more difficult question. But I have come to be of opinion that at the date when such parochial relief was afforded, the paupers' mother was not a proper object of parochial relief, and that the relief afforded did not therefore bar the acquisition of the settlement. I see no ground for holding that that settlement had been lost when the paupers became chargeable.

LORD MONCREIFF.—Three questions have been argued to us. (1) Did Barony finally admit liability? (2) Assuming that it did not, did the paupers' mother, Mrs Ferrier, reside in the Barony Parish for five years between August 1883 and 31st January 1889? And (3) Was the acquisition of a residential settlement in Barony interrupted by Mrs Ferrier applying for and receiving parochial relief in February, March, and April 1888?

The evidence upon all three questions is narrow. On the first question I agree with the Sheriff-substitute that it would not be safe on the evidence to hold that there was a final admission of liability on the part of Barony. There was a joint investigation which proceeded a considerable length, and at the conclusion of it Barony withdrew its claim against Rutherglen. But there is no sufficient evidence that a deliberate final admission of liability, duly authorised by Barony, was ever made. At the same time, the fact that this joint investigation was made, and that Barony's claim was withdrawn, may have this bearing on the second question, that it may excuse the absence of evidence which would otherwise have been looked for from Rutherglen, to establish the successive residences of the paupers' mother in Barony Parish.

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On the second question the evidence is extremely narrow, and I have felt considerable difficulty in assenting to the view that continuous residence for five years in Barony is made out. The Sheriff-substitute says in his note that Rutherglen Parish led no evidence whatever to shew that a residential settlement had been acquired in Barony. It may be true that no parole evidence was led; but there are two important pieces of evidence —first, a signed and witnessed statement by Mrs Ferrier, who is now dead, and her niece, Mrs Fulton, which is printed; and, secondly, the admitted dates and places of births and deaths. The statement by Mrs Ferrier is entitled to weight, because it was taken on the joint examination by the representatives of the two parishes. In that statement she specified various residences in Barony between August 1883 and the end of January 1889. Those residences include houses 85 George Street and 16 William Street. It is important to note that the certificates of the births and deaths of the children corroborate this statement to a considerable extent. Mary was born at 85 George Street on 25th July 1884; David was born at 16 William Street on 10th January 1888; John at 85 George Street on 31st January 1889. Lilias died at 16 William Street on 13th April 1888; and Ann was born at 8 Duncan Street on 1st May 1891 and died at 85 William Street, August 1891. I understand that there is no evidence to the contrary. It is true that there is no further confirmatory evidence, but it is explained that it has been found impossible at this distance of time to obtain it. I therefore, although not without difficulty, agree that there is sufficient proof of continuous residence in Barony between 1883 and 1889.

On the third question—it is proved that in February, March, and April 1888 Mrs Ferrier applied for and got from Barony certain small supplies of medicine, value in all about 18s. If she was a proper object of parochial relief this was quite sufficient to prevent the acquisition of a residential settlement.—*Wallace* v. *Dempster and Deas.*[1] But there is, first, the evidence of Edmiston that she was not a proper object of parochial relief, and that she admitted that she had deceived the inspector of Barony, and this is minuted by Barony. Lastly, it is to be observed that if this defence on the part of Barony was well founded, it was sufficient of itself to establish its case against Rutherglen whatever the proof of residence might have been. It is therefore all the more remarkable that Barony should have withdrawn its claim against Rutherglen if it had reason to believe that it was right as to interruption. This, like the other questions in the case, is narrow; but on the whole I am of opinion that the judgment of the Sheriff should be recalled, and that judgment should be given against the Parish Council of the parish of Barony.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact that Rose Ann Ferrier had acquired a residential settlement in the Barony Parish of Glasgow, which she had not lost at the time of her death, and which enured to her children, the

[1] 8 R. 27.

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paupers: Therefore assoilzie the defenders, the Parish Council of the parish of Rutherglen, from the conclusions of the action, and decern: and decern against the Parish Council of the Barony Parish in terms of the conclusions of the action."

W. & J. BURNESS, W.S.—H. B. & F. J. DEWAR, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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July 15, 1896.
Ross v. Ross.

DAME REBECCA SOPHIA ROSS, Pursuer (Respondent).—*Clyde.*
SIR CHARLES H. A. F. L. ROSS, Defender (Reclaimer).—*W. Campbell—Pitman.*

Succession—Election—Equitable Compensation.—By a universal settlement a testator conveyed his heritable estate to his widow in trust, for behoof of herself in liferent and of his son in fee. He conveyed his whole moveable estate to his widow absolutely. The son having claimed legitim, the widow raised an action against him for declarator that the heritable estate belonged to her in fee-simple. The Court appointed the son to state in a minute whether he averred that the value of his interest in the heritable estate, subject to the pursuer's liferent, exceeded the value of his legitim with the interest accrued thereon, and the son having lodged a minute stating that he did not make this averment, the Court *held* (*aff.* judgment of Lord Stormonth-Darling) that the pursuer was entitled to the lands in fee-simple to compensate her *pro tanto* for the loss which she had sustained in consequence of the defender's election.

1ST DIVISION. LdStormonth-Darling.

SIR CHARLES AUGUSTUS ROSS, of Balnagown, who died in 1883, left a universal settlement, whereby he conveyed to his wife, Lady Ross, in trust, the whole heritable estate held by him in fee-simple, for behoof of herself in liferent allenarly, and for behoof of his son, Charles H. A. F. L. Ross, in fee, in the event of his attaining majority. He further conveyed to his wife, in the event of her surviving him, his whole personal estate, and appointed her his sole executrix.

The testator's son, Sir Charles H. A. F. L. Ross, attained majority on 4th April 1893, and in the following January he brought an action against his mother, Lady Ross, for payment of legitim, with interest, from the date of his father's death.—(Reported *supra*, p. 802.*)

In June 1894 Lady Ross raised the present action against her son for declarator "that the defender having claimed . . . payment of his legitim, or otherwise, and at all events upon his receiving payment of the sum to be found due to him in name of legitim, must renounce and forfeit all right, title, or interest competent to him in . . . . the whole heritable and real estate" belonging to his father in fee-simple.

The pursuer set forth the son's claim to legitim in the above action. She did not aver that the sum due to the son as legitim exceeded the value of the son's interest under the settlement in the heritable estate liferented by her.

The pursuer pleaded;—(2) The defender having elected to claim his legitim in place of his rights under his father's settlement, has forfeited his right to the unentailed lands thereby conveyed, and the same be-

* In this action the Lord Ordinary, on 19th November 1895, gave decree in the son's favour for £16,268, with five per cent interest from 26th July 1883, and on 16th June 1896 the First Division adhered, except in regard to the rate of interest, which it fixed at four per cent.

long to the pursuer absolutely and in fee-simple. (3) Or otherwise, and at all events upon the pursuer receiving payment of his legitim, the said lands will belong to and be the property of the pursuer absolutely and in fee-simple.

The defender pleaded that the pursuer's averments were irrelevant.

On 19th November 1895 the Lord Ordinary (Stormonth-Darling) appointed the pursuer to state in a minute what she averred "to be the value of the unentailed estate after deducting debts heritably secured thereon, and the actuarial value of her own liferent, and how this sum compares with the admitted amount of the legitim fund."

The pursuer thereafter lodged a minute in which she stated that the net rent of the unentailed estates was £1414, 14s. 2d., and that, on the assumption that they were worth thirty years' purchase of this rental, their capital value would be £42,441 5 0

that from this there fell to be deducted:—

(1) Heritable debt, . .	£13,000 0 0	
(2) Redemption value of rent charges, . . .	676 9 8	
(3) Value of pursuer's liferent, .	12,509 17 3	
		26,186 6 11
Leaving as the net capital value, .		**£16,254 18 1**

That the amount of the moveable estate of the deceased as adjusted by the parties was, ... £32,537 17 7

whereof one-half fell to the defender as legitim, .	£16,268 18 9
on which interest at 5 per cent amounted to .	8,520 1 0
In all .	£24,788 19 9

On 14th December 1895 the Lord Ordinary allowed this minute to be received, and the defender to answer it if so advised.

The defender lodged a minute stating that he was unable to give any admission as to the figures given in the minute for the pursuer, and submitted (1) "that in no event, in the circumstances of the case, can compensation be given until the actual value of what the defender takes under his father's will can be ascertained,—that is, until the pursuer's death: (2) That if the pursuer's contention as to present compensation be sound, the whole calculations should be made as at the date of the late Sir Charles Ross's death: (3) That in any event the pursuer is only entitled to a bond and disposition in security upon the unentailed lands, containing all the usual powers, payable at the first term of Whitsunday or Martinmas after her own death."

On 4th February 1896 the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that the defender has claimed and elected to demand and receive payment of his legitim out of the free moveable estate of his father, the now deceased Sir Charles William Augustus Ross of Balnagown, Baronet; (2) that under and in terms of the trust-disposition and settlement of his said father, dated 17th April 1874, the defender became entitled on the attainment of his majority, which took place on 4th April 1893, to the fee of All and Sundry the whole heritable and real estate of every description, wheresoever situated, belonging to his father at the date of his death, held by him in fee-simple under burden of the liferent of the pursuer, his mother, who

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under the foresaid trust-disposition and settlement became entitled to the whole moveable estate belonging to the said deceased Sir Charles William Augustus Ross at the date of his death; (3) that the legitim due to the defender, as ascertained and determined in an action at the instance of the defender against the pursuer, the summons in which was signeted on 5th January 1894, amounts to £16,268, 18s. 9d. sterling, with interest thereon from 26th July 1883; (4) that the said sum of £16,268, 18s. 9d., with interest, exceeds the value of the fee of the said unentailed estates provided to the defender in his father's trust-disposition and settlement, after deducting heritable burdens, and the value of the pursuer's liferent: Therefore finds, decerns, and declares that the defender, having claimed and elected to demand and receive payment of his legitim as aforesaid, has renounced in favour of the pursuer all right, title, or interest competent to him under or in terms of the said trust-disposition and settlement in regard to the said unentailed estates, and that upon the defender receiving payment of the amount of his legitim, the whole heritable and real estate above mentioned, and described in the summons, will belong to the pursuer as absolute proprietrix thereof in fee-simple, and that she will then be entitled to dispone and convey the same from herself, as trustee acting under the foresaid trust-disposition and settlement, to herself and her own heirs and assignees, free from the trust constituted by the said trust-disposition and settlement: Finds the pursuer entitled to expenses," &c.*

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* "OPINION.— . . . It is clear that the defender cannot claim both his legal rights and his conventional provision, and that by claiming legitim he has to that extent frustrated the will and damnified the pursuer. What he must surrender is the fee of the unentailed lands, burdened by the pursuer's liferent, and it is of no consequence that that happens to be a heritable subject, because his right to it is derived through the will, and it is the only right which the will gives him. It is equally clear that he must surrender it in favour of the pursuer, because she, being universal legatory, is the only person who loses by his election.

"The defence stated was founded on the case of *Macfarlane's Trustees* v. *Oliver*, 9 R. 1138, which settled that after the amount carved out of an estate by a claim of legitim had been completely restored to it by the application of periodical payments, there was no equitable ground for the principle of absolute forfeiture, and the claimant of legitim was entitled to the future income provided to her by the will. In such a case it is quite accurate to say that the principle is equitable compensation and not forfeiture, and the defender argued that the pursuer's case was irrelevant, because it proceeded on the basis of forfeiture. In view of this distinction, I thought it material to inquire how the comparison stood between the amount of the legitim and the value of the unentailed lands, under deduction of heritable burdens, and the actuarial value of the pursuer's liferent, because, if the present value of the defender's fee had exceeded the legitim, it would have been impossible to give decree in the absolute terms concluded for. The pursuer, in answer to my call, lodged a minute, from which it appears that the free rental of the lands is £1414, 14s. 2d., and that, taking the high figure of thirty years' purchase of that rental and making the deductions which I have mentioned, the result is a net capital value of £16,254, 18s. 1d., as against an ascertained legitim of £16,268, 18s. 9d., to which must be added a very large sum of interest. If these figures are even approximately accurate, it is clear that the remedy which the pursuer asks will still leave her a considerable loser by the defender's claim, and therefore that the distinction between forfeiture and equitable

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The defender reclaimed, and argued;—When one party was injured by the election of another party, his right was to be compensated out of the provision rejected by that other party. Compensation, not forfeiture, was the principle to be applied.[1] In this case the summons was framed on the theory that the principle of forfeiture was to be applied, and the pursuer could not obtain decree under a summons in that form. All that she could demand was that the unentailed lands should be sold, and that she should receive compensation out of the proceeds, but the summons contained no conclusions to that effect. If this objection to the form of the summons were got over, the Lord Ordinary's interlocutor must still be recalled. He had proceeded on an *ex parte* statement as to the value of the unentailed lands, which was not admitted, and the proper course was to order the lands to be sold as the only certain mode of ascertaining their value.

Argued for the pursuer;—The term "forfeited" in the summons was perhaps not strictly correct, but its use was not fatal to the summons. Throughout the cases upon equitable compensation, as was pointed out in *Macfarlane's Trustees*,[1] "forfeiture" was often used in place of "compensation." The reason of this was that the rejected provision being generally less in value than the right claimed, compensation usually resulted in forfeiture. The defender had no right

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compensation (a very real one in many cases) has no practical importance here. The situation is somewhat similar to that which occurred in the case of *Davidson's Trustees*, 9 Macph. 995, where the liferents of certain heritable subjects destined directly to the children claiming legitim were directed to be made over to the residuary legatees as forfeited interest; and I observe that Lord Cowan said, 'The distinction between the legal effect of approbate and reprobate and that of equitable compensation might have come into prominence, had the subjects given specifically been alleged to be of greater value than the loss suffered by the general estate through the assertion of the claims for legitim. But no case of that kind is raised under this record.'

"Now, I think I am entitled to proceed upon the figures stated by the pursuer, because the defender does not really challenge them. In his minute, he evades the question of figures altogether, and falls back on the untenable proposition that the value of his right of fee cannot be ascertained till the expiry of the liferent, or in other words, that no compensation can be given to the pursuer until she is dead. Alternatively, he makes the equally untenable suggestion that the whole calculations should be made as at the date of his father's death, instead of the date when the claim of legitim was judicially made; and he propounds a scheme whereby the pursuer is to be satisfied with a bond over the unentailed lands, payable at the first term of Whitsunday or Martinmas after her own death.

"This last proposal can hardly, I think, be taken seriously, because if anything is certain in this branch of the law, it is, that as the loss caused by a claim of legitim or *jus relictæ* is immediate, so the compensation must be as immediate as the nature of the surrender interest will allow.

"The defender has a present fee in these lands, none the less that it is burdened with a liferent, and there is no reason why that should not be at once made over to the person who suffers present loss by his claim.

"If the defender's conventional provision had been of the nature of an annual payment, there might have been a chance of the same thing happening as in *Oliver's* case. But that not being so, I do not see how any rise in the value of land or any other change of circumstances can possibly affect the question. It seems to me therefore, that the pursuer is entitled to decree without further inquiry."

[1] Macfarlane's Trustees v. Oliver, July 20, 1882, 9 R. 1138.

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to force a sale of the lands, and would have had none even if the pursuer had not been entitled to a liferent of the lands. He had failed to aver that they were of greater value than the sum due to him as legitim with interest, and the pursuer was entitled to have the lands in fee-simple to compensate her *pro tanto* for the loss she had sustained through the pursuer's election.

After hearing the parties, the Court appointed the defender to state in a minute "whether he avers that the value of his interest in the heritable estate, subject to the pursuer's liferent, exceeds the value of the legitim and interest paid to him, and that within eight days."

In the minute lodged by him, the defender stated "that taking Lady Ross's liferent as being of the value stated by the pursuer, viz., £12,509, 17s. 3d., with regard to which he could give no admission, the defender did not aver that the value of his interest in the heritable estate, subject to the said liferent, exceeded the value of the legitim and interest found due to him."

At advising,—

LORD M'LAREN.—After hearing counsel on the reclaiming note we appointed the defender to state in a minute whether he averred that the value of his interest in the heritable estate, subject to the pursuer's liferent, exceeded the value of the legitim and interest. A minute has now been lodged for the defender, to the effect that he does not aver that the value of his interest in the heritable estate, subject to the said liferent, exceeds the value of the legitim and interest found due to him.

The case now stands in this position: The defender has claimed his legitim, and as a consequence of this claim he is disentitled to assert any claim under his father's will which would diminish the value of the interests of other beneficiaries under that will. Under the will of the late Sir Charles Ross the unentailed lands are given to his widow, Lady Ross, for life, and to the defender Sir Charles Ross in fee. Lady Ross, under the will, takes the personal estate absolutely. By his election to take legitim the defender has diminished the value of Lady Ross's interest in the personalty, and according to the established principle of equitable compensation Lady Ross is entitled to be compensated out of the heritable estate (which the defender is not in a position to claim) for the pecuniary loss which she has sustained by and through the withdrawal of the legitim fund. The only question between the parties relates to the form in which the compensation ought to be made. The claim of the pursuer is that the heritable estate should be declared to be her absolute property; in other words, that her liferent shall be enlarged to a right of fee.

This claim is opposed by the defender, who, as I understood, without committing himself unreservedly to an alternative proposal, suggested that the unentailed estate should be sold, and that compensation might be given out of the proceeds of sale. Now, unless there is any rule of law or equity which prescribes that compensation to a disappointed legatee can only be given in money, the proposed sale of the estate does not commend itself to my mind as a just or expedient measure. If there were any reason to suppose that the defender had made a mistake in his choice, and that the reversion of the estate was really more valuable than the legitim, we might have allowed him to reconsider his election, because a judicial election would not,

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in general, become final until it had been followed by a decree transferring the fund to the party electing.

It was in view of the possibility of mistake that we gave the defender an opportunity of stating in a minute whether he now says that the right chosen is the less valuable of the two. He does not say so, and I therefore assume that the reversion of the heritable estate is of less value than the legitim fund, and that the compensation to the pursuer is incomplete. That being so, I fail to see why the pursuer should be subjected to the risk of further loss by being compelled to submit to a forced sale of the estate. The defender can take no benefit by the proposed sale, because according to the existing conditions the whole price must be applied for the pursuer's benefit—first, in giving her an equivalent for her life interest in the lands; and secondly, in compensating her for the withdrawal of the legitim fund.

But in putting the argument thus I have understated the pursuer's case. She is a liferenter by disposition, and cannot be compelled to renounce her liferent of the specific estate, or to accept its value in money. Consequently, the hypothetical sale must be a sale of the reversion of the estate only. This, of course, would be a very disadvantageous mode of realisation, and it is not certain that a purchaser could be found at all who would be willing to buy an estate burdened with a liferent.

The only alternative is that which the Lord Ordinary has approved, that Lady Ross, as her husband's trustee, should be empowered to convey the estate to herself beneficially, and I am of opinion that the pursuer is entitled to compensation *in forma specifica*, and that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM concurred.

LORD KINNEAR.—I am of the same opinion. Sir Charles Ross's will embraces and disposes of the legitim fund, and therefore it is an implied condition of the bequest which he makes in favour of his son that his son shall not take legitim, but that the whole legitim fund shall go to his widow in consideration of his giving to the son the fee-simple land which he was entitled to dispose of by will. And therefore, if the son refuses to comply with the conditions of the settlement and demands legitim, there can be no question at all that the widow is to be compensated by taking the same amount out of the estate given to the son, since she cannot have the legitim fund which her husband intended for her. But the action is brought for the purpose of obtaining that compensation, and it appears to me that there is no relevant defence stated upon the record.

The only ground for the defence which was maintained in argument was that the Court was not entitled to declare the forfeiture of the heritable estate, because the result of the son's claim to legitim is, according to the argument, not forfeiture of any right given to him by the will, but a right to equitable compensation to those whose interests have been disappointed by his claim. That appeared to me to be a somewhat technical construction of the words used in the summons, because the true meaning of the summons is simply to give effect to what is admittedly the right of the widow, to have handed over to her the estates given by the settlement to the son in order to make up to her for the loss she has sustained through

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the claim to legitim. It is perfectly true that that right is inaccurately described when it is called a forfeiture, but the error in the use of language arises very commonly, as the Lord President explained in the case of *Macfarlane*,[1] from the condition of matters in which the claimant is placed by the demand for legitim, because, as his Lordship points out, in the great majority of cases the whole provisions of the refractory legatee are required to restore the administration of the estate against the disturbance caused by the claim for legitim, since the legatee will not in general claim legitim unless he supposes it to be more valuable than the testamentary provision. The result, accordingly, in the great majority of cases, is exactly the same as if the refractory legatee had forfeited his right, and hence the inaccurate use of the term "forfeiture."

But it appears to me that there is nothing in the use of that term to have precluded the defender in this action, if he had thought fit, from bringing forward in defence the plea which upon the theory of his argument would have arisen to him, and from saying, "I am not bound to give up the whole of the fee-simple estates, because they are more valuable than the legitim fund." But if he is not to consent to make over the provision in his favour to the widow by way of compensation, then it lies upon him to shew that he is not bound to do so because that would amount to more than the compensation due. That appears to me to be the only relevant defence he could state to this action, and he refrained from stating it.

I think the Lord Ordinary went somewhat further in his favour than he was entitled to expect when he called upon the widow to state the value of the fee-simple estates. The son is quite entitled to be fully informed as to the relative value of the legitim fund on the one hand, and of his testamentary provisions on the other, before he makes his election, but he was in quite as good a position as the widow could be for ascertaining the value which he himself was prepared to put upon the fee-simple estates. However that may be, he has now had a further opportunity of shewing whether or not the estates given to him under the will are or are not more valuable than the legitim fund; and he declines to say that they are more valuable. Therefore I am unable to see that he has any relevant defence to the widow's claim.

The LORD PRESIDENT concurred.

THE COURT adhered.

KEITH R. MAITLAND, W.S.—J. & F. ANDERSON, W.S.—Agents.

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July 15, 1896.
Mackie v. Strachan, Kinmond, & Co.

JOHN MACKIE, Pursuer (Appellant).—*P. J. Blair.*
STRACHAN, KINMOND, & COMPANY, Defenders (Respondents).—*Sym.*

Discharge—Reparation—Master and Servant.—In defence to an action of damages for personal injuries sustained by the pursuer when in the employment of the defenders, the defenders pleaded that the action was excluded by a receipt signed by the pursuer, and bearing that he had received from the defenders the sum of £10 as compensation for his injuries, "and this sum I accept in full discharge of all claims I can or may make in respect of said injury, either under the Employers Liability Act, 1880, or otherwise." With reference to this discharge the pursuer averred that the

[1] 9 R. 1138.

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defenders' manager "called upon the pursuer within a week of his leaving the infirmary, and induced him, when he was in a weak state of body and mind, and without advice, to sign the receipt."

The Court *dismissed* the action, holding that no relevant grounds had been stated for setting aside the discharge.

Woods v. *North British Railway Company*, 18 R. (H. L.) 27, *followed.*

2D DIVISION. Sheriff of Forfarshire.

IN October 1895 John Mackie, calender worker, Dundee, raised an action in the Sheriff Court at Dundee against Strachan, Kinmond, & Company, calenderers, Dundee, for £200 as damages for the loss of his left arm which had been amputated in consequence of injuries received by the pursuer on 24th March 1894, when in the defenders' employment.

The defenders, besides pleading that the pursuer's averments were irrelevant, maintained that the action was excluded by the following receipt granted by the pursuer on 5th May 1894:—"Received from Messrs Strachan, Kinmond, & Company, East Port Calender, Dundee, the sum of £10 sterling, as compensation for personal injury received by me on 24th March 1894 while in their employment, and this sum I accept in full discharge of all claims I can or may make in respect of said injury, either under the Employers Liability Act, 1880, or otherwise." Then followed the pursuer's signature across a penny stamp.

The pursuer stated that he was sixty-eight years of age, and further (Cond. 5)—"Explained and averred that defenders' manager, Mr Forbes, called upon the pursuer within a week of his leaving the infirmary, and induced him, when he was in a weak state of body and mind, and without advice, to sign said receipt for £10, on the distinct assurance that he would not be left in want. The defenders have not implemented the conditions on which the said receipt was granted to them."

The Sheriff-substitute (Campbell Smith), and on appeal the Sheriff (Comrie Thomson), having dismissed the action on the ground of irrelevancy, the pursuer appealed, and on the question raised by the receipt argued;—The pursuer's averments in regard to the granting of the receipt would have entitled him to bring a reduction, but under the Sheriff Court Act, 1877, a reduction was not necessary. The case of *Woods*[1] was distinguishable. In that case there had been a proof; here the defenders maintained that the action should be dismissed without inquiry. The pursuer was willing to repay £10 if allowed to proceed with this action.

The defenders were not called upon.

LORD JUSTICE-CLERK.—There may of course be some cases in which the pursuer, although he has granted such a discharge as we have here, may make such averments on record as would lead to inquiry being made into the circumstances in which it was granted. But in the present case I find on record no averment to the effect that the pursuer was not quite as fit both in body and mind to grant a discharge as the pursuer in the case of *Woods*[1] was held to be. With reference to that case I may remark that we gave our decision after the defenders' counsel had stated to us that he could not maintain the discharge to the effect of excluding the action, but in the House of Lords the learned Lords were asked to hold the discharge as excluding the action.

[1] Woods v. North British Railway Co., July 2, 1891, 18 R. (H. L.) 27.

No. 197. LORD YOUNG concurred.

July 15, 1896. Mackie v. Strachan, Kinmond, & Co.

LORD TRAYNER.—I agree that this discharge is a complete bar to the present action. No doubt the discharge might have been set aside if relevant averments for the purpose had been made and proved. I think reduction would not have been indispensable, and that if averments sufficient to warrant setting aside the discharge had been made and proved, it might have been set aside by exception under the Sheriff Court Act, 1877. But we have here no grounds to support reduction or exception. The discharge is complete and adequate, and there is nothing to shew that it was not an honest settlement fully understood by the pursuer.

LORD MONCREIFF.—I concur. I find in the statements of the pursuer no grounds which would support an action of reduction of this discharge.

THE COURT refused the appeal.

A. W. KETCHEN, Solicitor—REID & GUILD, W.S.—Agents.

No. 198. HUGH LINDSAY ANTROBUS AND ANOTHER, Petitioners.—*D. Dundas.*
THE ACCOUNTANT OF COURT, Compearer.—*F. T. Cooper.*

July 15, 1896. Antrobus.

Statute—Restrictive Construction—Implied Repeal—Court of Session Consignations (Scotland) Act, 1895 (58 *and* 59 *Vict. c.* 19), *secs.* 2, 3, *and* 5—*Titles to Land Consolidation Act*, 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 122—*Consignation by bondholder of surplus price—Accountant of Court.—Held* that the Court of Session Consignations Act, 1895, did not apply to surplus moneys deposited by a bondholder under sec. 122 of the Titles to Land Act, 1868.

Opinions as to the effect of any Act of Parliament directing money to be consigned subject to the orders of the Court *reserved.*

1ST DIVISION. Lord Low.

IN 1895 the trustees of the Free Church of Scotland called up a bond and disposition in security for £24,000, which they held over the estate of Kinnaird, and in virtue of the powers contained in the bond, sold the estate.

The price realised was £28,650. After applying this sum in liquidation of the bond and interest and in making the other payments incident to the sale and conveyance of the subjects, the trustees, on 11th November 1895, consigned the surplus, amounting to £2528, 13s. 8d., in the joint names of the sellers and purchaser, in the National Bank of Scotland.*

On 27th February 1896 Hugh Lindsay Antrobus and another, who held a postponed bond and disposition in security for £12,000 over the estate of Kinnaird, presented a petition to the Junior Lord Ordinary for a warrant to uplift the consigned sum of £2528, 13s. 8d.

They stated that both the sellers and purchaser declined to endorse the deposit-receipt.

The Accountant of Court thereupon presented a note, in which, after reciting sections 2 and 3 of the Court of Session Consignations

* The Titles to Land Consolidation Act, 1868 (31 and 32 Vict. c. 101), sec. 122, enacts,—"The creditor upon receipt of the price shall be bound to hold count and reckoning therefor with the debtor and postponed creditors . . . and to consign the surplus which may remain after deducting the debt secured" and expenses in bank, "in the joint names of the seller and purchaser for behoof of the parties having best right thereto."

Act, 1895,* he prayed the Court to refuse the petition until consignation was made in terms of that Act. No. 198.

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On 20th March 1896 the Lord Ordinary (Low) reported the petition and note to the First Division.†

* The Court of Session Consignations (Scotland) Act, 1895 (58 and 59 Vict. c. 19), sec. 2, enacts,—"In this Act the expression 'consignation' shall extend and apply to any sum of money consigned or deposited in any bank under orders of the Court, or in virtue of the provisions of any Act of Parliament, and shall include any sum of money, or any bank deposit-receipt, security, or other voucher for a sum of money, received by the Accountant of Court (hereinafter called the Accountant), or by any of the Clerks of Court, as the case may be, for deposit or consignation, in any cause or proceeding, whether by order of Court or otherwise, and any sum of money lodged by way of caution or security in corroboration of any bond, and also any unclaimed dividends, or special deposits, or unapplied balances, in any sequestration or cessio, deposited in any bank in terms of the Bankruptcy (Scotland) Act, 1856, or otherwise."

Section 3,—"The provisions of section 35 of the Judicial Factors Act, 1849, and of sections 5 and 6 of the Bill-Chamber Procedure Act, 1857, so far as relating to consignations, are hereby repealed, and in lieu thereof it is hereby provided that the Accountant shall be the sole custodier of all consignations under this Act, and the Clerk of Court, in each process in which, after the passing of this Act, a consignation is made, shall forthwith lodge the same with the Accountant, whose receipt therefor shall be a discharge to such Clerk.

"No fees shall be payable to the Accountant in cases of consignations other than those which are or may be prescribed by the Lords of Council and Session with the sanction of the Treasury."

Section 5,—"Within ten days after the receipt of any consignation in money, the Accountant shall lodge the same or deposit-receipt in one of the banks in Scotland established by Act of Parliament or Royal Charter, and every deposit-receipt for money lodged in any of the said banks representing a consignation, whether lodged by the Accountant or by any party to a cause, or by any other person, shall be taken in name of the Accountant and his successors in office, and shall bear on the face of it the name of the party or parties by whom or on whose behalf the consignation is made, and of the cause or proceeding or bond to which it relates."

† "NOTE.—The question which is raised by the note which the Accountant of Court has lodged in this petition is whether the provisions of the Court of Session Consignations (Scotland) Act, 1895, are applicable to the surplus of the price of heritable subjects sold by the creditor in a bond and disposition in security, and consigned in bank in terms of the 122d section of the Titles to Land Consolidation Act, 1868. . . .

"It was on the one hand contended for the Accountant of Court (1) that the consigned money fell within the definition of a consignation in the Act of 1895, being money consigned in virtue of the provisions of an Act of Parliament; and (2) that the provision of the 5th section of the Act of 1895, that every deposit-receipt for a consignation should be taken in the name of the Accountant, whether lodged by him 'or by any other person,' was wide enough to cover the case of money consigned under the 122d section of the Titles to Land Act.

"On the other hand, the petitioners contended that if the Act of 1895 had been intended to apply to the case of the surplus price of property sold by a bondholder, the 122d section of the Titles to Land Act would have been repealed. They further founded upon the last clause of the 5th section, which provides that the deposit-receipt shall bear on its face the names of the parties 'by whom or on whose behalf the consignation is made, and of the cause or proceeding or bond to which it relates.' The latter

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The arguments of the parties sufficiently appear from the opinions of the Court and of the Lord Ordinary.

At advising,—

LORD PRESIDENT.—The lands of Kinnaird were sold by the holders of a first bond and disposition in security; and the bondholders, after satisfying their own debt, consigned the surplus, in terms of the 122d section of the Titles to Land Consolidation (Scotland) Act, 1868, in the joint names of the seller and purchaser, for behoof of the party or parties having best right thereto. The petitioners are second bondholders for a sum much exceeding the consigned money, and they ask warrant to uplift it. Their right to have this is indisputable, unless it is affected by the question raised by the Accountant of Court.

That question is this:—The consignation was made in November 1895, and in the June previous the Court of Session Consignations (Scotland) Act had passed and came into operation. The Accountant says that this consignation ought to have been made in his name, in virtue of the Consignations Act, and not in the names of the seller and purchaser, as prescribed by the Act of 1868.

The question thus raised is whether the provision in the Act of 1868 is repealed by the Act of 1895.

It was not made clear to us what effect, if any, an affirmative answer would have on the right of the petitioners to have up this money; and I have not realised any valid reason for refusing the prayer whichever answer is given. But this, of itself, suggests some doubt of the soundness of the Accountant's theory of the legislation under consideration.

Proceeding, however, to consider the question raised by the Accountant, it is well to put ourselves in the position of the first bondholders, and to ask which was their true statutory guide when considering in whose name to consign. The matter in hand, be it observed, is in its nature highly technical, affecting heritable title, and forming part of a conveyancing system embodied in statute. For this exact and particular case, section 122 contains a precise and peremptory direction,—the consignation is to be made in the names of the seller and purchaser. Let it be noted also that the

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words are a repetition of the words of the second section, which refer to money received by the Accountant or a Clerk of Court for deposit or consignation 'in any cause or proceeding,' and 'to any sum received by way of caution or security in corroboration of any bond.' In the case of the surplus price of lands sold by a bondholder, the receipt could not be in the form required by the 5th section, because in such a case there is no cause or proceeding in which money is consigned with the Accountant or a Clerk of Court, and the money is not consigned by way of caution or security in corroboration of any bond.

"The question appears to me to be not without difficulty, and as it is of importance that the scope of the Consignations Act should be authoritatively defined, I have thought it right to report the case.

"As there is some hardship in keeping the petitioners out of their money until the summer session, I have granted warrant to them to uplift the consigned fund, with the exception of the sum of £100, which will remain in bank until the question of the application of the Consignations Act is determined."

selling bondholder does not require to go near a Court of law, the Legislature directs him as to the due mode of exercising his rights for himself. The enactment of 1868, therefore, is in a totally different chapter of law from that which regulates the disposition of moneys in the hands of law Courts or of suitors in law Courts.

Now, the Court of Session Consignations Act, whatever other regions it may be proved to touch or invade, is, at all events *prima facie*, an Act about judicial arrangements. I do not speak merely of the title, as prescribed by section 1, but of the Act read as a whole.

But, then, the Accountant has drawn our attention to the effect of the 2d section on the 3d section, and to the relative provision of the 5th section; and we must give heed to the definition of "consignation" in the 2d section as "any sum of money consigned under any Act of Parliament," and to the very general words of section 5, which speak of the consignations falling under the Act as being in some instances made by "any other person" than the Accountant or any party to a cause.

Now, for myself, I am bound to say that, if those words are to be taken in their primary sense, they would cover the present case, which is that of a consignation made under an Act of Parliament. But then it may be that the other parts of the Act, and the scheme of the Act generally, shew that these words are not used in their full latitude, but are limited by the practical provisions of the Act.

Now, if the operative provisions of the Act are examined, it will be found that there are effective provisions about consignations made in the course of all sorts of judicial proceedings, but there are no effective provisions which can be applied to such a consignation as we are now considering, which is made in relation to no judicial proceeding. Adhering, as I desire to do, to the question directly before us, I cannot discover any indication that the Legislature intended, incidentally to a Court of Session Act, to revise the conveyancing code in a matter not relating to the Court of Session. It is, I think, certain that, in a matter of this kind, there would have been a businesslike revision and adjustment of the existing statutory regulations and express provisions, or an express repeal of conflicting provisions. The absence of any such evidence of intention is strong support to the limited view of the Act suggested by its title, and this view is further confirmed by the complete absence of any machinery for compelling conformity with the provisions of the Act if it had the wider sense.

The leading enactment in the statute is in the 3d section. The pith and gist of the Act is that the Accountant "shall be the sole custodier" of consignations falling under the Act. Now, whereas the Act, by practical steps, puts judicial consignations into his custody, by the enforced action of officials, there are no similar steps taken for his even so much as obtaining custody of consignations like the present.

Here, for instance, are lands being sold all over Scotland, some small and some large, and consignations being made in all the branches of all the banks. If the Legislature had intended to alter the conveyancing code in order to obtain the custody desired, it would of course have set up some machinery for obtaining for the Accountant from the banks or from the consigners immediate intimation of consignations. As things stand, it

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must be by pure accident if the Accountant ever hears of such consignation, for it is not his duty to organise a system of inquisition, nor is it the duty of anyone else to inform him of particular cases.

Such considerations lead me to the conclusion that the general words of the Act of 1895 must be checked by its effective provisions, and, in particular, that it was not intended to repeal or alter the 122d section of the Act of 1868. The Acts of Parliament mentioned in the general words of the Court of Session Consignations Act are probably the Acts which require consignation in judicial proceedings. But those words do not necessitate or warrant the conclusion that they apply to Acts of Parliament dealing with matters outside the system which is effectively dealt with by the Act. The effective and operative enactments of a statute evidence and determine its scope. It is not to be lightly concluded that the Legislature would make an excursion from what is *prima facie* its scope, to unsettle conveyancing practice, and, while not expressly repealing a statutory rule of that practice (against which no one has ever heard any complaint) to prescribe a proceeding which would not result in the achievement in the case of such consignations of that "custody" which is the object of the Act. Accordingly, I am of opinion that the 122d section of the Act of 1868 was rightly followed in the case before us.

LORD ADAM.—This case has been reported by the Lord Ordinary in order that an authoritative decision of the Court may be obtained as to the scope of the Court of Session Consignations (Scotland) Act, 1895, and in particular, whether its provisions are applicable to the surplus of heritable subjects, sold by the creditor in a bond and disposition in security, and consigned in bank in terms of the 122d section of the Titles to Land Consolidation Act, 1868.

That section expressly directs that such surplus shall be consigned in bank "in the joint names of the seller and purchaser, for behoof of the parties having best right thereto." That was done in this case, and the deposit-receipt taken in the terms prescribed by the Act.

The Accountant of Court, however, maintains that this consignation was erroneous, and that the money should have been deposited in his name, and the deposit-receipt transmitted to him.

As I understand, he founds this contention on the 2d section of the Court of Session Consignations Act, which enacts that, in that Act, the expression "consignation" shall extend and apply to any sum of money consigned or deposited in any bank under orders of the Court, "or in virtue of the provisions of any Act of Parliament," and on the 5th section, which enacts, that "every deposit-receipt for money lodged in any of the said banks,"—that is, "banks in Scotland established by Act of Parliament or royal charter"—"representing a consignation, whether lodged by the Accountant, or by any party to a cause, or by any other person, shall be taken in name of the Accountant and his successors in office"; and he argues that this money is consigned in bank in virtue of the provisions of an Act of Parliament, that it is therefore a consignation to which the Act applies, and that therefore the deposit-receipt should have been taken in name of the Accountant. If this construction of the Consignation Act be correct, there can be no

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doubt that its scope is very wide indeed. It would not only repeal the express provision as to the mode of consignation in the case in question, but similar provisions in many other Acts which contain express directions as to the mode and manner in which money should be consigned. I should demur to the proposition that such express provisions contained in other Acts are to be held as repealed by the mere general words used in this Act. But I do not think that the Act was intended to have, or has, any such wide-reaching effect. I think it deals only with consignations of money in the Court of Session, and the short title of the Act, which is "the Court of Session Consignations (Scotland) Act, 1895," certainly suggests that. Then, again, the wide definition of the word "consignation" which is to be found in the 2d section is merely a definition of the word as used in that Act, and has no effect, except in so far as it is brought into operation by the subsequent clauses of the Act.

The 3d section obviously refers solely to the Court of Session and its officers, the Accountant and Clerks of Court.

The 4th section refers solely to the Court of Session and to the duties of the Accountant.

The 5th section provides that the Accountant, within ten days after the receipt of any consignation in money, shall lodge the same in one of the banks of Scotland established by Act of Parliament or royal charter,—so far the clause relates only to the Court of Session and its officers. Then it goes on to provide for the terms in which deposit-receipts are to be taken, and enacts that every deposit-receipt for money lodged in any of the said banks—that is, banks established by Act of Parliament or royal charter—representing a consignation, whether lodged by the Accountant, or by any party to a cause, or any other person, shall be taken in the name of the Accountant and his successors in office. The Accountant says "any other person" here means any other person whatever, whether a party to a cause or concerned with a cause or not. I do not think so, because the clause goes on to provide that the deposit-receipt shall bear on the face of it the name of the party or parties on whose behalf the consignation is made, and of the cause or proceeding or bond to which it relates. Therefore, the deposit-receipt referred to is a deposit-receipt relating to some cause or proceeding, which is to be set forth on the face of it. I do not think that the clause has any wider application than to causes and proceedings. It will be observed that it applies only to deposit-receipts for money consigned in banks established by Acts of Parliament or by royal charter, presumably because it is only in such banks that the Court orders consignation. But there is no such limit to consignations under the Titles to Land Act, and accordingly the money in this case was consigned in the National Bank, which is not one of these banks, and the 5th section, on which the Accountant relies, does not in terms apply to it.

I think the Accountant must make out that the effect of the Consignations Act is not merely to alter the parties in whose names the deposit-receipt is to be taken, but also to limit the banks in which consignation may be made. I do not see how otherwise he can bring the case under the 5th section, and I see no warrant for that.

The 6th section provides that the Accountant shall be responsible for the

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safe custody of the consignations made with him, and shall be bound to account for the same to the person having right thereto, subject to the orders of Court. It therefore relates solely to the Court and its officers.

These are the only clauses of the Act which were referred to as bearing on the construction of the Act for which the Accountant contends. In my view there is nothing in any of these clauses directing in whose names or in what terms deposit-receipts shall be taken except in the 5th, and that relates only to deposit-receipts for money consigned in causes or proceedings in Court, and therefore I think that the Act has no application to parties in the petitioners' position.

I may be permitted to add a few words as to the results which would follow if effect were given to the construction of the Act contended for by the Accountant. Take, for example, consignations under the Titles to Land Act under which the present question arises. I suppose these consignations are more or less numerous all over Scotland. I have never heard of any inconvenience arising from the present practice, and I can conceive no reason why the deposit-receipts should be taken in the name of the Accountant of Court, and all sent up to Edinburgh, with the result that the money could only be uplifted by incurring the expense of an application to the Court. In most cases, as I understand, the money at present is uplifted by the seller and purchaser simply indorsing the deposit-receipt. Why that facility was not given effect to in this case I do not know.

Another example may be taken from the Bankruptcy Statute of 1856, the 129th section of which provides that all disputed dividends shall be deposited in bank in names of the trustee and commissioners until the appeals are disposed of. It does not occur to me that it would be desirable that these deposits should be deposited with the Accountant, only to be got up again by an application to the Court.

Or take the Sheriff Court Consignations Act, which was passed only two years ago, and which contains provisions applicable to the Sheriff Court very similar to those in the Court of Session Consignations Act.

By section 4 of the Sheriff Court Act all consignations of not less than £5 are directed to be deposited in bank, and the deposit-receipts therefor taken in the name of the Sheriff-clerk and his successors in office. I cannot suppose it was intended that this should be repealed, and the deposit-receipts for all these small sums taken in the name of the Accountant of Court and remitted to him; yet that would be the result of the Accountant's contention,—instead of their remaining as at present, subject to the orders of the Sheriff, as no doubt they ought to be.

I have no doubt there are numerous other statutes which would be similarly affected.

On the whole matter I am of opinion that the money was properly consigned in this case, and that warrant should be granted to the petitioners to uplift the balance remaining in bank.

LORD M'LAREN.—I concur, but I wish to reserve my opinion as to the effect of any Act of Parliament directing any money to be consigned subject to the orders of the Court. As at present advised, I should apprehend that money so consigned would fall under the provisions of the Consignations Act.

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LORD KINNEAR.—I am of the same opinion. I concur, as I understand your Lordships also do, that the judgment now pronounced will not affect money ordered to be consigned subject to the orders of the Court.

The LORD PRESIDENT.—I concur in that observation.

LORD ADAM.—So do I.

THE COURT granted the prayer of the petition in so far as the balance of £2528, 13s. 8d. remained consigned, and found the Accountant of Court liable in expenses.

DUNDAS & WILSON, C.S.—CROWN AGENT—Agents.

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Hoy v. Magistrates of Portobello.

BENJAMIN WILLIAM HOY, Petitioner (Appellant).—*Clyde.*
MAGISTRATES AND TOWN-COUNCIL OF PORTOBELLO, Respondents.—*Young.*

Police—Buildings—Open space attached to dwelling-house—Burgh Police (Scotland) Act, 1892 (*55 and 56 Vict. cap. 55*), *sec.* 170.—The Burgh Police (Scotland) Act, 1892, sec. 170, enacts that "every building erected for the purpose of being used as a dwelling-house . . . shall have all the rooms sufficiently lighted and ventilated from an adjoining street or other open space directly attached thereto equal to at least three-fourths of the area to be occupied by the intended building."

The proprietor of ground within a burgh proposed to build thereon two rows of dwelling-houses parallel to each other, both facing public streets and with unbuilt-on ground separating them behind. This back ground was less than one and a-half times the extent of the combined areas to be occupied by the two rows of houses, but was greater than three-fourths of the area to be occupied by each row taken separately.

Held that the whole of the back ground was open space directly attached to each of the rows of houses in the sense of the above section, and consequently that the statutory requirements with respect to ventilation behind the houses would be satisfied.

2D DIVISION. Dean of Guild Court, Portobello.

THIS was a petition to the Dean of Guild Court, Portobello, by Benjamin William Hoy, for warrant to pull down buildings and to erect new buildings.

The petition was opposed by the Magistrates and Town-council of Portobello, on the ground that the proposed new buildings would not comply with the requirements of the Burgh Police (Scotland) Act, 1892, with respect to open spaces for ventilation.*

The following statement of the facts is taken from the note appended to the interlocutor of the Dean of Guild Court:—"The petitioner is proprietor of buildings fronting the promenade on the sea-beach, occupied as a temperance hotel and baths, with vacant ground

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 170, enacts,—"Every building erected for the purpose of being used as a dwelling-house, or any building not previously used as a dwelling-house, when the same is altered for the purpose, shall have the rooms sufficiently lighted and ventilated from an adjoining street or open space directly attached thereto equal to at least three-fourths of the area to be occupied by the intended building; and such space shall be free from any erections thereon other than water-closets, ash-pits, coal-houses, or other conveniences, all which conveniences shall, as to height, position, and dimensions, be erected subject to the consent and approval of the Commissioners. . . ."

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at the side and back thereof. He proposes to pull down and remove the buildings so as to have an area of vacant ground on which to erect certain tenements of shops and dwelling-houses. This area is bounded on the north partly by the promenade and partly by a two-storey building belonging to and occupied by John Grant, publican; on the west partly by said building and partly by Bath Street; on the south by Straiton Place; and on the east by a lane running from Straiton Place to the promenade. The petitioner craves warrant to build upon the promenade frontage two tenements of shops and dwelling-houses three storeys in height above the shops, with attics, containing sixteen separate dwellings; and one tenement of dwelling-houses, four storeys in height, with attics, containing ten separate dwellings; and upon the Straiton Place frontage four tenements of dwelling-houses, three storeys in height, with attics, containing thirty-seven separate dwellings. The tenements facing the promenade and those facing Straiton Place will be built on parallel lines, with a vacant piece of ground between them. This ground is not of sufficient size to allow of appropriating to the promenade tenements a space of three-fourths of the area to be occupied by them, and also a like space for the Straiton Place tenements, although it is much more than sufficient for either of them. The full measurement necessary to meet both of these requirements would be 1489 square yards or thereby, while the superficial area of the ground in question is only 1072 square yards or thereby, being a deficiency of 417 square yards. The proposed tenements are shewn on the block plan to be each 45 feet deep from the street fronts, and the space between the back walls measures 53 feet across. The width of Straiton Place is 30 feet, including footpaths."

On 3d July 1896 the Dean of Guild Court pronounced the following interlocutor:—"Find that the petitioner has not in the preparation of his plans made proper and sufficient provisions for complying with the requirements of section 170 of the Burgh Police (Scotland) Act, 1892, to have all the rooms of his intended buildings sufficiently lighted and ventilated from an adjoining street or other open space directly attached thereto, equal to at least three-fourths of the area to be occupied by the intended buildings: Therefore refuse to grant the warrant craved." *

The petitioner appealed, and argued;—The Dean of Guild Court had misconstrued the 170th section of the statute. In the first place, the section on a sound construction meant that there must be an open space of the specified extent both behind and in front of the building. One legitimate reading of the words was, that it was enough that the free space behind and the street in front together amounted to the specified extent. But taking it that the space behind must by itself be equal to at least three-fourths of the area to be occupied

* "NOTE.— . . . It was contended for the petitioner that being proprietor of the ground behind both lines of tenements he was entitled to reckon the whole space as directly attached to each line instead of one-half thereof to each, and that thereby he had made proper provision for complying with the requirement of section 170 of the Police Act. The Court cannot adopt this view, but must find that there should be an open space directly attached to each tenement equal to at least three-fourths of the area thereof. Although the buildings and ground will at first belong to one proprietor, the tenements are being built for the purpose of sale, and may soon be divided among many owners."

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by the intended building, that condition would be satisfied here. "Directly attached" meant physically attached, and if the whole free space behind the buildings was of the extent specified in the statute it was immaterial that half of the ground belonged to the proprietors of the tenements on the other side. It was not suggested that only a half of the street should be taken into consideration in calculating the free space in front, and the language of the statute required that the same rule should be applied to the ground behind.

Argued for the Magistrates and Town-council;—The policy of the Act was that there should be the specified extent of street facing the windows in front and the specified extent of back free space facing the windows behind. The result of the petitioner's construction was that "adjoining" and "directly attached" meant the same thing, so that the one expression or the other was unnecessary, which was a result to be avoided in the construction of statutes. The sound construction was that "adjoining" qualified "street," and meant connected in situation, which was the only relation that a private property could have to a public street, while "directly attached" meant connected in title—attached as a pertinent of the building. In this view the proposed buildings would not comply with the statute, for there could be no doubt that the area behind would be divided in property between the two rows of tenements.

LORD JUSTICE-CLERK.—It appears to me that upon a proper reading of this clause the requirements of the statute have been sufficiently fulfilled by the petitioner, and that the judgment of the Dean of Guild Court is erroneous.

LORD YOUNG.—I am clearly of the same opinion. I think that the argument for the respondents is not stateable. The words of the Act are "lighted and ventilated from an adjoining street or other open space directly attached thereto." I read that as meaning "street directly attached thereto, or other open space directly attached thereto," and "attached thereto," means coming up to or touching, so that an adjoining street which comes up to the building will be an open space directly attached thereto, and in calculating the street open space you are not to measure up to the *medium filum* of the street merely, you are to measure the whole street, because it is the street as a whole which comes up to or touches the building, and so is attached to it. So with regard to the open space behind the building, you are not to measure merely up to the *medium filum*, it is the whole open space which is attached to the building just as in the case of the street.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT recalled the interlocutor of the Dean of Guild Court, and remitted the petition for further procedure.

A. C. D. VERT, S.S.C.—R. PASLEY STEVENSON, S.S.C.—Agents.

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Carron Co. v. Henderson's Trustees.

CARRON COMPANY, Pursuers (Respondents).—*D.-F. Asher—C. J. Guthrie—Chree.*

THE HONOURABLE HEW H. D. MERCER HENDERSON AND OTHERS (Mercer Henderson's Trustees), Defenders (Reclaimers).—*Sol.-Gen. Dickson—Clyde.*

Mines and Minerals—Lease—Construction.—A proprietor let to a tenant the coal under certain lands described, with the sole right of working and winning "the whole or any part of said coal" for the period of 171 years, but with power to the tenant to renounce the lease in certain events, and, *inter alia*, so soon as that part of the coal was worked out which lay above what was known as the day level. On his part the tenant bound himself to pay to the landlord, "as long as the workings are confined to that part of the coal which is above" the day level, a fixed rent of £200, or in the option of the landlord one-seventh of the gross produce of the coal. He also bound himself to proportion the working of the splint seam "as nearly as possible" to the other seams in the same manner as was observed in other well-regulated collieries. It was further agreed that in case the tenant, his heirs and successors, "shall not avail themselves of the break stipulated for in this lease when that part of the coal is worked out which lies above" the day level, "but shall declare their intention of proceeding to work out the remainder of the coal, . . . then and in that event, and so soon as the said coal lying above the said level shall be completely worked out . . . the rent and proportion hereinbefore specified . . . shall thencefurth cease and determine," and the tenant and his foresaids "shall in lieu thereof" be bound to pay a fixed rent of £150, or in the option of the landlord one-tenth of the gross produce of the coal, "the said restricted rent to commence either upon the day in which the sale of the coal under the foresaid level commences, or at the expiry of two years from the day upon which the former rent ceases, whichever of these events shall first happen."

In an action raised by the landlord for declarator that the tenant was not entitled to work the coal below the day level until the coal above that level was exhausted, the tenant maintained that, as no restriction was expressed in the lease, no restriction was to be implied. *Held* (*aff.* judgment of Lord Kyllachy) that the tenant was not entitled to work coal below the day level until the coal above that level was exhausted.

Lease—Mineral Lease—Agreement to alter—Proof—Acquiescence in contravention of lease—Personal Bar.—By the provisions of the lease of a coal-field granted in 1798 for a period of 171 years, the tenant and his successors were not entitled to work the coal below what was known as the "day level" until the coal above that level was exhausted. In 1828 it was found that the most valuable seam in the field was practically worked out above the day level, and the tenant, with the approval of the landlord, began to work below that level. After that date, with occasional intervals, the tenant and his successors continued, with the knowledge and tacit consent of the landlord, to work coal below the day level, although the upper seams of coal were unexhausted, and with the view to such working they drove mines to the lower seams.

In an action raised by the landlord in 1895, for declarator that the tenant was not entitled to work coal below the day level until the coal above that level was exhausted, and for interdict, *held* (*aff.* judgment of Lord Kyllachy) that the landlord's consent to the tenant's deviation from the lease in the past did not imply an agreement to alter the terms of the lease, and that the landlord had done nothing to bar himself from demanding their observance in the future.

Bargaddie Coal Company v. *Wark*, March 15, 1859, 3 Macq. 467, *commented on.*

1ST DIVISION. Ld. Kyllachy.

BY lease, dated in 1798, William Wemyss of Cuttlehill let to Sir John Henderson of Fordel, his heirs and successors, with full power

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to him or them to "subsett the same in whole or in part," All and Whole the coal within and under certain lands described, "together with the sole exclusive right and privilege of winning, working, selling . . . and leading off the whole or any part of said coal . . . lying and situated within or under the bounds before ascertained and described" for the period of 171 years, but with power to the said Sir John Henderson to renounce the lease in certain events, and, *inter alia, tertio,* "So soon as that part of the coal is worked out which lies above the said Sir John Henderson's present level,* as it now stands in stone," in Fordel ground; and lastly, when the coal was entirely worked out. On his part Sir John Henderson bound himself, his heirs, executors, and successors whomsoever, to pay to William Wemyss, his heirs, executors, and assignees, "and that as long as the workings are confined to that part of the coal which is above the said Sir John Henderson's present level," the rent of £200 annually, or in the option of William Wemyss and his foresaids, one-seventh part of the gross produce (under a certain deduction) of the coal worked out and sold from "the subjects hereby sett." Moreover, Sir John Henderson bound himself and his foresaids during the subsistence of the lease, to work the coal in no other than a regular and workmanlike manner, and more particularly "to proportion the working of the splint seam as nearly as possible to the other seams, in the same manner as is observed in Fordel or other well-regulated collieries." It was provided that William Wemyss and his foresaids, or any person having written authority from them, might, as often as they thought proper, inspect the workings, and Sir John Henderson bound himself and his foresaids to keep regular books shewing the output and sale, which should be open to the inspection of the landlord. Moreover, it was agreed betwixt the parties "that in case Sir John Henderson and his foresaids shall not avail themselves of the break stipulated for in this lease, when that part of the coal is worked out which lies above the said Sir John Henderson's present level . . . . but shall declare their intention of proceeding to work out and exhaust the remainder of the coal in the premises hereby lett, by means of a deeper cut level or of a steam-engine or other machinery . . . then, and in that event, and so soon as the said coal lying above the said level shall be completely worked out and disposed of, the rent and proportion hereinbefore specified and fixed shall from thenceforth cease and determine, and the said Sir John Henderson and his foresaids shall in lieu thereof be bound and obliged, as he hereby binds and obliges himself and them to pay to the said William Wemyss and his foresaids £150 sterling of fixed rent only, or in the said William Wemyss and his foresaid's option, one-tenth part of the gross produce of the coal" (subject to a certain deduction) as the yearly rent of the subjects let, "the said restricted rent to commence either upon the day in which the sale of the coal . . . under the foresaid level commences, or at the expiry of two years from the day upon which the former rent ceases, whichever of these events shall first happen."

By lease, dated in 1832, Robert Wemyss of Cuttlehill, who was then in right of the lessor under the lease of 1798, let to Dame Anne Isabella Henderson Durham, and Sir Philip Durham, her husband, who were then in right of the lessee under the former lease, and to the

* Generally known as the "day level."

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said Anne I. Henderson Durham's heirs and assignees, the coal under certain lands lying contiguous to those specified in the lease of 1798, for the period of 137 years, it being provided that the lessees should pay a fixed rent of £150 per annum, or, in the lessor's opinion, one-eighth of the gross produce (subject to a certain deduction) of all coal worked above the day level, and one-tenth of the gross produce (subject to the same deduction) of all coal worked below said level. The lessees bound themselves "within two years from the 24th day of November 1831, to complete a proper and substantial winning to the splint coal, at or near the south-west corner of the field, marked No. 3" on the plans signed as relative to the lease, "which winning shall be made to the north of No. 6 dyke, and the engine-pit of the said winning shall be situated so near to the Dirthill dyke as to work out the whole splint and other coals between these dykes to the depth of the said winning, that is to say, not only the whole coal hereby let, but also the whole coal possessed by the said parties in right of the said Sir John Henderson" under the lease of 1798.* The lessees further bound themselves to bring forward the Fordel day level to the pits of the foresaid winning, and power was given to them to communicate the Fordel day level through the portion of the Cuttlehill coalfield which they already possessed (*i.e.*, under the lease of 1798) to the coalfield "hereby let."

In 1854 the Carron Company acquired the rights of the lessors under the two leases above mentioned, and in 1895 they brought an action against the trustees of the deceased George William Mercer Henderson, who were in right of the lessees under the said leases, in which they concluded, *inter alia*, (1) for declarator that the defenders, as lessees under the lease of 1798 were not entitled, until that part of the coal thereby let "which lies above the day level, called in the said lease 'Sir John Henderson's level,' and generally known in the district as the 'Fordel day level,' is completely worked out, to work and win any part of the remainder" of said coal, "except only in so far as it lies within the area between the dykes known as the No. 6 dyke and the Dirthill dyke respectively," and for interdict against their doing so.

The pursuers made averments to the following effect:—There was a large quantity of coal above the day level in the leasehold of 1798 still unwrought, and it was the duty of the defenders under the lease of 1798 to confine their workings within that leasehold to such coal until it was completely exhausted. They had, however, discovered the coal below said level to be better in quality and more profitable to work than the bulk of the coal above it, and had therefore proceeded to work it.

The defenders admitted that there was still coal let by the lease of 1798 lying above the day level unwrought. They made statements to the following effect:—Workings below the day level had been opened by them prior to 1829, and since that date they had worked sometimes above, sometimes below, and sometimes both above and below. The lessors knew all along that the splint coal was being worked below the day level, and that outwith the area between No. 6 dyke and the Dirthill dyke. The lease of 1832 proceeded on the footing that the defenders had a right so to work. The pursuers were all along well aware that

* A considerable part of the coal between No. 6 dyke and the Dirthill dyke was situated within the 1798 leasehold.

without such working the obligation contained in the 1798 lease to proportion the working of the splint seam to the other seams could not have been implemented, and acquiesced and agreed with the lessees in simultaneous workings above and below the day level being carried on. On the faith of said agreement the defenders' pits, machinery, and workings had been made and adapted for such simultaneous working at an expense largely in excess of what would have been incurred if no coal was to be worked below the level until the coal above had been exhausted. The abandonment of the pits and workings thus made would occasion a heavy loss to the defenders.

The defenders pleaded;—(4) The pursuers are excluded by *mora*, taciturnity, and acquiescence from insisting in the present action. (5) In respect of the actings of parties as condescended on, the defenders should be assoilzied. (6) The conclusions of the summons not being warranted by the leases founded on, or either of them, the defenders should be assoilzied.

Proof was allowed. The evidence shewed that the most valuable coal in the fields let was the splint, which was the lowest seam, and that until about 1850 it required a proportion of at least one-half of splint to make the other coals saleable. A proportion of splint was still necessary to meet the requirements of the market. The splint seam in the 1798 leasehold was practically worked out above the day level prior to 1828, and it was shewn that as early as that year the lessees had begun, with the knowledge and approval of the landlord, to work the splint seam below the day level, and had since that date, with occasional intervals, continued, with the same knowledge and approval, to work coal in the 1798 leasehold below the day level, their right to work below the level, so far as appeared, never having been questioned until the case noted below was in the House of Lords. The knowledge and approval of the landlords appeared, *inter alia*, from a series of reports by the mining engineers employed by them to inspect the workings on their behalf, from letters written by the landlords in 1846 and 1848 complaining of the tenants having violated the provisions of the leases by abstaining from working the splint coal, and from the returns made by the tenants to the landlords, in which royalties at the rate of one-tenth were frequently entered in respect of coal wrought from the 1798 leasehold.*

* Down to 1864 the returns of royalties made to the landlords distinguished between the coal worked in the 1798 and in the 1832 leaseholds, and the royalties varied from one-seventh to one-eighth or one-tenth. After 1864 the returns made no distinction between the leaseholds, and the royalties entered were at the uniform rate of one-tenth. In 1885 the Carron Company objected that the returns were defective, *inter alia*, on the ground that they did not distinguish between the output from above and below the day level, and in 1886 they raised an action against Mercer Henderson's trustees, concluding for declarator that, until the coal above the day level in the 1798 leasehold was exhausted, the defenders were bound to pay royalty at the rate of one-seventh of the gross produce of the output from that leasehold, and for payment of £11,303, 12s. 8d. After the case had been twice in the Inner-House and once in the House of Lords, the pursuers in 1894 obtained decree for a certain sum, the Court holding that the royalty due on coal worked in the 1798 leasehold below the day level was one-tenth of the gross produce, on the ground, as expressed by the Lord President, that "the workings in dispute took place with the sanction of the landlord, and on the footing, so far as both parties were concerned, that a royalty of one-tenth was payable." The defenders founded upon the

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The evidence further shewed that four pits had been sunk in the 1832 leasehold, viz., the Roundell in 1837, the William in 1844, the George in 1852, and the Alice in 1880. The last named had never been worked, but the others had all been used to work coal in both leaseholds. The cost of the four pits had been about £25,000. It was stated by the defenders' witnesses that two pits, sunk in the proper places, would have sufficed to work the whole coal in the 1832 leasehold, and that the George and William pits, which were the only going pits in either leasehold at the date of the action, would not have been sunk where they were, unless it had been intended to use them for working the coal in both leaseholds. It was proved that in 1861 a dook had been driven sixteen fathoms below the bottom of the William pit, with the object of getting at coal in the 1798 leasehold below the day level, and that mines had been carried from it into the 1798 leasehold for the purpose of working that coal. Two stone mines had also been driven from the George pit into the 1798 leasehold, for the purpose of working coal below the day level. The first of these had been begun in 1878 and completed in 1880, and the second, begun in 1886, had been carried across into the 1798 leasehold in 1890, although in 1888 the pursuers had intimated that they objected to the coal below the day level in the 1798 leasehold being worked until the upper seams were exhausted. The expense of these operations had been about £1000 in the case of each pit. The pursuers' witnesses admitted that two pits, if sunk in the most advantageous places, would have sufficed to work the whole coal in the 1832 leasehold, but expressed doubt as to whether, at the time the pits were sunk the lessees' knowledge of the coalfield was sufficient to have enabled them to select the sites for their pits with such propriety. They alleged that there still existed considerable areas of coal in the leasehold of 1832 which could be worked by the George and William pits, and that the defenders had already been fully recouped for their outlay in connection with these pits and the mines driven from them to the lower seams of coal in the leasehold of 1798.

On 21st February 1896 the Lord Ordinary (Kyllachy) decerned in terms of the first declaratory conclusion of the summons; and decerned also in terms of the corresponding conclusion for interdict.*

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opinions delivered in this case in the House of Lords and Court of Session, as deciding that they were entitled to work the coal below the day level in the 1798 leasehold before the coal above that level was exhausted. These opinions are printed in the session papers in this case.

* "OPINION.—(After referring to the previous action between the parties —see note on p. 1045)—The present action has been brought not to raise any further question with respect to the past, but to determine and regulate the order and mode of working for the future. And with respect to that matter, what I have first to consider is, what is the just construction of the lease of 1798, confining attention to its terms, and construing it as if the question had arisen say in the year 1798 when it was made?

"Now, I must observe in the outset that this question has not hitherto been decided. There have been opinions expressed, or rather indicated, both in this Court and in the House of Lords, which are of course entitled to great weight; but there has been no decision. Moreover, the opinions indicated have been, as I read them, conflicting. I must therefore endeavour to construe the lease according to the best judgment I can myself form.

"I do not recite the clauses of the lease on which the question turns. They are by this time familiar to us all, and up to a certain point all parties are, I think, at one as to their effect. It is conceded on all hands that the

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The defenders reclaimed, and argued;—(1) The whole coal in the lands described in the 1798 lease was let from the beginning, and the lessees were empowered to sublet any part of it. There was no express prohibition of working below the day level until the coal above that level had been exhausted, and the stipulation that the working of the splint should be proportioned to that of the other seams could only be implemented by means of simultaneous working. The necessary conclusion was that simultaneous working was authorised, even although the stipulations with regard to rents and royalties seemed to proceed on the footing that the upper coal would be worked out before the lower coal was touched. A consideration of the lease of 1832, and of the actings of parties since the year 1828, demonstrated that the parties had themselves construed the lease in the way now contended for, and if the lease was ambiguous in its terms, the Court should give effect to the construction upon which the parties themselves had acted. (2) Assuming that the lease of 1798 did not authorise simultaneous working, it had been altered in this respect by the lease of 1832, which laid on the lessees the obligation to sink a pit to the splint coal which was below the day

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lease does not contemplate simultaneous working, but, on the contrary, contemplates that the upper—the 'level free' seams—should be worked out first. That seems to be common ground. But as to the inference to be drawn, there are two views.

"The pursuers say that the just inference is that both parties were agreed that simultaneous working should not occur—in other words, that while the whole coal was let, it was an implied condition of the lease that it should be worked in two stages, the coal above the level on certain terms, and the coal below the level on certain other terms. The defenders, on the other hand, say that the just inference is only this, that the parties assumed—erroneously as the event proved—that simultaneous working was impossible,—that is to say, practically impossible, because inconsistent with any interest on the part of the tenants; and they argue that right being given to work out the whole coal without restriction expressed, no restriction can be implied from the omission to fix the rent or lordship payable in an event which was overlooked. That omission they admit creates a difficulty as to the rent or lordship which they have now to pay, but it cannot, they say, affect their right to work out the coal in such manner as is most for their interest.

"Now, I do not say that the question thus raised is free from difficulty, but I have come to be of opinion that so far the pursuers are right. Whatever the motive was (objection by the landlord to simultaneous working, or assumed absence of any interest in the tenant so to work), the fact is, I think, manifest that the parties transacted and adjusted the clauses of the lease on the footing that the upper seams should be worked out before the lower seams were touched. That such was the intention of both parties is, I think, as plain as if it had been expressed; and if the judicial mind is satisfied on the just reading of the instrument that such was their intention, it does not seem to me to be a different proposition to say that such was their agreement.

"If I am right in this, it is not necessary to inquire to what results in law the acceptance of the defenders' view would lead. But I must say that these results would appear to me to be dangerous for the defenders. If they are right that the lease proceeded on an erroneous assumption as to the modes of working possible, then it becomes at least a question whether the lease is not void, or voidable, as having been made under mutual error. Similarly, or rather alternatively, if they are right in holding that for modes of working possible under the lease, and which have been in fact followed, neither rent nor lordship is stipulated, I do not, as at present advised, see

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level, and to work out the whole coal between the dykes, without distinction as to whether such coal was above or below the day level. A large part of the coal between the dykes was within the leasehold of 1798, and the lease of 1832 therefore necessarily proceeded on the footing that the lessees had a right to work the coal below the day level in the old leasehold. (3) In any event, the actings of parties, both before and after the pursuers acquired the property, necessarily implied an agreement to alter the lease, and entitled the defenders to continue simultaneous working above and below the day level in the 1798 leasehold. The pursuers and their predecessors had permitted the lessees to work below that level for a long series of years, and to incur expense in sinking pits and driving mines with a view to such working in the future. Matters could not now be restored to their original position, and the proof shewed that serious loss would be inflicted upon the defenders, if the lease were now to be rigidly enforced. The pursuers therefore were not now entitled to object to simultaneous working. An agreement to vary the terms of a written agreement might be presumed from the actings and transactions of parties,[1] and such an

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how the lease in question can be a good lease, or at least a lease binding under the Act 1449 on singular successors. The suggestion no doubt is that the contract of lease having been partly executed, the absence of a stipulated rent involves merely a reference to the *quantum meruit*. But I know of no such doctrine as applicable to a claim for future possession, or at all events a claim by a tenant to continue in possession as against the lessor's singular successors.

"I have not overlooked the defenders' argument that simultaneous working must be held as impliedly permitted because the lease contains a clause obliging the tenants as far as possible so to work as to put out a proportional quantity of splint coal. It may be as the defenders allege, that as matters now stand that obligation cannot now be performed without simultaneous working both above and below the level. But if so, it is enough to say that at the time the lease was made the assumption of parties was plainly different. That, as we have seen, is common ground. And accordingly, if the fact be as the defenders say, the only result is that the obligation in question is now impresstable. In point of fact there was no difficulty in procuring sufficient splint above the level down at all events to 1828, and it is a circumstance not without significance that as soon as a deficiency appeared the new lease of 1832 was negotiated—one of the objects of that lease being to provide splint coal to be wrought with the other seams.

"On the whole, therefore, I conclude that the pursuers are right in their construction of the lease of 1798, and that if the conditions of that lease are still in force, the pursuers are entitled to prevail in this part of their action. The defenders, however, allege that with respect to the particular matter in controversy, the conditions of the lease have been abrogated by agreement express or tacit, or by acquiescence by the landlords in the mode of working which is now challenged.

"Now, the law on this subject is so far fairly well settled, and, I think, speaking generally, it may be stated as follows:—(1) A lease may have its provisions varied by a subsequent agreement expressed in a probative writing. That is of course clear. (2) The same result may follow from an improbative written agreement followed by *rei interventus;* or from a verbal agreement proved by writ or oath and followed by *rei interventus*.

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[1] Bargaddie Coal Co. v. Wark, March 15, 1859, 3 Macq. 467, esp. *per* Lord Chancellor Chelmsford, pp. 479-80, 31 Scot. Jur. 323.

agreement would be valid in a question with a singular successor. The question with a singular successor under the Act of 1449[1] was, what was the tack existing at the date of the succession? If, as was maintained, the lease had been altered by the actings of parties prior to the date of the succession, the alteration would be held effectual in a question with a singular successor.[2] It was not necessary that a singular successor should have notice of such alteration. Obligations imposed by the custom of an estate were binding on a purchaser of the estate without notice.[3]

Argued for the pursuers;—(1) The defenders were not entitled, under the lease of 1798, to work below the day level until the coal above that level was exhausted. A mineral lease was not of the same nature as an ordinary lease, but was a privilege to one person to enter upon and remove the property of another during a fixed period upon specified terms.[4] The defenders must shew a licence to take away coal below the day level by simultaneous working above and below that level. The lease contained no conditions relative to simultaneous working, and did not provide for rent or royalty for the lower coal in the case of such working. It therefore necessarily implied that

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The rule so far is the same as in the constitution of contracts relating to heritage—*Gowans* v. *Carstairs*, 24 D. 382; *Walker* v. *Flint*, 1 Macph. 417; *Gibson* v. *Adams*, 3 R. 144. (3) A lease may also be altered by a verbal agreement proved by parole if followed by actings contrary to the lease and in pursuance of the agreement. At least it may be so to the effect of justifying or barring challenge of the particular acts done. *Bargaddie Coal Company* v. *Wark*, 3 Macq. 467; *Kirkpatrick* v. *Allanshaw Coal Company*, 8 R. 327. (4) Apart from express agreement, written or verbal, consent to a particular contravention may be implied from knowledge and non-objection—that is to say, from acquiescence on the part of the landlord, and such acquiescence may be proved by parole—*Bargaddie Coal Company* v. *Wark*, *supra*. (5) Apart also from express agreement, a lease may be altered *rebus ipsis et factis*—that is to say, it may be altered, both for the past and for the future, by acts of the parties necessarily and unequivocally importing an agreement to alter, and such acts of the parties may be proved by parole—*Bargaddie Coal Company* v. *Wark*, *supra*.

"In the present case the first suggestion is that the lease of 1832, which is of course a probative writing, abrogated by implication the restriction in the lease of 1798. It certainly did so as regards a particular area, viz., that between No. 6 dyke and Dirthill dyke. For it required that within that area the splint coal (which was there under the day level) should be at once worked in both leaseholds. But I am quite unable to hold that, as regards the rest of the 1798 leasehold, any change was made or sanctioned by the lease of 1832. The utmost that can be said is that it was not thought necessary to express in that lease that the provisions which it contained as to working between the dykes were in derogation of the provisions of the prior lease.

"There being thus no written agreement, it has next to be noted that there is no evidence, and, indeed, no proper averment, of any verbal agree-

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[1] Act 1449, c. 17.

[2] Baillie v. Fraser, June 15, 1853, 15 D. 747, 25 Scot. Jur. 449; Carnegie v. Guthrie, Dec. 22, 1866, 5 Macph. 253, 39 Scot. Jur. 112; Lindsay v. Webster, Dec. 9, 1841, 4 D. 231, 14 Scot. Jur. 89.

[3] Bell v. Lamont, June 14, 1814, F. C.; M'Tavish v. Fraser of Lovat's Trustees, Hume's Dec. 546.

[4] Gowans v. Christie, Feb. 14, 1873, 11 Macph. (H. L.) 1, *per* Lord Cairns, p. 12, 45 Scot. Jur. 167.

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there was no power to work, and the absence of an express prohibition would not avail the defenders. If as a result of this construction the defenders were unable to proportion the working of the splint seam to the other coal, they would be free of the obligation in that respect laid upon them by the lease. The obligation was qualified by the words "as nearly as possible." (2) The 1798 lease was not modified by the lease of 1832, except in regard to the area between the dykes. (3) The extent to which simultaneous working had been carried on was not as great as the defenders contended, but, assuming it to have been carried on to some extent with the knowledge of the landlord, that would only, on the authority of *Wark*[1] and other cognate cases bar the pursuers from claiming damages as for breach of contract in the past, but could not bar them from insisting that the stipulations of the lease should be complied with in the future.[2] At all events the pursuers could not be so barred unless it was shewn that the defenders would suffer serious prejudice by being now compelled to comply with the provisions of the lease; but the defenders had failed to prove that they would be so prejudiced. It was not proved that the defenders would have had to sink fewer pits if those sunk in the 1832 leasehold

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ment. There is thus no need to inquire what would be the result as to future workings of such verbal agreement proved by parole and followed by acts done in pursuance of such agreement.

"Accordingly the defenders' case must depend upon simple acquiescence, or upon acquiescence coupled with facts and circumstances importing necessarily and unequivocally an alteration of the lease *rebus ipsis et factis*.

"Now, I think it is quite clear that, except as regards the past, mere acquiescence will not do. Acquiescence in—that is to say, tacit consent to—acts done in contravention of a lease may justify those acts, or bar complaint with respect to them, but it can have no effect as to the future. This, I think, was not ultimately disputed.

"The ultimate question therefore comes to be whether both parties to the lease have so transacted and acted as to imply, and necessarily to imply, a final agreement between them that for the whole period still to run of the 1798 lease the coal above and the coal below the day level may, notwithstanding the terms of the lease, be worked simultaneously.

"Now, there is no doubt upon the proof of two things—(1) That the landlord (including the pursuers since their purchase in 1854) knew, or through their engineers had the means of knowing, that coal was being worked in the 1798 leasehold both above and below the day level. (2) That in that knowledge they accepted (without objection on that score) lordships calculated at one-seventh of the produce for the coal above, and one-tenth of the produce for the coal below. On the other hand it is not, in my opinion, proved that any pits were sunk or mines driven specially in connection with the lower level—that is to say, pits or mines which would not have been sunk or driven if the conditions of the lease had been adhered to. I speak with diffidence as to the results of a proof which was so much overloaded, and in which the different issues were so much mixed up. But I do not remember, and cannot find that proof of that kind was even attempted. Certainly if it was so my attention was not drawn to it. Of course the simultaneous workings (admittedly lawful in the 1832 field) were extended into the lower seams in the older field, and the necessary roads and communications were of course made as those workings pro-

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[1] 3 Macq. 467, 31 Scot. Jur. 323.

[2] Hall v. M'Gill, July 14, 1847, 9 D. 1557, 19 Scot. Jur. 650; Bank of Scotland v. Stewart, June 19, 1891, 18 R. 957; Sutherland v. Montrose Shipbuilding Co., Feb. 3, 1860, 22 D. 665, 32 Scot. Jur. 262.

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had not been intended to work coal below the day level in the older leasehold. The defenders had profited by the landlord having allowed them to work in that way, and had been fully recouped for their outlay in driving mines from the one leasehold to the lower seams in the other. It was said that the lease had been altered, but there was no evidence of any agreement to alter it. Such an agreement was not even alleged, the defenders' case being that the lease had been altered by the actings of parties. But mere actings could not alter a written agreement. Taking the view of the law most favourable to the defenders, actings could have no such effect unless they were preceded by and in pursuance of an agreement in writing or words between the parties.[1] Still less could mere actings of parties be founded on as altering a written lease in a question with a singular successor.[2]

At advising,—

LORD PRESIDENT.—The first question is whether, on a sound construction

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gressed. But there is no evidence that these workings thus permitted did not fully recoup the necessary outlay, or that anything was done which would not have been done supposing it had been quite in view that the right to work simultaneously was precarious, and that in course of time it might be the landlord's interest to interfere. Further, I do not find that except by inaction the landlords, particularly the present pursuers, made themselves in any way parties to the workings in question, or any of them. The tenants did what they did, whatever it was, at their own instance and on their own responsibility. I am not, of course, speaking of the arrangements of which the 1832 lease was the upshot. These were made matter of express agreement under that lease.

"These being the facts, can I affirm that they necessarily imply an agreement to abrogate or alter the conditions of the 1798 lease? I am of opinion that I cannot. I think all that the facts necessarily imply is a licence by the landlord to the tenants to do the things which the tenants did do. They do not, I think, necessarily imply an agreement fettering or affecting the landlord's action during the whole period of the lease. In other words, I do not think it necessary, in order to explain what occurred, to postulate any such agreement as the defenders infer. Especially do I hesitate to do so when there is no averment and no suggestion that the subject was ever brought up between the parties, or that any definite terms were ever discussed between them. It would, I think, be highly dangerous if the provisions of a formal lease should be liable to be abrogated by proof of facts and circumstances so plainly equivocal; and in that connection it is not, I think, without importance that the alteration which the defenders suggest is not said to have included any provision for a new fixed rent. Assume that simultaneous working is to be held as sanctioned not for the past only but permanently, what is to happen if the defenders after a time cease to find the working sufficiently profitable? What fixed rent are they to pay? There is none fixed in the lease. The alternative fixed rents in the lease are both inapplicable. That is admitted. And how, that being so, the rent is to be fixed, I have I confess been unable to gather. I think that is a difficulty which in itself militates seriously against the defenders' hypothesis of a permanent alteration of the prescribed mode and order of working.

"I am therefore of opinion that the pursuers are entitled to declarator and interdict in terms of the first alternative of the first conclusion of their summons. . . ."

[1] Kirkpatrick v. Allanshaw Coal Co., Dec. 17, 1880, 8 R. 327.

[2] Ersk. ii. 6, 29; Hall v. M'Gill, July 14, 1847, 9 D. 1557, 19 Scot. Jur. 650; Bruce v. M'Leod, July 8, 1822, 1 Shaw's App. 213; Turner v. Nicholson, March 6, 1835, 13 S. 633.

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of the lease of 1798, the tenant is entitled, without the consent of the landlord, to work the minerals below the day level before the upper minerals have been exhausted, and I am of opinion that he is not.

If the lease be examined as a whole, and the several passages be compared which directly relate to working and to royalties, it is plain that the lease contemplates and provides for the tenant working and paying for—first, the minerals above, and then, when they are worked out, the minerals below the day level. It does not contemplate or provide for the simultaneous working of or payment for both. The smaller royalty to be payable on the more costly working of the lower minerals is expressed as "in lieu of" the higher royalty which, it is assumed, has ceased to be paid. The absence of any provision for payment of any return for any of the lower minerals, worked simultaneously with the upper, presents the strongest possible reason for holding that the contract treats such working as outside its scope.

It is true that the whole coals are let, and that this includes the lower strata. But nothing is more common than to let the whole coal of a field, and then to define the system or order of working; the two provisions are quite consistent, and, in my opinion, we have here a prescribed order of working.

The defenders also founded upon the clause in the lease requiring the tenant to proportion the working of the splint seam as nearly as possible to the other seams; and they say that it is impossible to give effect to this clause, on the pursuers' theory, inasmuch as all the splint coal is below the day level. It is to be observed, however, that while it is true of the splint coal now and for a long time that it is below the day level, this was not so at the date of the lease, or for some years after its date, and the words "as nearly as possible" point to this being a condition which might not in all circumstances be effective.

Assuming, now, that under the terms of the lease of 1798 the tenant was not entitled, without the consent of the landlord, to work the lower minerals until the upper minerals were exhausted, the next question is, Have the pursuers been debarred by anything done by themselves or their predecessors in title from compelling adherence to the lease in the future workings?

I do not consider the lease of 1832 to have had any such effect. I think that its provisions about what has been called the "'tween dykes area" shew that the parties assumed that the tenant was entitled to work both levels simultaneously, and I gave my reasons for so thinking in my former opinion. But, be those reasons as sound as I deem them, they furnish no warrant for holding that this error bound the parties to prosecute the same system of working on a part of the field to which the contract of 1832 itself had no application.

Among the acts and deeds on which the defenders rely the lease of 1832 stands out, not on account of its argumentative avail, which I think small, but because it is a written deed. It has its place, however, also, in the train of conduct on which the defenders found.

I have become very familiar with the various incidents, from 1798 downwards, to which our attention has been called. It may be conceded to the defenders that it is clearly proved that, from a very early period of the lease, coal was wrought in the lower seams, now and again, and to substan-

tial amounts; that not only was this done with the knowledge and consent of the pursuers' predecessors, but that the working of the lower minerals was encouraged by them, and that the same system of working was continued after the pursuers became proprietors and down to the present time. Further, I think it clear in fact that, until the former action was in the House of Lords,[1] neither party had at all considered whether the lease allowed or did not allow the working of the lower minerals. Both parties found it convenient that they should be so worked.

I think that I have put the case of the defenders on this matter fairly, and the question is, What does it avail them in the present action?

The pursuers are not seeking to question, or to make the defenders liable for anything done in the past as having been done in breach of the contract. Their own knowledge and consent would be conclusive against any such claim. But the present question is of the future. Have the pursuers barred themselves from now insisting that the lease shall in future be complied with?

Now, it can hardly be maintained that a permitted deviation from a clause of a lease of itself commits the landlord to continue the like permission all through what may be as in the present lease a very long term. The case must be carried beyond the mere fact of the prohibited act having been allowed to be done with more or less frequency. Whatever be the mode of proof competent, the thing to be proved is an agreement to abrogate for the future one of the terms of the lease.

The primary answer, however, to the defenders' case is that such an agreement can only be proved by writing. None of the cases cited support the defenders. In particular, the difference between the *Bargaddie*[2] case and the present is too obvious to require further development, except in one aspect, to which I shall presently refer.

I have said that whatever be the competent mode of proof, the thing to be proved is an agreement to abrogate one of the leading conditions of the lease. Now, it may be well to say that, even were the question of competency waived, the history of the coalfield shews that this question was never so much as considered. As I have already said, the parties never adverted to the terms of the lease, and assumed that simultaneous working was within the lease. Further, very much shorter views were taken than applied to the whole remaining term of the lease.

It was argued, however, for the defenders that what had been already done in the way of working, and done with the consent and approval of the landlord, rendered it impossible, without altogether unreasonable loss, now to revert to the scheme of the lease; and that the past permission or tolerance must be held to have implied a consent for the future. The defenders' case under this head (even assuming it to be a legitimate development of the *Bargaddie*[2] case) fails in fact. All that can be said is that certain mines have been constructed for the lower minerals, which, if those workings must in the meantime be given up, will cease to be remunerative. Even if this general statement were not subject to some criticisms, I should say that the mere fact that some of the defenders' outlay would be made

[1] See note on p. 1045.

[2] 3 Macq. 467.

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unremunerative by the pursuers reverting to their rights under the lease, could hardly be held to debar them from those rights. The defenders cannot say, to put it at the highest, that the pursuers are more responsible than they are themselves for the departure from the lease, and they must be held to have executed those works at their own risk. But, further, the defenders could only found on the execution of those works by pleading that it would be inequitable to throw on them substantial loss induced by the pursuers' conduct. Now, I do not think that it is proved that the works in question have been unremunerative, even if their working be stopped now. Yet again, one of the stone mines from the George pit, upon which this argument arises, was constructed after intimation by the pursuers that they held the under workings to be illegal.

On these grounds, which I have stated in condensed form, I am of opinion that the pursuers are entitled to prevail in their leading conclusions.

LORD ADAM concurred.

LORD M'LAREN.—Since the case was argued before us I have carefully considered the documentary evidence and proof in order to ascertain whether there is legal evidence of a variation of the conditions of the holding of the tenants of the minerals as expressed in the lease of 1798. As we are agreed in opinion, I do not think it necessary that I should restate the grounds of our decision, which are expressed in your Lordship's opinion. I shall confine myself to the briefest possible statement of my view of the law applicable to such questions. As it is a fundamental principle of our law that rights to land can only be constituted by writing, it follows, in my view, that where a subaltern right is constituted by an owner of land, whether this be a right in perpetuity or a right of tenancy for a term of years, the interests of the superior or owner on the one part, and of the feuar or tenant on the other, will be regulated by the original grant until these rights are altered by an agreement in writing between the parties or their successors in title. I think there is neither principle nor authority to support the proposition that the right of the tenant may be enlarged or restricted otherwise than by an agreement in writing, but of course if there be such an agreement in an informal writing evidence of possession or performance distinctly referable to the new agreement may be used to supply the want of the formalities which are essential when the written title only is relied on.

I think that the generality of the rule that writing is necessary to the constitution of a right in relation to land is in no way affected by the principle recognised in such cases as *Wark* v. *Bargaddie Coal Company*,[1] which, as expressed by Lord Cranworth, amounts to no more than this, that if a landlord authorises something to be done in contravention of a lease, the tenant is not liable as for a breach of contract. If, for example, a tenant or feuar is put under obligation not to build on a certain part of his holding, or is to leave intact a barrier between his mine and that of an adjacent tenant or proprietor, or is only to cultivate his field in a particular way, then if he is charged with a breach of his agreement he may prove *prout de*

[1] 3 Macq. 467.

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jure the consent of the landlord to the particular building, or mine, or deviation from the prescribed rotation, as a bar or justification of the alleged breach. But I am unable to admit that this equitable plea should be extended so as to justify acts of the tenant to which the landlord has not given his consent, or so as to warrant the inference that the consent to particular acts amounts to a discharge of the condition for the remaining years of the lease.

The landlord could not in my judgment be entitled to deprive the tenant of the benefit of capital laid out with his consent in developing the estate; and if it could be shewn in the present case that pits had been sunk with the landlord's permission or acquiescence for the working of an area which had not been fully wrought out, I should have thought that the defenders were entitled to follow out their workings to the extent to which the original permission might reasonably be taken to apply. But the existing pits have already been wrought for a period exceeding the usual duration of a mineral lease. Such expenditure in underground mining as has since taken place is in my view nothing more than ordinary mining, and I cannot regard it in the light of capital expended in reliance on a right or permission given to vary the mode of working prescribed by the lease.

With regard to the question how far the consents of the heirs of Mr Wemyss (the contracting party) would be binding on the Carron Company, I should imagine that an alteration of the terms of a lease, if made in writing and acted upon, would be binding on a singular successor for the same reason as the lease itself is binding,—I mean by the effect of the statute. But I do not think that the accounts of royalties which were rendered from time to time by the tenants and accepted as the basis of settlement, nor the letters which were written on behalf of the proprietors inviting the tenants to work the splint coal below the day level, amount to an agreement or consent to discharge the condition which I take to be implied in the lease of 1798, that the working of coal below the level is only to begin after the upper coal is exhausted. I think these writings amount at most to a toleration of simultaneous working above and below the level so long as such working suited the views and wishes of both parties, and such consent to the existing mode of working as Carron Company may be held to have given is of the same character. In our judgment in the previous case, in which we applied the successive rates of royalty specified in the lease to the altered state of circumstances, we gave full effect to the principle that the landlord is not entitled to be indemnified against acts which he has authorised. But I find nothing in what has been done which amounts to the introduction of a new term into the contract of location, or which bars the Carron Company from reverting to the mode of working prescribed by the lease.

LORD KINNEAR concurred.

THE COURT adhered.

JOHN C. BRODIE & SONS, W.S.—DAVIDSON & SYME, W.S.—Agents.

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EDINBURGH NORTHERN TRAMWAYS COMPANY, Pursuers (Reclaimers).—*Salvesen—C. K. Mackenzie.*

GEORGE VILLIERS MANN AND ANOTHER, Defenders (Respondents).—*Johnston—Clyde.*

Company—Law-agent's and engineer's expenses incident to passing Act of Parliament—Promoter's remuneration—Trust—Auctor in rem suam—Edinburgh Northern Tramways Act, 1884 (47 *and* 48 *Vict. cap. ccxli.*), *sec.* 78.—The Edinburgh Northern Tramways Act of 1884 by section 78 enacted that "the company shall pay all costs charges and expenses of and incident to the preparing for obtaining and passing of this Act or otherwise in relation thereto."

Held that the engineer and law-agent of the Edinburgh Northern Tramways Company were not barred from receiving remuneration for professional services rendered by them incident to the preparation for obtaining and passing the company's Act of Parliament, or otherwise in relation thereto, by reason of their being promoters of the Act at the time when such services were rendered.

Observations (*per* Lord M'Laren and Lord Kincairney) as to the analogy between the positions of an ordinary trustee and a company promoter.

Company—Promoter—Preliminary Expenses—Cost of procuring parliamentary deposit—Edinburgh Northern Tramways Company Act, 1884 (47 *and* 48 *Vict. cap. ccxli.*), *sec.* 78.—The Edinburgh Northern Tramways Act, 1884, sec. 78, provides that "the company shall pay all costs charges and expenses of and incident to the preparing for obtaining and passing of this Act or otherwise in relation thereto." *Held* that a promoter of a company who had obtained from a bank on his own individual credit the sum required for the parliamentary deposit in connection with the company's Act, was not entitled to charge a commission for so doing against the company.

Process—Remit—Company—Remit to Taxing-Master of the House of Commons to tax promoter's account—Finality of report.—In an action of accounting brought by a public company against one of its promoters, the defender lodged certain counter claims. The account of these lodged by the defender was remitted to the Taxing-Master of the House of Commons, who taxed the account. The pursuer lodged objections to the report, mainly on the ground that the Taxing-Master did not state in detail the method adopted by him in dealing with disputed items. The Lord Ordinary pronounced an interlocutor remitting these objections to the Taxing-Master. The Court *recalled* his interlocutor, in respect that it did not appear that the reporter had mistaken the duty entrusted to him, or come to a wrong conclusion on any matter of principle.

1ST DIVISION. Lord Kincairney.

(ANTE, 18 R. 1140, and 20 R. (H. L.) 7.)

In February 1889 the Edinburgh Northern Tramways Company brought an action against William Hamilton Beattie, architect and surveyor in Edinburgh, and George V. Mann, S.S.C., concluding, *inter alia*, for an accounting by them in regard to all moneys, shares, or debentures received by either of them as promoters of the Tramways Company, or in virtue of an agreement entered into between them and the Patent Cable Tramways Corporation on 25th October 1884.

Mr Beattie and Mr Mann were the principal promoters of the Tramways Bill, and afterwards became the engineer and solicitor respectively of the Tramways Company.

On 18th July 1890 the Lord Ordinary (Trayner) pronounced an interlocutor finding that the defenders were bound to account to the pursuers for all sums of money, &c., received by them in virtue of the agreement entered into on the 25th October 1884, and appointed them to lodge an account of "all sums which they claim respectively to be entitled to set against the before-mentioned sums of money," &c.

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This interlocutor was afterwards affirmed by the First Division and by the House of Lords.[1]

Thereafter Mr Beattie and Mr Mann lodged accounts, and the tramways company lodged objections thereto, and Mr Beattie and Mr Mann lodged answers to these objections.

At the request of the parties the Lord Ordinary (Kincairney) dealt first of all with objection 1, which was as follows:—"The chief ground of the present action is that the defenders Messrs Mann and Beattie were promoters of pursuers' company, and that, as such, they are bound to account to the company for the whole sums of money, debentures, shares, &c., received by them under and by virtue of an agreement with the Patent Cable Tramways Corporation, dated 25th October 1884, under which they became entitled to receive from the Cable Corporation the cash, shares, and debentures set forth in account No. 1. The defenders Mann and Beattie, in their answers to the pursuers' statements, admit that they were promoters of the pursuers' company, along with . . . The pursuers maintain that, as such promoters, and as occupying a fiduciary position in relation to the pursuers, the defenders Mann and Beattie are not entitled to charge the pursuers for any professional services rendered by them or by their respective firms or partners, or by any of their copromoters in connection with the obtaining of the pursuers' Act of incorporation, unless such charge is expressly sanctioned by the said Act, and that the said Act does not sanction the payment of remuneration to a promoter. The pursuers accordingly object" to certain specific charges in the defenders' accounts for engineering and legal work done by them respectively.

The defenders, *inter alia*, founded on the Northern Tramways Company's Act, 1884, section 78.*

On 20th December 1893 the Lord Ordinary (Kincairney) pronounced an interlocutor, by which he found that the defenders were "not barred from charging the pursuers for professional services rendered by them incident to the preparing for obtaining and passing of the pursuers' Act, or otherwise in relation thereto, by reason that they were promoters of the said Act at the time when such services were rendered," remitted sundry of the accounts and objections thereto to the Auditor, and to the Taxing-Master of the House of Commons, and found that a remit fell to be made to an Accountant to report on certain other objections, and to a civil engineer to report on objection 11 (see p. 1058, note), with instructions to distinguish in the latter case any charges not incident to the promotion of the Act.†

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[1] Mann v. Edinburgh Northern Tramways Co., June 26, 1891, 18 R. 1140, Nov. 29, 1892, 20 R. (H. L.) 7.

* The Edinburgh Northern Tramways Company Act, 1884 (47 and 48 Vict. cap. ccxli.), sec. 78, provides that "the company shall pay all costs, charges, and expenses of and incident to the preparing for obtaining and passing of this Act, or otherwise in relation thereto."

† "OPINION.—Messrs Mann and Beattie have now, in compliance with Lord Trayner's interlocutor of 18th July 1890, lodged an account of the sums of money, shares, and debentures which they claim to be entitled to set against the considerations received by them from the Patent Cable Tramways Corporation, Limited, under the agreement dated 25th October 1884, but disallowed as promotion money by that interlocutor. The tramway company have lodged objections to these accounts, and parties have been heard in the Procedure Roll on the objections. Parties were agreed

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The pursuers reclaimed, and the First Division on 6th March 1894 recalled the interlocutor of the Lord Ordinary *in hoc statu* in so far as it found that the defenders were not barred from charging the pursuers for professional charges, on the ground that it was not expedient to determine that question until the accounts were taxed and the claims were before the Court in specific form. *Quoad ultra* the Court adhered to the Lord Ordinary's interlocutor, and remitted to him to proceed.

The Lord Ordinary thereafter proceeded to dispose of the other objections to the defenders' accounts, including objection 11 (which was concerned with the defender Beattie's account, No. 763 of process) and objection 15.*

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that the greater number of these objections cannot be disposed of without inquiry.

"There is, however, one main objection on which both parties desired a judgment, in the belief that the point of law involved could be determined without inquiry, and that the decision of it would materially affect all the other objections.

"The objection is the first, and is this, that Mann and Beattie are not entitled to take credit for their accounts for professional services rendered in obtaining the Act incorporating the Edinburgh Northern Tramways Company. Each of these gentlemen has lodged a professional account for services rendered during the promotion of the company, and I am asked to negative absolutely their claims for these accounts, on the ground that, although the services may have been rendered, and may have been beneficial to the company, the accounts cannot be recovered, because Mann and Beattie were promoters of the company when the services were rendered.

"There is no need to make any attempt to define the term 'promoter,' because, whatever limitations may be put on the meaning of the term, there can be no doubt that Mann and Beattie were promoters of the company. They do not dispute it, and the payment to them of £17,000, stipulated to be made to them by the Cable Corporation, under the agreement of 25th October 1884, was disallowed just because it was promotion money.

"Messrs Mann and Beattie rest their claim on the 78th section of the Northern Tramways Company's Act, whereby it is provided that 'the company shall pay all costs, charges, and expenses of and incident to the preparing for obtaining and passing of this Act, or otherwise in relation thereto.'

"The argument of the objectors is that a promoter of a company is in law a trustee for the company which he is bringing into existence, and that the whole principles of the law of trust, applicable to the relations between the trustee and the trust-estate, apply to him; and that it is an elementary

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* Objection 11.—"The pursuers, without prejudice to their other objections thereto, claim that the account of William Hamilton Beattie, No. 763 of process, be remitted to a competent party for taxation. The defenders are called upon to produce the diaries of the said William Hamilton Beattie, and all memoranda, drawings, plans, specifications, or other writings prepared by him, and also receipts for all outlays, so that the said account may be properly instructed."

Objection 15 was an objection to a sum of £1070 claimed by the defenders as commission for procuring the necessary parliamentary deposit of £5350 in connection with the Act of Parliament. The defenders in answer to this objection explained that they had with others granted a promissory-note to the bank, that by so doing they had incurred a serious risk for the benefit of the company, and been put to expense, and that they had actually paid to the bank as interest and commission £388, 10s.

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On 29th March 1894 the Lord Ordinary (Kincairney) remitted to John Wilson Brodie, C.A., Edinburgh, to report on, *inter alia*, objection 15, and remitted also "to C. W. Campion, Taxing-Master of the House of Commons, to report on objection 11, with instructions to distinguish in the latter case any charges not incident to the promotion of the pursuers' Act."

In addition to his account, No. 763 of process, which was a summary, and contained no details of the work alleged to have been done by him, Mr Beattie, in compliance with an order by Mr Campion, lodged a detailed statement of particulars, No. 775 of process.

On 24th January 1895 Mr Campion issued the following report:—"In pursuance of the remit by Lord Kincairney, Lord Ordinary . . .

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principle in the law of trust, not only that a trustee cannot make a secret profit at the expense of the trust-estate, but also that he cannot be *auctor in rem suam*, cannot make a traffic of his trust, and cannot charge for any professional services rendered by him to the trust-estate of which he is trustee.

"That these are elementary principles of trust law cannot be questioned, and there can be no doubt that the accounts of Messrs Mann and Beattie must be disallowed, if their position as promoters was precisely that of trustees, and if their charges are not authorised by the 78th section of the Act above quoted.

"The application of these principles of the law of trust to a promoter of a company was considered in the leading case of *The Huntington Copper Company* v. *Henderson*, Jan. 12, 1877, 4 R. 294, aff. Nov. 29, 1877, 5 R. (H. L.) p. 1. There, a director of a company, who had been a promoter, was held bound to pay to the company £10,000, which, during the course of the promotion of the company, had been paid to him by the vendors of the concern for the purchase of which the company was promoted and incorporated. He was considered to be a trustee, and therefore not entitled to make a profit at the cost of the company; and it was considered that the £10,000 was truly paid by the company to the vendors, and by the vendors to the promoters. Lord Young, who was Lord Ordinary, put his judgment on the general principle that a trustee shall not, without the knowledge and consent of his constituent, make profit of his office, or take any benefit from the execution of it, or (expressing the doctrine with still greater generality) 'that a man who is charged with the duty of attending to the interests of another shall not bring his own interest in competition with his duty.' In the Inner-House reference was made, particularly by Lord Mure, to the principle that a trustee could not charge for professional services rendered to the trust-estate, and his Lordship clearly indicated his opinion that that rule of trust law was applicable to the case of a promoter which was then under consideration; and I think the objectors are entitled to found on Lord Mure's opinion. But I do not think that the point now raised, viz., whether a promoter is entitled to credit for professional charges, was decided in the Court of Session in the case of *The Huntington Copper Company*. Neither do I think that any distinct opinion on the point was expressed in the House of Lords. The case of *The Huntington Copper Company* seems to leave the point now made open, although there were certainly observations made on the Bench to which the objectors are entitled to refer.

"The objectors referred also to *The Emma Silver Mining Company* v. *Grant*, 1878, 11 Ch. Div. 918, and *Lydney & Wigpool Iron Ore Company* v. *Bird*, 1886, L. R., 33 Ch. Div. 85, in which promoters were held bound to account for promotion-money, but were allowed to take credit, and that on a liberal footing, for their outlays in promoting the company, so that they were held bound to account for their net profits only. The objectors founded on these cases, because nothing but outlay was allowed, and nothing

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I have, in presence of the parties, taxed the within bill of costs of Mr William Hamilton Beattie, in accordance with the instruction contained in the said remit, and I have allowed the same at the sum of £2494, 1s. 4d., and I have further allowed Mr William Hamilton Beattie the sum of £62, 10s. as costs of the taxation, all which I humbly report to the Lord Ordinary."

This report was indorsed on Mr Beattie's account, No. 763 of process. The amount of the account was £4200, and there was taxed off £1705, 18s. 8d., leaving £2494, 1s. 4d.

Mr Brodie also presented his report in which, *inter alia*, he referred the claim by the defenders for commission in connection with procuring the parliamentary deposit to the decision of the Court.

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was allowed for services rendered. But it does not appear that in either of these cases any services of the kind had been rendered.

"No clause authorising payment of the costs, charges, and expenses of promotion was founded on in any of these cases, and there seems to have been no such clause.

"Had a claim for services been advanced in any of these cases, it seems that it would have been open to the further answer that such services must have been rendered without any contract, because, until a company is incorporated, there is no one with whom a promoter can contract, and therefore no claim for such services in such a case could have been rested on contract. But this difficulty is obviated by the 78th section of the pursuers' Act, a clause which is usual in such statutes, and the object of which appears to be to meet this difficulty.

"The previous judgments in this case leave the present question undecided, although opinions were expressed in the course of the proceedings which certainly appear to be favourable to the objection.

"In these circumstances, it is with no little mistrust that I have come to the conclusion that I cannot sustain the objection.

"I think that the analogy between a trustee and a promoter is defective, and that all the principles and practice applicable to a trustee cannot be applied to a promoter. Mann and Beattie were not in a strict sense trustees when they were engaged in promoting the company. They could not be, because they had no constituent or beneficiary. They were creating the trust, and even the strictest law applicable to trusts does not bar an agent from making professional charges for framing the trust-deed by which he is made a trustee. Again, a promoter may lawfully promote a company for the purpose of selling to it his own property, and a sale by a promoter of his own estate to the company which he promoted might be unobjectionable. To use the language of Lindley, 5th ed. 349,—'It is unsafe to say that any particular person was a promoter of a particular company, and to infer from thence that he is liable to account to it, as if he had been its trustee.' It cannot be affirmed that, during the whole time when a promoter is concerned with the promotion of a company, he is under the disabilities of a trustee. It seems to be a question of circumstances in each particular case when such disabilities begin to attach.

"There is no doubt that a promoter cannot make secret profits, and that all promotion money is illegal. But I cannot affirm that his duties towards the company which he promotes are the same as the duties of a trustee towards the trust-estate, or towards the beneficiaries under the trust law, and I think that it is stretching the analogy of trust law too far to affirm that a promoter can never be paid for his professional services in virtue of a clause which requires the company to pay the costs, charges, and expenses incident to the obtaining of the Act.

"That clause is a clause in favour of promoters chiefly or solely, and it has been decided in England that it is not a clause for the protection of

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On 12th March 1895 the Lord Ordinary "having heard counsel on Mr Campion's report annexed to No. 763 of process, finds that the said report imports that the whole charges in the account which he has taxed are incident to the promotion of the pursuers' Act: Allows objections to said report to be lodged."

Objections to both reports, and answers thereto, were lodged, the purport of which for the purposes of this report sufficiently appears from the Lord Ordinary's opinion, printed *infra*.

On 20th March 1896 the Lord Ordinary (Kincairney) pronounced an interlocutor, in which he, *inter alia*, remitted to Mr Campion to consider and report on the objections by the pursuers to his report, and sustained the objection by the pursuers to the charge of £1070 for commission for procuring the parliamentary deposit.*

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those who render services on the employment of promoters, but of those who have no one to look to except the company when it is brought into existence,—that is to say, of promoters—*Wyatt* v. *Metropolitan Board of Works*, 1862, 11 C. B. (N. S.) 744; *Skegness and St Leonard's Tramways Company*, 1888, 41 Ch. Div. 215.

"I think that the words 'costs, charges, and expenses' ought to be read as extending beyond outlays. For, according to the cases of *The Emma Silver Mining Company* and *Lydney*, *supra*, outlays would be allowed without the sanction of any such clause, and unless the words go beyond outlays they are ineffectual. The case of *Shaw's* claim *in re Brampton and Longtown Railway Company*, 1875, 10 Ch. 177, appears to be in point. In that case a claim of a solicitor, who was promoting a railway company, for professional services rendered by him was allowed against the company. A similar claim was disallowed in *Wyatt* v. *The Metropolitan Board of Works*, *supra*, but there the person making the claim was not the promoter, and it was held that his recourse was against the promoter.

"The right of a promoter to make professional charges under this clause appears distinctly recognised by Lindley, J., who says that in *Wyatt* v. *The Metropolitan Board of Works* it was in effect decided 'that only those persons can sue the company upon a clause in the usual form who have incurred expense or bestowed time and trouble in forming the company, and in getting its Acts passed, and who have no other paymasters. For example, solicitors or parliamentary agents who have thus acted, and who have not been employed by other people who are liable to them, can sue the company on such clauses.'—Lindley on Company Law, 5th ed. p. 147.

"On the whole, I come to the conclusion that there is no sufficient authority for applying to the case of a promoter the rule that a trustee cannot be allowed his professional charges, and that such charges may be allowed under the words 'cost, charges, and expenses' in the 78th section of the pursuers' Act.

"There are some of the objections which apparently cannot be disposed of without proof or further admissions. Of these, with, I understand, the assent of the parties, I have reserved consideration. I understand that this interlocutor will be submitted to review, and in that view it may be more convenient that I should not name the accountant or the civil engineer to whom it will be necessary to remit several of the objections."

* "OPINION.— . . . On 24th January 1895 Mr Campion issued his report, which bore that he had taxed Mr Beattie's account in accordance with the instructions contained in the remit, and had allowed it at the sum of £2494, 1s. 4d.

"Mr Campion's report does not distinguish or point out in any way 'any charges not incident to the promotion of the pursuers' Act.' Whatever was intended by this report it appears to me that it fails to furnish

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The pursuers reclaimed against the interlocutors of 20th December 1893 and 20th March 1896, and argued;—(1) A company promoter was in relation to the company which he was promoting in a fiduciary position analogous to that of a trustee in relation to the beneficiaries of the trust. As a trustee was undoubtedly barred from claiming remuneration for his professional services out of the trust-estate, so the promoter was not entitled to claim remuneration for his services out of the estate of the company. He might, like a trustee, claim to be reimbursed for all reasonable outlays and costs of which he was out of pocket, but he was not entitled to make a secret profit, nor could he by making a traffic of the company be *auctor in rem suam*. This rule was founded upon considerations of public policy, which demanded that one who had a duty to perform should not be at liberty to place himself in a position where his interest would be likely to conflict with his duty.[1] It was true that under the 78th section of the Northern Tramways Act, 1884, a promoter was to be kept *indemnis* for costs and charges incurred by him in promotion,

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any information as to the precise nature of the defenders' charges, such as their Lordships in the Inner-House appeared to desiderate.

"Mr Wilson Brodie's report was afterwards lodged. . . .

"I will first deal with Mr Campion's report, to which the pursuers have stated detailed objections. For the defenders, however, it was contended that almost all these objections were foreclosed by the report, and that the remit should be dealt with as a judicial remit, or judicial reference, and that Mr Campion's report was therefore final as to all questions properly falling within the remit. I am not of that opinion. I think that the remit was not of that character, but was of the nature of an ordinary remit to an accountant, whose report is, by our practice, open to review by the Court.

"Some embarrassment, however, was said to be caused by an interlocutor pronounced by me on 12th March 1895, on consideration of a note by the pursuers and answers by the defenders, Nos. 772 and 776 of process. The note craved that the account should be remitted back to Mr Campion, that he might separate from the other items all items which did not properly pertain to the performance by Mr Beattie of professional work as engineer in relation to the obtaining and passing of the pursuers' Act. In their answers to this note the defenders made certain averments as to the manner in which Mr Campion had dealt with the account, and they stated, in particular, that 'while he taxed down the scale of charges he determined that the whole charges contained in the account were charges for professional services, and were, in his judgment, "charges incident to the promotion of the pursuers' Act," and accordingly he was not called on to distinguish any charges not incident to the promotion of the pursuers' Act; and his report bears that he has taxed Mr Beattie's said account in accordance with the instructions contained in the said remit.'

"Considering that note and the answers, with Mr Campion's report, I pronounced the interlocutor of 12th March 1895, by which I found that

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[1] Lord Gray and Others, Nov. 12, 1856, 19 D. 1; Mann v. Edinburgh Northern Tramways Co., Nov. 29, 1892, 20 R. (H. L.) 7, *per* Lord Chan. Herschell, p. 11; Huntington Copper Co. v. Henderson, Jan. 12, 1877, 4 R. 294, Lord Mure, p. 306, and Nov. 29, 1877, 5 R. (H. L.) 1, Lord O'Hagan, p. 7; Emma Silver Mining Co. v. Grant, 1878, L. R., 11 Ch. Div. 918; Bagnall v. Carlton, 1877, L. R., 6 Ch. Div. 371, *per* Vice-Chan. Bacon, pp. 382, 384, and 386; Whaley Bridge Calico Printing Company v. Green & Smith, 1879, L. R., 5 Q. B. D. 109; Lydney & Wigpool Iron Ore Co. v. Bird, 1886, L. R., 33 Chanc. Div. 85.

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but the section did not warrant him in asking a commission for his personal labours in promoting the company. (2) Mr Campion was not performing his statutory duty under 10 and 11 Vict. c. 69, as Taxing-Master of the House of Commons, in taxing the account in question. He was acting under a special remit, otherwise he could not have taxed Mr Beattie's account as an engineer, for that was quite outside the scope of his official duty. His report, therefore, was not final and conclusive. The statutory procedure for taking objections to his report was not, however, open to the pursuers, for this was not a statutory remit. The Court, therefore, ought to review, and if necessary, correct the report. It was necessary here, for Mr Campion had dealt erroneously with many of the disputed items. Their treatment depended on legal principle, and Mr Campion had misapplied the law. Unfortunately there was nothing in his report to shew the method he had followed, and there were no materials furnished by it which enabled the pursuers to raise the legal question. A re-remit was therefore necessary. (3) The Lord Ordinary had rightly disallowed the charge for commission. All that the defenders were entitled to retain was the amount of interest, &c., actually paid by them to the bank.

Argued for defenders;—(1) There was no absolute rule to the

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the said report imports that the whole charges in the 'account which he has taxed are incident to the promotion of the pursuers' Act,' and I allowed parties to lodge objections to the report. That interlocutor gave effect to the defenders' contention, and was in accordance with their averments in their answers, No. 776 of process; and it still appears to me that it construed correctly Mr Campion's report. Still, on reconsideration, I can hardly say that I now think it a well-advised interlocutor, or calculated to advance the cause, except in so far as it allowed objections, and I regret having pronounced it. I do not think, however, that it occasions any real difficulty; and I was, as I understood, informed by both parties, notwithstanding the defenders' averments in their answers, No. 776 of process, that whether it correctly interpreted the report or not, it did not correspond with what Mr Campion actually did. Besides, the report does not, as it appears to me, furnish the information which appeared to the Court desirable for the due disposal of the cause. The pursuers' objections to the report and the answers consist of statements and counter statements as to the allowance or disallowance by Mr Campion of various charges. Of course nobody but Mr Campion can tell whether the pursuers or the defenders state the more correctly his mode of dealing with the defenders' account; and I confess I think that it is desirable to know what charges of the character objected to Mr Campion has allowed or disallowed, and also his reason for doing the one or the other. Now, the only mode in which this can possibly be ascertained appears to me to be by remitting the defenders' account back to Mr Campion, with the pursuers' objections and the defenders' answers, and asking him to report on the objections and answers except Nos. I. and X. Objection I. raises a question of law with which the Court must deal, and no explanation is required as to objection X. This course may no doubt involve a good deal of trouble and expense, but it seems essential for the disposal of the cause. I do not consider such a remit inconsistent with the interlocutor of 12th March 1895. . . .

"There are, I think, four items which the reporter [Mr Brodie] has left to be dealt with by the Court, and I think he was right in doing so. . . . Lastly, the charge of £1070 as commission for procuring the parliamentary deposit. For this last charge the defenders adduced no authority, and I am prepared to repel it. I am satisfied that it does not fall under section 78 of the Act, and I think that no inquiry about it is necessary. . . ."

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effect that a promoter was in the fiduciary position of a trustee, and liable in all circumstances to the rules regulating a trustee's actions. It could not certainly be deduced from the English authorities. A promoter was not entitled to take up a position of double agency and secret commission, but it was stretching the analogy of trust law too far to affirm that a promoter could never be paid for his professional services in virtue of such a clause as section 78 of the Act. The undernoted cases,[1] and especially *Shaw's* case, shewed this. In any view, Mann and Beattie could not be said to be trustees in the ordinary sense when they promoted the company, for at that time they had no constituent or beneficiary. The case was clearly outside *Lord Gray's*[2] case, the doctrine of which was admitted. The question of a promoter's right to credit for professional charges was not decided in the *Huntington Copper Company*[3] case, and in the *Emma Silver Mining Company*[4] case, and the *Lydney*[5] case, no professional services were rendered of the kind rendered in this case. (2) There was no necessity for a second remit to Mr Campion. What had been remitted to him was quite within the scope of his ordinary duty, and no one was better qualified for the work. There was nothing to suggest that he had proceeded under any misconception of the duty entrusted to him. Every detail and particular had been furnished to him. (3) The defenders having risked their private funds for the benefit of the company, were entitled to the commission claimed.

At advising,—

LORD M'LAREN.—We are now to dispose of two successive reclaiming notes against interlocutors of the Lord Ordinary disposing of objections to the accounts of the defenders Mann and Beattie for services rendered in connection with obtaining the Act of Parliament under which the Northern Tramways Company was incorporated and empowered to execute certain works, and to carry on the business in which it is engaged.

It is not necessary to refer to the previous history of the litigation further than to say that by a decision of this Court, affirmed by the House of Lords on appeal,[6] it was determined that the defenders were not entitled to take benefit by an agreement under which they claimed to retain a sum of £17,000, which they had received from the Cable Corporation in consideration of relieving that company of their obligation to pay the cost of obtaining the Act of Parliament. Under the 78th section of this Act the Edinburgh Northern Tramways Company were empowered to pay the costs, charges, and expenses of and incidental to the preparing for obtaining and passing the Act, and it is

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[1] The Waterloo Co. (Beresford's case), 1863, 33 Beavan, 204; Albion Steel and Wire Co. v. Martin, 1875, L. R., 1 Chanc. Div. 580; *In re* Hereford and South Wales Waggon and Engineering Co., 1876, L. R., 2 Chanc. Div. 621; *In re* Brampton and Longtown Railway Co. (Shaw's case), 1875, 10 Chanc. App. p. 177; *In re* Skegness and St Leonards Tramway Co., *ex parte* Hanly, 1888, L. R., 41 Chanc. Div. 215; Wyatt v. Metropolitan Board of Works, 1862, L. R., 11 C. B. (New Series), 744.

[2] Lord Gray and Others, Nov. 12, 1856, 19 D. 1.

[3] Huntington Copper Co. v. Henderson, Jan. 12, 1877, 4 R. 294.

[4] Emma Silver Mining Co. v. Grant, 1878, L. R., 11 Chanc. Div. 918.

[5] Lydney & Wigpool Iron Ore Co. v. Bird, 1886, L. R., 33 Chanc. Div. 85.

[6] Mann v. Edinburgh Northern Tramways Co., 18 R. 1140, 20 R. (H. L.) 7.

not disputed that the defenders in accounting for the sum of £17,000, which I understand was paid partly in cash and partly by a transfer of shares, are entitled to set off or retain whatever sums they can establish to be due to them as costs and charges falling within the scope of the 78th section.

Accordingly, by the interlocutor of Lord Trayner, dated 18th July 1890, which was adhered to by this Division of the Court, and affirmed on appeal, the defenders were appointed to give in an account of the moneys, shares, &c., received by them under the said agreement, and also an account or accounts of all sums which they claim respectively to be entitled to set against the before-mentioned sums of money, shares, &c.

The case having come to depend before Lord Kincairney, it was maintained on behalf of the pursuers that the defenders were not entitled to remuneration for their services as law-agent and engineer in preparing and obtaining the company's Act of Parliament, but only to repayment of their advances, including sums paid to other professional persons who assisted in the preparation of the bill, and carrying it through its stages.

On 20th December 1893 the Lord Ordinary dealt with these objections, by an interlocutor in which it is found "that the defenders Mann and Beattie are not barred from charging the pursuers for professional services rendered by them incident to the preparing for obtaining and passing of the pursuer's Act, or otherwise in relation thereto, by reason that they were promoters of the said Act at the time when such services were rendered." These findings are followed by a remit in which the different heads of the account are referred for audit to professional persons named by the Lord Ordinary.

This interlocutor is the subject of the first of the reclaiming notes under consideration, the reclaiming note which is dated 21st December 1893.

After hearing argument at this stage of the case, we were not disposed to dissent from the legal opinion of the Lord Ordinary on the subject of the rights of promoters to compensation for services rendered under a clause authorising in general terms the payment of costs and charges incident to the obtaining of an Act of Parliament. But the accounts before us had not been taxed, and to some extent the claims depended on disputed matters of fact. The claims were not before us in a shape in which we could distinguish between legitimate and illegitimate charges, and in such circumstances we considered that it was inexpedient to pronounce general findings defining the rights of the defenders in relation to accounts which could not be assumed to represent the actual expenditure of the defenders in money and services.

We therefore recalled the finding which I have quoted *hoc statu*, and the case went back to the Outer-House for further procedure under the operative part of the Lord Ordinary's interlocutor of 20th December 1893.

The accounts have now been reported on by Mr Campion, Taxing-Master of the House Commons, and Mr Wilson Brodie, accountant, to whom different portions of the accounts had been remitted for taxation. Objections to these reports and answers thereto were lodged by the pursuers and defenders respectively, and the interlocutor of 20th March 1896 disposing of these objections is the subject of the second reclaiming note which is under consideration.

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Before adverting to the specific objections which the pursuers maintain under this reclaiming note, I may state that the reporter, Mr Campion, in his taxation of the account, has allowed Mr Beattie to take credit for his time and trouble in connection with preparing for and obtaining the bill, including not only professional services as engineer of the undertaking, but a large amount of general agency, and similarly Mr Mann's charges for services as law-agent have been sustained. It may be convenient first to consider the general objection to allowing the defenders to take credit for such charges.

It appears to me that in a case like the present it is necessary to distinguish between the special disability which applies only to trustees, or to persons standing in a quasi-fiduciary position towards beneficiaries whose estates are in their hands for administration, and the more general rule which disentitles any agent or representative person from appropriating to himself a benefit which, according to his duty, he ought to secure for his constituent.

It may not be strictly accurate to describe the promoter of a private bill as an agent for a company which does not exist until the bill becomes an Act; but if Parliament thinks fit to recognise his services in obtaining the Act, and gives him a claim against the company for his costs and charges, I think it is a condition of his claim that he must put himself in the position of an agent for the company which he has promoted, and must regulate his relations towards the company according to the duty of an agent. According to this standard of duty the action of the present defenders in taking the £17,000, which would otherwise have gone to the company, was judged illegal; or rather, the transaction was open to the double objection (1) that it was an application of assets of the company to purposes not authorised by the Act of incorporation; and (2) that it was inconsistent with the duty which the defenders owed to the company that they should accept a sum of money for which they had given no consideration, and which they ought to have secured for the company under the agreement which they made on its behalf. But I do not find in the opinions delivered in the House of Lords, or in this Court, any expressions which imply that the defenders were disentitled to fair professional remuneration for services of which the company had the benefit. To say that they were trustees is to assume the question. Persons who agree to act as trustees are understood to give their services gratuitously, and it may very well be that even when Parliament has authorised the payment of the expenses of obtaining an Estate Act, such authorisation will not be construed as creating an exception to the rule that accepting trustees have no claim to professional remuneration. This I take to be the ground of judgment in the case of *Lord Gray*.[1] But in the present case there is no trust. The defenders never agreed to undertake any fiduciary duties that I know of, and I venture to think that it is only in a very remote and unreal sense that the language of trust law can be used with reference to the relation of a company to its promoters. I think that the services of promoters, and especially these professional services, are fairly within the scope of such a clause as this

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78th section, which authorises the payment of costs and charges connected with obtaining the Act.

On the subject of the decisions which touch this point, I have nothing material to add, because I agree in the Lord Ordinary's statement of their import. The cases fall under two heads; those which relate to parliamentary companies, where the payment of costs and charges is authorised by the Act, and cases of registered companies where the preliminary expenses are usually provided for by a contract of which notice is given in the company's prospectus, or sometimes by the terms of the memorandum of association. It has been considered that in the absence of such express agreement or authority the payment of preliminary expenses would not be a legitimate application of the company's money.

The cases falling under the first head are, *Wyatt* v. *Metropolitan Board of Works*,[1] *re Brampton and Longtown Railway Company*,[2] and *Skegness and St Leonards Tramways Company*.[3] In these cases the principle is recognised that the usual indemnity clause in a private Act of Parliament is designed to empower the company to indemnify solicitors and others who have given their time and money in promoting the formation of the company and in obtaining its Act. The Lord Ordinary's view of the cases is also supported by the high authority of Lord Justice Lindley, who (in the passage cited) says that parliamentary agents who have thus acted, and who have not been employed by other people who are liable to them, can sue the company on such claims. I do not understand his Lordship to exclude from the contemplation of the usual statutory clause the case of solicitors who have a guarantee, but it is right that I should say that in my apprehension the question in such cases is, whether the bill of costs represents costs incurred in preparing for and obtaining the Act, and that it is not a good answer to the claim to say either that the claimant holds a guarantee from the promoters of the company, or that he is himself in the position of a promoter.

I pass now to the objections which have been stated to certain findings in the second of the interlocutors under review. I have already mentioned that the Lord Ordinary, giving effect to our wish for further information regarding these accounts, had made certain remits for purposes of taxation. *Inter alia*, by interlocutor, dated 13th June 1894, the account of Mr William Hamilton Beattie was remitted for taxation to Mr Campion, Taxing-Master of the House of Commons. Print G (May 26, 1896) contains the account, with Mr Campion's taxation in a separate red-letter column, and his certificate appended thereto, allowing the sum of £2494, 1s. 4d., together with £62, 10s. as costs of the taxation.

Objections to this account were lodged on behalf of the pursuers, and by the first head of the interlocutor under consideration, the Lord Ordinary has remitted to Mr Campion to consider and report on these objections. I am very clearly of opinion, in common I believe with all your Lordships, that sufficient cause has not been shewn for sending back the account to the Taxing-Master for reconsideration, though I do not say that this might not be done if it could be shewn that the Taxing-Master had made a

[1] 1862, 11. C. B., N. S. 744. [2] 1875, 10 Ch. App. 177.
[3] 1888, L. R., 41 Ch. Div. 215.

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mistake as to the nature of the duty entrusted to him, or had come to wrong conclusions on some matter of principle. If, for example, it should be held that Mr Beattie was not entitled to remuneration for time and trouble, it would be necessary that the account should be reconsidered on that basis. I observe that the account on which the certificate is written only sets forth the heads of Mr Beattie's claim for outlay and professional services; but for the purposes of taxation, Mr Campion was furnished with a statement of particulars in which the work done day by day is recorded with the number of hours occupied in the performance of each piece of business. It is admitted that the parties were heard by Mr Campion with reference to this statement of particulars, and it is not said that the account was not taxed according to the practice of the Taxing-Master's office.

Now, this is not an account, like that of a solicitor, to which a table of fees can be applied, and I may safely affirm that no two persons taxing such an account independently could (unless by accident) arrive at the same numerical result, though, if they were qualified by experience, these limitations might not differ very widely. I am not satisfied that the method of taxation employed differs from what would be employed by our Auditor; but if it does, it must be remembered that this is a case of a remit to a public officer accustomed to tax accounts of this description, and that a true result is most likely to be reached by leaving him free to proceed according to methods which in his experience have been found to be best.

I do not think it is a good objection to the report that it does not distinguish or point out "charges not incident to the promotion of the pursuer's Act," because I assume that such charges, if any, were disallowed; and again, I think it is not a good objection to the report that "it fails to furnish information as to the precise nature of the defenders' charges," *i.e.*, the entries in the account, because this information is furnished by the detailed account on which the report proceeds. I apprehend that the Lord Ordinary desired this information, not so much for the satisfaction of his own mind, but rather in view of the wish expressed by this Division of the Court for further information, and if your Lordships agree with me on the question first considered, it is not now necessary that we should have the particulars of the professional charges allowed by Mr Campion. But if the reasons clearly stated by his Lordship, and supported by counsel in the argument addressed to us, are insufficient to displace the presumption in favour of a report which is evidently the result of very careful consideration, it follows that the report should now be approved. The account claimed amounts to £4200. From this there has been taxed off £1705, 18s. 8d., and I think we should approve of the allowance of £2494, 1s. 4d. as the taxed amount of the bill of costs, with the further sum of £62, 10s. as costs of the taxation.

The Lord Ordinary next deals with the report of Mr Wilson Brodie, and the objections thereto. Subject to any explanations which your Lordships may desire from counsel as to unvouched items which his Lordship has held to be a subject of proof, I am entirely satisfied as to the correctness of these findings. The parties have already had an opportunity of making representations before the Lord Ordinary against the findings of Mr Brodie, and I do not propose to go over these objections seriatim, because I do not

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think we should encourage reclamations against the decisions of a Judge in matters of mere account. I shall only refer to one point, which seems to me to raise a question of principle, I mean the pursuers' objection to the charge of £1070 for procuring the parliamentary deposit, an objection which was very properly referred by the accountant to the decision of the Lord Ordinary and the Court. The deposit was obtained by an advance from the Union Bank on a promissory-note signed by seven obligants, including the defenders Mann and Beattie. The deposit has now been repaid. The charge for commission is defended on the ground that the defenders risked their money for the benefit of the company which they sought to bring into existence. Supposing the risk to have a real existence, I think this is a risk which the defenders voluntarily took on themselves, and is not a charge of the nature contemplated by the 78th section. I presume that the deposit is required as a guarantee that there is a body of subscribers to the undertaking possessed of means, and that the time of Parliament may not be occupied in considering speculative schemes for which money is not likely to be found. In the ordinary course of such business, the deposit would be provided by the subscribers in proportion to their prospective interests in the undertaking, and then no commission for obtaining the money would be required. But if the money is obtained from bankers, the shareholders ought not, in my opinion, to be called on to meet a charge which would not have been incurred if the money had been found in the ordinary way.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT pronounced an interlocutor finding "that the defenders Mann and Beattie are not barred from charging the pursuers for professional services rendered by them incident to the preparation for obtaining and passing of the pursuers' Act, or otherwise in relation thereto, by reason that they were promoters of the said Act at the time when such services were rendered, and to that extent and effect adhere to the interlocutor of 20th December 1893: Recall the said interlocutor of 20th March 1896, in so far as it remits to Mr Campion to consider and report upon the objections by the pursuers . . . to his report . . . Recall also the said interlocutor in so far as it sustains the objection by the pursuers to the charge of £1070 for procuring the parliamentary deposit, and disallows said charge: Repel the said objections of the pursuers, No. 777 of process, to the said report by Mr Campion, on the account of Mr William Hamilton Beattie, No. 763 of process: Approve of the said report: Find that in terms thereof the defenders are entitled in the accounting in the present action to credit for the sum of £2494, 1s. 4d., being the taxed amount of said account: . . . Find that the defenders are also entitled in the accounting to take credit for the commissions paid by them to the Union Bank of Scotland, Limited, in connection with the said parliamentary deposit, with interest thereon at such rate as may be allowed in the accounting," &c.

GRAHAM, JOHNSTON, & FLEMING, W.S.—A. & G. V. MANN, S.S.C.—Agents.

No. 202. EARL OF STAIR AND OTHERS (Earl of Stair's Trustees), Petitioners.—*D. Dundas.*

July 17, 1896. Earl of Stair's Trustees.

Trust—Administration—Application for directions of Court—Judicial Factors (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 39), *sec.* 18.—Under section 18 of the Judicial Factors (Scotland) Act, 1889, it is competent for testamentary trustees to apply to the Court for an order on the Accountant to superintend their administration of the trust-estate, "in so far as it relates to the investment of the estate, and the distribution thereof," and if such order be granted, the Accountant may, if he thinks fit, report to the Court upon any question that may arise in the administration of the estate, "with regard to any of the foresaid matters," and obtain the directions of the Court thereupon.

Held that it was not competent for the Court, upon a report by the Accountant under the above section, to give directions as to whether trustees should or should not delay to sell heritable estate, which the testator had directed them to sell at such time as they thought advantageous or expedient, that not being a question which related to the investment or to the distribution of the estate.

Observations by the Lord President and Lord M'Laren upon the powers of the Court under the above section.

1ST DIVISION. Lord Pearson.

THE Right Honourable North Hamilton Dalrymple, ninth Earl of Stair, died on 6th November 1864, leaving a trust-disposition and settlement by which he conveyed to trustees, *inter alia*, the estate of Cleland in Lanarkshire. After making sundry other provisions, he directed the trustees to sell the said estate at such time as they thought advantageous or expedient, and apply the proceeds, after paying or providing for the other trust purposes, in the purchase of lands to be entailed on his second son, George Grey Dalrymple, and the heirs whatsoever of his body, whom failing, to his eldest son and other substitute heirs. The income was to be paid after George Grey Dalrymple attained the age of twenty-five years, or after his death and during the subsistence of the trust, to the person who, if the trust had come to an end by the fulfilment of all the purposes thereof, would for the time be entitled to the rents of the lands directed to be entailed, but so long as the estate of Cleland remained unsold, one-half of the free rents or proceeds of the minerals in that estate was to be held and added to capital.

The trust came into operation in 1864.

In 1895 the trustees resolved to take advantage of the power conferred by section 18 of the Judicial Factors (Scotland) Act, 1889,* and accordingly they presented a petition to the Court for an order under

* That section enacts,—"Section 166 of the Bankruptcy (Scotland) Act, 1856, shall be and is hereby repealed, and in lieu thereof be it enacted that where a person deceased has left a settlement appointing trustees or other persons with power to manage his estate, it shall be competent for such trustees or other persons to apply to the Court of Session for an order on the Accountant to superintend their administration of the estate, in so far as it relates to the investment of the estate and the distribution thereof among the creditors of the deceased and the beneficiaries under the settlement, and the Court may grant such order accordingly; and if such order be granted, the Accountant shall annually examine and audit the accounts of such trustees or other persons, and at any time, if he thinks fit, he may report to the Court upon any question that may arise in the administration of the estate with regard to any of the foresaid matters, and obtain the directions of the Court thereupon."

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that section upon the Accountant to superintend the administration of the trust. The petition was granted.

At this date Cleland had not been sold, and on 11th December 1895 the Accountant reported to the Court for directions as to whether the terms of the Thellusson Act did or did not apply to the provisions of the trust-disposition and settlement, directing the trustees to accumulate one-half of the proceeds of the minerals in the estate of Cleland.

On 14th January 1896 the Lord Ordinary (Low) decided that the Thellusson Act did apply, and that George Grey Dalrymple was, at the expiry of the period of twenty-one years, entitled to the whole rents and proceeds of that estate.

Thereafter the trustees took steps to have the estate of Cleland valued with a view to its sale, but they were advised by a mining engineer whom they consulted to delay the sale for a time, until the lower seams could be effectually proved.

The trustees accordingly asked the Accountant to report to the Court for directions as to whether they should at once proceed to realise the estate of Cleland, or should delay its sale until the lower seams were proved, and the Accountant presented a report in accordance with their request.

On 1st July 1896 the Lord Ordinary (Pearson) reported the petition to the First Division.*

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* "OPINION.—This application raises a new and wide question touching the scope of a recent statute (The Judicial Factors (Scotland) Act, 1889), and the relations established by that statute between the Court and all trusts which may be brought under its superintendence. . . .

"The question I have to report is, whether the matter thus reported by the Accountant falls within the scope of the 18th section of the Judicial Factors Act, 1889. In my opinion that section ought to receive a favourable construction, and I should not hesitate to aid trustees in matters falling within the scope of it. This application, however, asks for direction on a matter which is not only a question of law, but is peculiarly within the region of discretion. It is the kind of question which would usually be left entirely to the decision of trustees acting honestly, and with the best advice that they can get. The question on the merits is, whether, having regard to the probabilities and possibilities of a certain mineral estate, the rents of which are now paid away under the previous decision as to the application of the income, the trustees ought to sell it now or to keep it? And there is the further question which has been raised on the suggestion of the eminent mining engineers whom the trustees have consulted, viz.:—whether, if they are not to sell it now, they ought to be authorised to spend between £1000 and £2000 of the trust-estate in proving the minerals, with a view to getting a more favourable sale, if they should turn out to be present in workable quantity. Now, the position of trustees, as regards matters falling within the ordinary limits of their discretion, is that they are bound to exercise it on the best advice, and honestly. Here they are aided in the exercise of their discretion by consulting the Messrs Geddes, who are among the foremost mining engineers in Scotland. It is obvious that if the Court is to do anything by way of advising or directing the trustees, so as to keep them safe in the future, it must either accept the report of the men of skill whom the trustees have consulted, or must invite fresh advice. The latter course would probably not advance matters much, and on the other hand, the report and relative letter do not give a very certain sound. While the valuation, which amounts to £26,246, is arrived at apart from the unlet portion of the mineral field, Messrs Geddes' report,

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The petitioners argued that the application for the directions of the Court was competent, in respect that it related to the investment and distribution of the estate.

At advising,—

LORD PRESIDENT.—The 18th section of the Judicial Factors (Scotland) Act, 1889, introduces an entirely new and, from the point of view of trustees, a highly beneficial change in the administration of Scotch trusts. It enables the trustees acting under any private trust to obtain immunity for their acts, in the important articles of investment and distribution, by subjecting their administration to the supervision of the Accountant of Court.

It was said at the bar that the section has been sparingly made use of. If so, this must be either because trustees are not so timid of the responsibilities of administration as the complaints of recent years had persuaded the Legislature, or because they have not been informed of the remedy provided. I am not aware of any reason, in regard to expense or otherwise,

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read as a whole, does not leave out the unlet portion, and in advising the trustees whether they should sell or not, it balances the chances of certain mineral fields presently worked being exhausted against the chances of further minerals being developed. On the balance of these considerations, Messrs Geddes report that they would not advise the trustees to sell the mineral portion of the estate now for a lower sum than £26,000. That report, taken by itself, looks as if Messrs Geddes were prepared to advise a sale if that amount could be got. But the letter which accompanied it contains these words: 'In the whole circumstances I am rather inclined to recommend the trustees to delay the sale for a time, until the lower seams can be effectually proved, as I am satisfied that if they can be developed they will be likely to yield a large income for many years.' Now, I profess myself unable to see how the Court could in any useful way, or to any useful purpose, undertake to direct the trustees in a matter of that sort. It seems to me to be a matter on which the trustees must still exercise their discretion, honestly, and on the best advice they can get; and unless I can find something in the section which clearly imposes such a duty upon the Court, I should hesitate to undertake it. The present petition is, I suppose, one of the earliest presented under this section, and it has already furnished an instance of the usefulness of the statute, for the trustees have obtained the direction of the Court as to the application of the Thellusson Act. But if this application were granted, it seems to me that the Court would be put into the position of directing trustees upon a matter which does not fall within the intention of the statute. As I said before, the 18th section is one which ought to be widely construed; but referring to the words of the section, I doubt whether this particular application is within the limits of it at all. It is limited in its terms to the superintendence of the trustees' administration of the estate by the Accountant, in so far as the administration relates to the investment of the estate and the distribution thereof among the creditors or beneficiaries. The question is, whether I am to direct a sale to be made or to be deferred? That does not relate to distribution among creditors or beneficiaries; though if a sale were directed it might lead up to a stage at which questions as to distribution would arise. Is this, on the other hand, a question of administration relating to the investment of the estate? It is a question as to realisation, and realisation may be for investment or distribution. The region of investment is not reached until after realisation, except in cases where the item proposed to be dealt with is in the ordinary sense one of the trust investments; and I doubt whether that can be predicated of the mineral estate of Cleland."

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which should deter honest administrators of a trust from coming under the supervision of the Accountant of Court, and thereby obtaining protection from that responsibility about investments which has frightened so many men away from the office of trustee.

I have said thus much of the importance and beneficence of the Act, because I think that much of its usefulness depends on a distinct understanding of its limits. It does not "throw into Court," to use a popular expression, the whole administration of the trusts coming under its operation. Those trusts go on, on the responsibility of the trustees, except in the matters of investment and distribution, as to which the trustees are entitled to the direction of the Accountant and through him of the Court.

Now, in nine-tenths of the cases which arise, there can be no doubt as to what is within the section, and this is especially so as regards investment. It is purely administrative work. The word distribution seems to touch more controversial matter. Holding, as I do, that the matter now proposed for the direction of the Court is neither investment nor distribution, I am not anxious to define or dogmatise as to the scope of the words. But I think it sufficiently plain that in disposing of matters of distribution, the Court will not, under this section, apply what are really powers of administration to the determination of contentious rights. So long as distribution is more or less plain sailing or consequential the Court will sanction it; but should a conflict of right arise, the Court would presumably relegate it for decision *in foro contentioso*. In short, the jurisdiction would seem, as Lord M'Laren suggested, to be similar to that exercised by the Court in superintending judicial factors.

Now, the question reported by the Accountant is whether the trustees shall now proceed to sell the estate of Cleland which is vested in them. It is to be observed that the truster expressly directed his trustees to sell certain lands of which Cleland forms part; and I do not know very well why the sale of Cleland has been so long delayed, as the discretion allowed is only the usual one,—at such time as they think advantageous or expedient. It appears, however, that there is something to be said for further delaying the sale in order to prove the lower seams of the minerals (it might be at some expense), with a view to getting a higher price if the minerals were proved to be valuable. The pros and cons of this question may easily be imagined, and shew it to be one of discretion, on which skilled opinion and good judgment in balancing alternatives would be chiefly of account. The matter is, however, further complicated by the effect which the postponement would have on the relative interests of the heirs in possession and the subsequent heirs.

It seems, however, quite clear that this is not a question of investment. The trustees are not even comparing the desirableness of some contemplated investment with the land which they now hold. As the Lord Ordinary says, the stage of investment has not been reached.

On the other hand, I do not see how the question reported by the Accountant is one of distribution. It is true that by the combined action of the trust-disposition and the Thellusson Act, so long as Cleland is unsold the whole of the minerals go to the heir in possession. But that does not affect the quality of the question—sell, or delay selling?

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I am therefore for finding that the matter reported does not relate to the investment or distribution of the estate, and with that finding the case would go back to the Lord Ordinary.

LORD ADAM.—Like your Lordship, I am of opinion that the questions raised in this case relate to the administration of the estate as regards neither investment nor distribution. It is on these questions alone that the Court is entitled to give its assistance. I therefore concur with your Lordship both as to this particular case and as to the general purpose of the Act.

LORD M'LAREN.—I am, like all the Judges, anxious to give full effect to the provisions of this Act for the relief of gratuitous trustees; and I think we do give it if we realise as the guiding principle that we should be prepared to give the same assistance to trustees as we would give to the officers of the Court. The Court has always declined to advise a judicial factor as to the exercise of his purely discretionary power. We have not the means of judging the circumstances which render the exercise of a discretion beneficial or the reverse to the trust, and I agree with your Lordship that it was not within the contemplation of the statute that the Court should either assist a trustee in the exercise of a discretion, or decide contentious matters.

LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"Find that the question of the sale of the estate of Cleland submitted is not a question relating to the distribution or investment of the estate, and with that finding remit to the Lord Ordinary . . . Find the trustees entitled to the expenses incurred by them out of the trust-estate."

DUNDAS & WILSON, C.S., Agents.

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Mudie v. Clough.

JAMES MUDIE, Pursuer (Respondent).—*A. S. D. Thomson—W. Thomson.*

JOHN CLOUGH, Defender (Reclaimer).—*D.-F. Asher—Guy.*

Husband and Wife—Mutual Settlement—Revocation—Conjugal Rights Amendment Act, 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 16—*Reasonable provision for wife.*—The Conjugal Rights Amendment Act, 1861, sec. 16, enacts that "when a married woman succeeds to property . . . the husband or his creditors . . . shall not be entitled to claim the same as falling within the *communio bonorum* or under the *jus mariti* or husband's right of administration except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife if a claim therefor be made on her behalf. . . ."

Spouses who had invested a legacy of £1000, received by the wife from a relative, in their joint names, executed the following deed,—"We . . . in order to regulate the succession to our heritable and moveable estates after our deaths, have resolved to grant these presents . . . We . . . do hereby leave and bequeath, assign and dispone to the last survivor of us in liferent for his or her liferent use allenarly, whom failing, to our son in fee," certain of the investments, declaring that in the event of the son dying before the surviving spouse without leaving issue and intestate, the shares and moneys should be divided equally, one share to be divided among the children of the husband's brother, and the other share to be paid to the wife's brother. The residue of the estates of

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the two spouses was bequeathed to the surviving spouse, and "in so far as these presents relate to the shares . . . and moneys to be liferented by the survivor of us are concerned, we hereby mutually declare the same to be irrevocable unless with our joint consent."

The husband survived, and the son died during his survivance without issue and intestate.

In an action brought by the wife's brother against the husband for declarator that he had an indefeasible right under the mutual deed, and that the husband was not entitled to revoke it to the pursuer's prejudice, *held* (*aff.* judgment of Lord Pearson) that the deed was contractual, and, in the sense of section 16 of the Conjugal Rights Amendment Act of 1861, a reasonable provision by the husband for the support of the wife, and was not revocable by the husband.

Kidd v. *Kidd*, Dec. 10, 1863, 2 Macph. 227, 36 Scot. Jur. 112, *followed*.

1st Division. Lord Pearson.

JOHN CLOUGH, Dundee, was married to Ann Mudie in 1862. On 31st July 1880 they executed the following deed:—"We . . . in order to regulate the succession to our heritable and moveable means and estates after our deaths, have resolved to grant these presents in manner underwritten: Therefore we, the said John Clough and Ann Mudie or Clough, with joint consent and assent, do hereby leave and bequeath, assign, and dispone to the last survivor of us, in liferent for his or her liferent use allenarly, whom failing, to our son, George Mudie Clough, in fee (1) fifteen shares" of a shipping company registered in their joint names; (2) the sum of £200 secured by mortgage in their joint names; (3) the sum of £250 in a heritable bond in their joint names. "Declaring, in the event of the said George Mudie Clough, our son, dying before the last survivor of us without leaving lawful issue and intestate, that the shares and moneys above mentioned shall in such event be divided into two equal parts or shares, one part or share whereof shall be divided equally amongst the children of the late Richard Clough, brother of me, the said John Clough, and the other part or share shall be paid over to James Mudie, brother of me, the said Ann Mudie or Clough, whom failing, equally, share and share alike, between his children: And in regard to the residue of the means and estate belonging to us respectively, we severally leave and bequeath, assign and dispone the same to the last survivor of us: And we severally nominate and appoint the last survivor of us to be executor to the first deceaser . . . And we severally give full power to the survivor of us to alter or vary the securities held by us . . . And in so far as these presents relate to the shares of said shipping company and moneys to be liferented by the survivor of us are concerned, we hereby mutually declare the same to be irrevocable unless with our joint consent."

Mrs Clough died in 1881.

The son, George Mudie Clough, died intestate and unmarried on 7th June 1889.

On 11th December 1895 James Mudie, Mrs Clough's brother mentioned in the mutual deed, raised this action against John Clough for declarator that the pursuer had a valid and indefeasible vested right and interest in one-half of the investments dealt with in the mutual deed, and further, that the defender was not entitled to revoke the mutual deed so as to affect the pursuer's right and interest thereunder, and for interdict against the defender mortgaging, selling, assigning, or in any way disposing of the said investments to the pursuer's prejudice.

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The pursuer averred that after 1867 Mrs Clough had received £1200 under the will of Mr Small, a granduncle, and that she had no other means. That there was no marriage-contract between the defender and his wife. She never had any means except what fell to her under her said uncle's will. The defender never has had any estate of his own, but he appropriated all that fell to his wife under her said uncle's will, except the portion thereof which was laid out in and formed the investments mentioned in the conclusions of the summons. The defender is not entitled to revoke the said mutual deed. The provisions therein made by him to his wife and the pursuer were contractual. The provision of the said investments, even on the assumption that they were his own property *jure mariti*, was a remuneratory donation to his said wife and the pursuer, in respect of the funds which he appropriated as above mentioned, and in any event the said provision was no more than a reasonable provision to them in the circumstances in which it was made."

The defender admitted that his wife had received above £1000 from her granduncle, and that the money was invested in their joint names, and that the investments mentioned in the mutual deed were made from this fund, but explained that the money was so invested simply because it was the whole money he possessed, and that it belonged to him *jure mariti*.

The defender pleaded;—(2) On a sound construction of the said mutual deed, the defender ought to be assoilzied, with expenses. (4) *Separatim*, in the circumstances condescended on by the defender, he is entitled to revoke the said mutual deed, if so advised, and is therefore entitled to absolvitor.

On 2d June 1896 the Lord Ordinary (Pearson), after a proof, pronounced this interlocutor:—"Finds that the mutual deed mentioned in the summons is not revocable by the defender: Finds that the pursuer has a vested right in the investments specified in the summons, or their proceeds, to the extent of one-half: Appoints the defender to state in a minute what steps he proposes to take to restore the trust funds and put them in a proper course of administration, and that within eight days: Grants leave to reclaim." *

The defender reclaimed, and argued;—Although the money originally belonged to the wife, it became the property of the husband *jure mariti*. The mutual deed which dealt with it was purely testamentary,

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* "OPINION.—(After narrating the facts)—His (the defender's) case is, that the deed is revocable by him as a donation to his wife, that the legacy to her had vested in him *jure mariti*, and that, therefore, it was he, and not she, that settled the money by the mutual deed. He maintains that, although it be true that she had certain rights against him as regards these funds in respect of section 16 of the Conjugal Rights Amendment Act, yet he conceded to her by the deed all the rights she could possibly have claimed, and remained master of the situation to all other. I do not think this position of the defender is sound. In my opinion, the surroundings shew that it was contractual, and that, in so far as it amounted to a donation, it was dealt with by both parties as a remuneratory donation not to be revoked. The case appears to me to fall within the principle of *Kidd* (1863), 2 Macph. 227.

"I shall, therefore, find that the deed is not revocable; that the pursuer has a vested right in the specified investments, or their proceeds, to the extent of one-half; and appoint the defender to state in a minute what steps he proposes to take to restore the trust funds, and put them in a proper course of administration."

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and was therefore revocable by the surviving husband.[1] The case of *Kidd* v. *Kidd*,[2] was distinguishable. In it there was the machinery of a trust and a provision which gave to the children of the marriage an immediate interest. Here there was no trust and no provision for any interest in anyone until the death of the survivor of the spouses. In *Kerr* v. *Ure*[3] there was also a trust. The settlement by the husband of the liferent upon his wife was a *donatio inter virum et uxorem*, and on her death he was entitled to deal with the fund as he pleased.[4] The pursuer took no aid from the provisions of section 16 of the Conjugal Rights Amendment Act, 1861,* for Mrs Clough's only right under that section was to a reasonable provision for her maintenance and support. She could not under it secure rights to her next of kin. The provision which she had accepted was the liferent of the fund, and the husband remaining undivested owner of the fund could at her death deal with it as he pleased.

Argued for the pursuer;—The provisions in the deed in favour of the wife and her brother were intended by the spouses to be a remuneratory donation. The deed was therefore onerous and irrevocable.[5] The provisions were no more than "a reasonable provision" in the sense of section 16 of the Conjugal Rights Amendment Act, 1861, and on that ground also the deed was irrevocable. The fact that in commuting her rights the wife had stipulated for the interests of her next of kin rather than for herself, did not affect the question.[6] *Stiven's*[7] case was entirely different. There the husband had bought the

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[1] Lang v. Brown, May 24, 1867, 5 Macph. 789, 39 Scot. Jur. 407; Nicoll's Executors v. Hill, &c., Jan. 25, 1887, 14 R. 384.

[2] Kidd v. Kidd, Dec. 10, 1863, 2 Macph. 227, 36 Scot. Jur. 112.

[3] Kerr v. Ure, &c., June 28, 1873, 11 Macph. 780, 45 Scot. Jur. 512.

[4] Stiven v. Brown's Trustees, Jan. 10, 1873, 11 Macph. 262, 45 Scot. Jur. 193.

* The Conjugal Rights Amendment Act, 1861 (24 and 25 Vict. c. 86), sec. 16, enacts:—"When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum* or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*, provided always, that no claim for such provision shall be competent to the wife if before it be made by her the husband or his assignee or disponee shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has before such claim is made by the wife attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of furthcoming, or has poinded and carried through and reported a sale thereof."

[5] Ferguson's Curator Bonis v. Ferguson's Trustees, June 20, 1893, 20 R. 835; Rust v. Smith, Jan. 14, 1865, 3 Macph. 378, 37 Scot. Jur. 182; Fraser on Husband and Wife, vol. ii. p. 940; Ersk. Inst. i. 6, 30; M'Laren on Wills and Succession, vol. i. p. 422.

[6] Clark v. Clark, May 25, 1881, 8 R. 723.

[7] Stiven v. Brown's Trustees, 11 Macph. 262, *vide* note 4.

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property with his own money, and not with his wife's. In *Nicoll's Executors*[1] the wife was fiar of the whole moveable estate, and entitled to do what she liked with it.

At advising,—

LORD M'LAREN.—In this action the pursuer seeks first a declaratory decree to the effect that he has an indefeasible vested interest under the mutual deed, to the extent of one-half of certain moveable investments described; and that the defender is not entitled to revoke the mutual deed so as to affect the pursuer's right and interest; and for interdict against his mortgaging, selling, or disposing of said investments to the pursuer's prejudice. The argument advanced for the defender was in effect that the mutual deed, in so far as it put one-half of the property beyond the defender's control, was in substance a *donatio inter virum et uxorem*, and that the defender was entitled to treat the property as his own.

The Lord Ordinary has found that the pursuer has a vested right in the investments specified in the summons, or their proceeds, to the extent of one-half, and has appointed the defender to state what steps he proposes to take to restore the trust funds and to put them in a proper course of administration.

I am of opinion that the Lord Ordinary's findings are right, for the reasons which his Lordship has given. It would not, in my view, be a historically correct statement of the law of Scotland at any time since it has been systematised, to say that money acquired by a married woman became so completely the property of the husband that a reasonable postnuptial deed giving equal rights to the heirs of the spouses was revocable as a donation. It is no doubt a fair subject of controversy whether the doctrine of the *communio bonorum* as expounded by the institutional writers is a sound theory, in the sense of being a true representation of the law regulating the rights of the family in the husband's estate. But as regards the personal estate of the wife at least the theory fairly enough represented the effect of marriage on such estate, because it cannot be said that a wife's estate ever vested in the husband unconditionally. The husband in virtue of his *jus mariti* had the administration of the wife's estate; but her interest in it was so far recognised that a reasonable postnuptial settlement was binding in a question between the spouses, and was even effectual against the husband's creditors to the extent of affording a provision to the wife after the husband's death.

The surrender of the claim of *jus relictæ* was regarded as sufficient consideration to support an annuity or life interest to the wife secured out of her estate; and the exclusion of the claim of the wife's next of kin was consideration for such a testamentary provision in their favour, or in favour of selected relations of the wife, as the spouses might agree on.

This principle was no doubt to some extent trenched upon by the 6th section of the Intestate Moveable Succession Act, 1855, which deprived the wife's next of kin and legatees of all right to a share of the goods in communion. It may be doubted whether the Legislature when it enacted this law was fully informed as to the state of the common law with respect to

[1] Nicoll's Executors v. Hill, &c., Jan. 25, 1887, 14 R. 384.

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wives' personal estate, as it can hardly be supposed that it was intended to deprive married women in Scotland of the only vestige of right which they possessed in their personal estates. But this anomalous condition of the law did not long continue. By the Conjugal Rights Act, 1861, the husband or his creditors are not to be entitled to claim the wife's money as falling under the *jus mariti* except on condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf. It is only in case of dispute that the amount is to be determined by the Court, and it follows that if the spouses are agreed, they may themselves apportion the wife's money, so as to secure for her an equitable share of the fund, to be held by her exclusive of the *jus mariti*. Again, it is not necessary that this provision shall take the form of an annuity. In cases that have come before the Court for decision, it has been held that a capital sum may be set aside as a provision to the wife, which would of course be subject to her testamentary disposition.

In the present case, the spouses have divided the fund equally, giving the fee, in the event of there being no issue of the marriage surviving, in the proportion of one-half to the heirs of each. This seems to me to be according to the statute, and in the case of *Kidd* v. *Kidd*,[1] cited by the Lord Ordinary, it is recognised that the statute is a sufficient foundation for a postnuptial settlement of the wife's estate. I am accordingly of opinion that the reclaiming note should be refused.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT adhered.

J. & W. L. OFFICER, W.S.—DAVID MILNE, S.S.C.—Agents.

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July 17, 1896.
Stevenson v. Steel Co. of Scotland, Limited.

WILLIAM STEVENSON AND OTHERS, Pursuers (Reclaimers).—*Rankine—Guy.*
THE STEEL COMPANY OF SCOTLAND, LIMITED, Defenders (Respondents).—*W. Campbell—Fleming.*

Property—Feu-contract—Obligation to make road—Jus quæsitum tertio.—By feu-contract, dated in 1871, B's trustees, the first party, disponed two plots of ground, part of the lands of Blochairn, to C D, the second party, their heirs and assignees, "declaring that a street" of 60 feet in breadth should be made along the south of the plots of ground disponed, and that it should be formed upon such levels as the first party or "their successors in the said lands and estate, including any parties who have feued or who may feu or purchase the ground on the opposite side of the said street," and the second party or their foresaids might think fit, "having regard to the continuation of the same eastward, so as conveniently to accommodate the portion of the first party's remaining lands lying . . . to the east of the ground hereby feued." It was further provided that the second party and their foresaids should be bound, whenever required "by the first party or their foresaids, including as aforesaid," to make the one-half of the roadway situated next to the plots of ground thereby disponed. It was further declared that the first party and their foresaids should be entitled to give a power to use the said street, and any others that might be formed by the second party and their foresaids in the ground disponed, to their feuars in

[1] 2 Macph. 227, 36 Scot. Jur. 112.

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the remaining parts of their lands of Blochairn, and that the second party and their foresaids should have power to use any streets which should be formed by the first party or their feuars in the remaining portions of the lands of Blochairn, and the first party bound themselves to insert clauses sufficient to secure those objects in all future conveyances of the lands of Blochairn or parts thereof.

In 1877 B's trustees sold and disponed part of the lands of Blochairn, lying to the east of the ground feued in 1871, to E F, with their "whole rights, title, and interest, present and future, therein." The disposition imposed no obligation upon the disponees to construct any road, and contained no reference to the obligation imposed upon C D by the feu-contract of 1871.

In an action by E F to compel a successor of C D to implement their obligation in the feu-contract of 1871 to make the sixty feet road, *held* (*aff.* judgment of Lord Low) that the pursuers had no title to sue, in respect that (1) the disposition in their favour did not contain any assignation of the rights of B's trustees under the feu-contract of 1871; (2) they were not successors of B's trustees in the lands of Blochairn (being their disponees in only a portion thereof), or feuars upon the south side of the proposed sixty feet street; and (3) there existed no mutuality of rights and obligations between them and the vassals under the feu-contract of 1871.

1st Division. Lord Low.

In 1895 William Stevenson, quarrymaster, Glasgow, and others, proprietors of part of the lands of Blochairn, under a disposition granted in 1877 by the trustees of the deceased Sir William Baillie and spouse, raised an action against the Steel Company of Scotland, proprietors of another part of the lands of Blochairn, disponed in a feu-contract by the said trustees in 1871 to Robert Hannay and others, concluding, *inter alia*, for declarator that the defenders were bound under their feu-contract to make certain roads upon their feu.

The defenders pleaded no title to sue.

The following was the state of the titles of the parties:—

In 1871 the trustees of the deceased Sir William Baillie of Polkemmet and his spouse, proprietors of the lands of Blochairn, entered into a feu-contract by which they feued to Robert Hannay, Robert Hannay junior, and Thomas Hannay, ironmasters in Glasgow, and the survivors and survivor of them, and the heirs of the survivor, as trustees for their firm of Hannay & Sons, and their assignees, two plots of ground, containing respectively about 6 acres and 36 acres, being part of the lands of Blochairn. The larger plot of ground was bounded both on the east and west by unfeued parts of the lands of Blochairn, and on the south by a portion of the lands, parts of which had been feued.

The feu-contract provided, *inter alia*;—"But these presents are granted, and the said plots or areas of ground are disponed with and under the reservations, . . . obligations, declarations, and others afterwritten, viz., reserving to the said first party [Baillie's trustees] and their successors in the said lands and estate the whole . . . minerals in the said plots or areas of ground . . . And farther declaring, as it is hereby expressly provided and declared, that a street of 60 feet in breadth, marked A B C D on the said plan, shall, so far as not already done, be made and formed, extending along the south-by-west and south-south-east boundary of the plot or area of ground in the first place hereby disponed, and along the south-south-east boundary of the plot or area of ground in the second place hereby disponed, with such common sewers and drains therein as the said first parties or their foresaids, including any parties who have feued or who may feu or purchase the ground on the opposite side of the said street, and

the second parties, or their foresaids, may consider proper; which street shall be formed of such breadth of roadway and pavements on each side thereof respectively, and the same and the said sewers and drains shall be formed on such levels, as the said first parties or their foresaids, including as aforesaid, and the second parties or their foresaids, may think fit, having regard to the continuation of the same eastward, so as conveniently to accommodate the portion of the first party's remaining lands lying on the north bank of the canal, and to the east of the ground hereby feued."

It was further provided that the roadway, pavements, and drains should be formed in such manner and of such materials as the parties and their foresaids should appoint: "And declaring, as it is hereby expressly provided and declared, that the said second party and their foresaids shall be bound and obliged, whenever required by the said first party or their foresaids, including as aforesaid, to level, make, form, causeway, and finish, the one half of the roadway of the said street situated next to the said plots or areas of ground hereby disponed, and to make and form the pavement situated on the side thereof . . . so far as extending along the said plots or areas of ground hereby disponed: And also declaring, as it is hereby expressly provided and declared, that it shall be in the power, either of the said first parties and their foresaids, or their successors in the remaining lands of Blochairn, including any parties who have feued or purchased, or may feu or purchase, the ground on the opposite side of the said street, or of the second party and their foresaids, to make and form the said common sewer and drains . . . whenever they shall think proper so to do, and the said other party, and their foresaids, shall be bound and obliged to repay to the party forming the said sewer and drains, and their foresaids, the one-half of the expenses of forming the said common sewer and drains so far as extending along the said plots or areas of ground hereby disponed; . . . . and also declaring, as it is hereby expressly provided and declared, that the second party and their foresaids shall be bound and obliged, with all convenient speed after the execution of these presents, to make and form a street of 60 feet in breadth between the points marked C E F on the said plan, extending along the north-by-east, and east-north-east boundaries of the plot or area of ground in the first place hereby disponed, and along the south-by-west and west-south-west boundaries of the plot or area of ground in the second place hereby disponed; and as soon as the ground lying to the north of the canal and to the east of the ground in the second place hereby disponed, or any portion thereof, is feued, to make and form a street of 60 feet in breadth, between the points marked E G on the said plan, and that with such common sewers and drains therein as the first and the second parties may consider proper, which street shall be formed of such breadth of roadway and pavements on each side thereof respectively, and the same and the said sewer and drain shall be formed on such levels, as the first parties or their foresaids, and the second parties or their foresaids, may think fit, having regard to the continuation of the street E G eastward, so as conveniently to accommodate the portion of the first party's remaining lands lying on the north bank of the canal, and to the east of the ground hereby feued . . ."

Provisions followed as to the manner in which, and the materials with which the roadway, pavements, and drain should be formed, and

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it was also declared "that in the event of the said first party or their successors, as proprietors of the remaining lands of Blochairn, deeming it expedient themselves to make and form" any part of the said streets and causeway, roadways, or of the pavements, and the common sewers or drains in the streets C E F and E G, or any of them, they should be entitled to do so, and the second party and their foresaids should be bound to repay them one-half of the expense of making the street A B C D, and the whole of the expense of making the streets C E F and E G. "Declaring that the said first party and their foresaids shall be entitled to give a right of access to and a power to use the said streets and common sewers or drains, or the portions thereof from time to time formed, as well as any other streets and common sewers or drains which may be formed by the second party and their foresaids in the plots or areas of ground hereby feued, to their feuars in the remaining parts and portions of their said lands of Blochairn, or to any other parties they may think proper, without being liable in any compensation therefor to the said second party and their foresaids: . . . And further declaring that the said second party and their foresaids shall have right of access and power, so far as the first parties can competently confer the same, to use all streets and common sewers or drains, or portions thereof, which have been or may be formed by the first party or their feuars in the remaining portions of the said lands of Blochairn, without being liable in any compensation therefor to the first party or their successors or their feuars in the said lands; and the first party bind and oblige themselves and their successors to insert clauses sufficient to secure these objects in all the future conveyances to be granted by them or their foresaids of the lands of Blochairn or parts thereof." The whole obligations and declarations before written were declared to be real conditions and qualifications of the grant, and real liens and burdens affecting the ground disponed, and as such were appointed to be validly referred to in all future conveyances and investitures.

In 1877 Baillie's trustees sold and disponed to William Stevenson and others two plots of ground, consisting of 92 and 4 acres respectively, lying to the east of the ground disponed to the Hannays, "together with the parts, pertinents, privileges, and pendicles of the said portions of ground, our whole rights, title, and interest, present and future, therein, and whole buildings and erections thereon, which portions of ground above disponed are parts of All and Whole the lands of Easter and Wester Blochairn . . . more fully described in the prior titles, including both property and superiority of the whole foresaid lands, with the pertinents thereof." The disposition imposed no obligation as to the construction of roads upon the disponees, and contained no reference to the obligation imposed on Messrs Hannay in the feu-contract of 1871. The disposition was recorded on 17th May 1877.

The Messrs Hannay possessed the ground feued to them in 1871 until 1890, when their estates were sequestrated, and the trustee in the sequestration, with consent of the commissioners, executed a renunciation and conveyance of the feu in favour of the trustees of Sir William and Lady Baillie, which was recorded in July 1890.

On 15th November 1890 the trustees of Sir William and Lady Baillie disponed the whole remaining lands of Blochairn, so far as then belonging to them, including the two plots of ground formerly feued to the Hannays, to the Steel Company of Scotland, Limited, to

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be held of the granters' superiors. The disposition provided that the disponees should be bound to relieve the granters of all obligations undertaken by them in regard to roads and accesses through or in the lands disponed. It contained none of the declarations and provisions as to the streets contained in the feu-contract to the Hannays. The disposition was recorded on 15th November 1890.

Subsequently Baillie's trustees executed a minute of consolidation, which was recorded on 18th November 1890, but it was admitted to be inept.

Prior to the date of the feu-contract in favour of the Hannays the ground to the south of the road marked A B C D on the plan annexed to that contract had been feued out by Baillie's trustees, by feu-contracts dated in 1854 and 1864. These feu-contracts imposed obligations upon the vassals in regard to the construction of a road to the north of their feus.* These feus were acquired in part by the Steel Company of Scotland after the date of the disposition to Stevenson.

In the present action the pursuers concluded for declarator that the defenders were bound to make the roads A B C D, C E F, and E G, so far as not already made, and that, in the event of their failing to do so, the pursuers were entitled to make said roads, and that the defenders were in that event bound to pay to the pursuers the expense thereby incurred.

On 21st May 1896 the Lord Ordinary (Low) sustained the plea that the pursuers had no title to sue, and assoilzied the defenders from the conclusions of the action.†

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* The provision contained in the feu-contract of 1854 was as follows:—"And further declaring, as it is hereby expressly provided and declared, that the said first party or their foresaids shall be entitled, at any time hereafter they may think proper, to direct and appoint that a street not exceeding 60 feet in breadth shall be made and formed, extending along the north-by-east and north-north-west boundaries of the said plot or area of ground hereby disponed, or any part thereof," . . . and declaring "that the said second party and their foresaids shall be bound and obliged, whenever required by the said first party or their foresaids, to level, make, form, causeway, and finish the one half of the roadway of the said street situated next to the said plot," and to form the pavement on that side; "and at one and the same time the said first party and their foresaids shall be bound and obliged to level, make, &c., the other half of the roadway of the said street, and the pavement on the other side thereof, so far as extending along the said plot or area of ground hereby disponed." It was also provided that the first party and their foresaids might themselves make the drains, roadway, and pavement, and that, if they did so, the second party and their foresaids should be bound and obliged to repay them the expense so incurred.

The feu-contract of 1864, after imposing upon the vassal the obligation to make one half of a 60 feet road on the northern boundary of the feu whenever required by the superior, provided that "the said first party or their foresaids, or the parties who have feued, or may hereafter feu or purchase the ground on the other side of said street," should be bound at the same time to make the other half of the said roadway.

† "OPINION.— . . . The first question is whether the pursuers have a good title to sue?

"I have already pointed out that the pursuers acquired their lands in 1877, and if the disposition in their favour gives them a title to enforce the obligations against the Messrs Hannay, then I assume that the subsequent renunciation of the feu by Hannays' trustee, and the disposition of the ground, without reference to the streets, to the defenders, could not pre-

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The pursuers reclaimed, and argued;—(1) The disposition in the pursuers' favour carried the "whole rights, title, and interest" of Baillie's trustees in the lands disponed. It therefore constituted the pursuers assignees of the right of the trustees to enforce the obligations as to roads contained in the defenders' titles. (2) The pursuers had a *jus quæsitum* to enforce the obligations in question. The "foresaids," who were by the terms of the Hannays' feu-contract entitled, in addition to the granters themselves, to enforce the obligations as to roads contained in that deed, were the granters' "successors" in the lands of Blochairn. The pursuers had acquired both property and superiority of a great part of these lands, and they were therefore entitled by the express terms of the deed to enforce the obligations in question. Further, it was enough to give them a title to enforce the obligations that they were disponees of the lands intended to be accommodated by the continuation of the roads. To confer a *jus quæsitum tertio* it was sufficient that there was an expressed or implied intention that the *tertius* should have the right,

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judice the pursuers. I shall therefore consider the case as if it had arisen between the pursuers and the Messrs Hannay.

"I shall first deal with the street A B C D. The clause of the contract referring to that street does not commence by laying an obligation upon the feuars to make it, but by a declaration that such a street shall be made, and a description of the character of the street. It is in this part of the clause that it is provided that the street shall be of such a breadth as to accommodate the portion of the first parties' remaining lands 'to the east of the ground hereby feued.' That is the only reference to the ground to the east as distinguished from the other unfeued parts of the lands of Blochairn, and I think that it is not unimportant to observe that it occurs in a part of the clause which lays no obligation on the feuars.

"The obligation which is subsequently laid on the feuars is expressed thus:—'The said second parties and their foresaids shall be bound and obliged, whenever required by the said first parties and their foresaids, including as aforesaid,' to make the one-half of the street next the ground feued to them.

"Now, the foresaids of the first parties there referred to are their successors in the lands of Blochairn, and the words 'including as aforesaid' mean (as shewn by the context) 'including any parties who have feued or may feu or purchase the ground on the opposite side of the street.'

"The pursuers argued that two separate classes of persons were thereby empowered to enforce the obligation—(1) the successors in the lands of Blochairn (which the pursuers claim to be); and (2) the feuars on the opposite side of the proposed street. Whether the feuars on the opposite side of the street would by themselves have a title to enforce the obligation depends upon the meaning of the word 'including.' The defenders argued that that word must be read in the natural sense, and as signifying that the 'foresaids' of Baillie's trustees should mean their successors in the lands, *plus* the feuars on the opposite side of the street. I do not think it likely that Baillie's trustees should have stipulated that the obligation should not be enforceable by them and their successors alone, but that they should require the concurrence of certain feuars. Further, I notice that in the feu-contract of 1864, which is conceived in practically the same terms as the feu-contract in favour of the Messrs Hannay, an obligation is laid upon 'the first party or their foresaids,' or the parties 'who have feued' ground on the opposite side of the street. I am, therefore, inclined to think that the word 'including' means that the term 'foresaids' shall include the feuars on the opposite side of the street, and that either they or Baillie's trustees and their successors should be entitled to enforce the obligation.

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and that he had an interest to enforce the obligation.[1] It was not decided that the *tertius* must be designated. The doctrine had been given effect to in favour of co-feuars who had not acquired their feus at the date of the contract sought to be enforced.[2]

Argued for the defenders;—The parties stood in no feudal relation to one another, and the obligations sought to be enforced, although conditions of the tenure, were personal obligations. *Prima facie* obligations of that kind were enforceable only by the superior who imposed them. None of the grounds upon which the pursuers based their claim were established. 1. The disposition in their favour only carried the lands conveyed, and the granters' right, title, and interest "therein," *i.e.*, in the lands conveyed. The right to enforce obligations in the defenders' titles could not be called a right in the lands disponed to the pursuers, and was therefore not carried by the disposition in their favour. 2. No *jus quæsitum tertio* had been conferred upon the pursuers. Such a right only existed when there was express description of the *tertius*,[3] or mutuality of obligation. Here neither of these conditions was present. (1) The pursuers were not successors of the Baillie trustees in the lands of Blochairn, but only in a part of them. They were, therefore, not "foresaids" of the trustees in the sense of the Hannays' feu-contract. It was not readily to be inferred that the creditors in obligations of this kind were to be multiplied. (2) No obligations in regard to the formation of roads had been imposed upon the pursuers, and they had no interest to enforce the obligations, because no right to use the streets when made had been conferred upon them.

But that does not help the pursuers, because they are not feuars on the opposite side of the street, nor are they the successors of Baillie's trustees in the lands of Blochairn, but only in a portion thereof. No doubt they have acquired the lands lying to the east of the ground feued to the Hannays, and these are the lands which the street was to be constructed so as to accommodate, but the clause imposing this obligation cannot, in my opinion, be construed so as to limit the expression 'foresaids' to successors in a particular part of the lands of Blochairn. It would have been a different question if the only lands remaining in the hands of the superior had been those to the east, but that was not the case.

"As regarded the street C E F, the Messrs Hannay were taken bound to make it 'with all convenient speed after the execution of these presents.' It was also declared that if the Messrs Hannay failed to make the street, 'the first party, or their successors in the remaining lands of Blochairn,' should be entitled to do so at the expense of the Messrs Hannay. What I have already said applies to this street also. The pursuers are not the successors of Baillie's trustees in the remaining lands of Blochairn.

"The third street, E G, is in the same position as the street C E F, with this exception, that it is declared that it shall be made 'so as conveniently to accommodate the portion of the first party's lands lying to the east of the ground hereby feued.' That however can, in my opinion, make no difference to the title of the pursuers. What I have said in regard to the other streets applies equally to the street E G.

"I am therefore of opinion that the defenders must be assoilzied."

[1] Finnie v. Glasgow and South-Western Railway Co., Aug. 13, 1857, 3 Macq. 75, 29 Scot. Jur. 537; Peddie v. Brown, June 9, 1857, 3 Macq. 65, 29 Scot. Jur. 388.

[2] M'Gibbon v. Rankin, Jan. 19, 1871, 9 Macph. 423, 43 Scot. Jur. 205; Hislop v. M'Ritchie's Trustees, June 23, 1881, 8 R. (H. L.) 95.

[3] Finnie (see *supra*, note 1).

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LORD KINNEAR.—The pursuers and defenders are respectively proprietors of two adjoining pieces of land in the neighbourhood of Glasgow, and their rights are derived from a common author, the trustees of Sir William Baillie, of Polkemmet. As the titles now stand, Sir William Baillie's trustees are entirely divested of all right and interest in either parcel of land. But the defenders' property was formerly held of the trustees in feu-farm, by virtue of a feu-contract executed in 1871 between them as superiors and Robert and William Hannay and others as feuars; and the purpose of the action is to enforce against the defenders certain conditions of this feu-contract which are said to enure to the benefit of the pursuers as proprietors of the adjoining lands. The defenders are now in right of the superiority, as well as of the *dominium utile* of the lands feued to the Hannays. But they do not maintain that the obligations in question are extinguished *confusione;* and in abstaining from stating any plea of this kind, I think they have taken a correct view of their title.

It appears that in July 1890 the subjects set in feu were reconveyed to the superiors by the trustee and commissioners on the sequestrated estate of the vassals. The superiors recorded the disposition in the Register of Sasines. But before taking any steps for consolidating the *dominium utile* with the superiority, they, in November 1890, disponed the subjects to the defenders, to be held of the granters' superior. The disposition has not been printed, but the parties are agreed as to its import and effect. The defenders recorded the disposition in their favour on the 15th of November, and were thereupon entered, as I understand, with the Crown as superior, under the Titles to Lands Act, 1874. Three days later the disponers recorded a minute of consolidation. But this is admitted to be inept, by reason of the prior infeftment of the defenders. The defenders therefore are not in a position to maintain, as they might have done, had consolidation been validly effected before the disposition in their favour was recorded, that they held the *plenum dominium* as singular successors under a title which is unaffected by the obligations of the original feuars. The property and superiority are still held as separate estates, and the record has not been cleared of the feu-contract. It follows that, although the mutual rights and liabilities of superior and vassal may be suspended *confusione*, they have not been extinguished so as to prevent the rights of third persons, if such there be, from being enforced in the same manner as if the feu were still held by the original feuars or their disponees under the feu-contract, and by no other title. I therefore agree with the Lord Ordinary that the pursuers, who acquired their lands in 1877, cannot be prejudiced by subsequent alterations of the defenders' title, and that the question must be decided in the same way as if they had brought their action against the Hannays before 1890. But taking the case on that assumption, I am of opinion that they have no right or interest in the Hannays' feu-contract, and no title to enforce any of its stipulations.

The conditions which they claim right to enforce impose obligations on the feuars for the construction of certain streets, and in order to construe these conditions correctly it is necessary to understand the relative posi-

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tions, both in fact and in point of title, of the various pieces of ground to which they are said to relate. The ground feued to the Hannays was bounded on the south and also on the east by other portions of the Blochairn estate. The ground to the south had been already feued out. The defenders have now acquired both the property and the superiority of the greater part of this ground, and the remainder, extending to three acres or thereby, belongs to the Caledonian Railway Company. But, at the date of the feu-contract in favour of the Hannays, both portions were held in feu of Sir William Baillie's trustees, and they were still so held when the piece of land to the east of the Hannays' feu was acquired by the pursuers. This last portion was never set in feu, but in 1877 it was disponed to the pursuers, who still hold it under a title which contains no reference to the feu-contract with the Hannays, or to any of the obligations which it creates. The pursuers maintain, however, that the mere title to the lands of which they are now in possession carries with it a title to sue upon the defenders' contract, and they allege that by that contract the defenders are bound to form and causeway three separate streets, for the mutual convenience of themselves and the pursuers.

The first of these is a street marked A B C D on a plan extending along the south and south-east boundaries of the plots of ground feued. The precise terms of the contract with reference to this street must be considered; but for a just appreciation of their effect, it is necessary to observe in the first place that by the feu-contracts of the ground to the south it had already been agreed between the superior and the feuars that a street of 60 feet in breadth should be made in this situation, and that the feuars should be bound to make, form, causeway, and finish the one half of the roadway of the said street next to the plots or areas of ground disponed to them respectively. This is an obligation in favour of the superior which he was entitled to enforce for the benefit of the ground to the north, and keeping this in view there is no difficulty in ascertaining the extent of the obligation imposed upon the Hannays when this ground to the north was feued to them. The clause begins with a declaration that a street of 60 feet in breadth shall be made and formed extending along the south and south-east boundaries of the areas in question, with such common sewers and drains therein "as the said first parties or their foresaids," that is, the superiors or their successors in the lands and estate of Blochairn, "including any parties who have feued, or who may feu, or purchase the ground on the opposite side of the said street, and the second parties or their foresaids," that is, the original vassals, and the survivors and heirs of the survivor as trustees for Hannays and their assignees, "may consider proper, which street shall be formed of such breadth of roadway and pavement on each side thereof, and the said sewers and drains shall be formed on such levels, as the said first parties and their foresaids, including as aforesaid, and the second parties or their foresaids, may think fit, having regard to the continuation of the same eastward so as conveniently to accommodate the portion of the first party's remaining lands lying on the north bank of the canal and to the east of the ground hereby feued." So far there is no obligation imposed directly upon the vassal, but there is a very plain indication that the street to be formed is primarily for the accommodation

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of the ground to the south as well as of the ground feued, and that it may be continued eastward for the accommodation of the superior's land to the east. Then come conditions as to materials and mode of construction, and a provision for arbitration in case of difference, and then follow the words of obligation,—"And declaring as it is hereby expressly provided and declared that the said second party and their foresaids shall be bound and obliged, whenever required by the said first party or their foresaids, including as aforesaid, to level, make, form, causeway, and finish the one half of the roadway of the said street situated next to the said plots or areas of ground hereby disponed, and to make and form the pavement situated on the side thereof of the width, on the level, in the manner, and of the materials foresaid, so far as extending along the said plots or areas of ground hereby disponed; and also declaring, as it is hereby expressly provided and declared, that it shall be in the power either of the said first parties and their foresaids or their successors in the remaining lands of Blochairn, including any parties who have feued or purchased, or may feu or purchase, the ground on the opposite side of the said street, or of the second party and their foresaids, to make and form the said common sewer and drains on the levels, and of the materials, and in the manner before mentioned, whenever they shall think proper so to do, and the said other party and their foresaids shall be bound and obliged to repay to the party forming the said sewer and drains, and their foresaids, the one-half of the" expense, with interest. Now, that is just the counterpart of the obligations which had been already imposed upon the feuars of the ground to the south, and I cannot say that I see any difficulty in construing it. It is an excellent example of the manner in which each of several feuars deriving right from a common superior may acquire a *jus quæsitum* in the feu-contracts of the others. It does not matter that no feuar is a party to the contract between any other feuar and the superior. Each is taken bound to contribute to the operation, which is intended for the common benefit of all, and right to compel performance as against the second set of feuars is conferred in terms upon the first. It is unnecessary to determine whether the Hannays could have sued in their own name upon the contracts with the feuars to the south, which are conceived in different terms from their own. I assume in favour of the pursuers' argument that their title so to sue might have been supported by reasonable implication from the reference in both contracts to a common scheme of operations for the benefit of both feus. But I am unable to see any ground on which the purchasers of ground to the east can maintain that the same right is conferred upon them. I agree with the Lord Ordinary that they are not within the words by which the possible creditors in the obligation are described in the feu-contract. They are not the successors of the superiors either in the superiority or in the remaining lands of Blochairn. These words cannot be construed to cover an indefinite number of purchasers of separate portions of that estate; and if they could otherwise have been so construed, I think that interpretation would have been excluded by the contrast between the manner in which the land to the east and the land to the south is dealt with in the contract. It is contemplated, as we have seen, that the street may be continued so as to accommodate the land to the east, but there is

no obligation either on superior or vassal to continue it; and there is no stipulation in favour of feuars or purchasers of land to the east corresponding to the stipulation in favour of feuars or purchasers of land to the south. When it is intended that purchasers of separate portions of the estate shall have right to enforce the obligations of the feuars, it is so stipulated in express terms, and the inference is that other purchasers for which no such stipulation is made were not intended to have any similar right.

The same reasoning applies to the other streets C E F and E G. The only distinction is that in these cases the obligation is in favour of the superiors and their successors alone, and not of any feuar or purchaser of separate lots.

For these reasons I agree with the Lord Ordinary on the construction of the obligation. But that construction is confirmed by the stipulations with reference to the right of access to and power to use the streets, sewers, and drains. The superiors stipulate that they shall be entitled to give such rights of use and access to "their feuars in the remaining parts and portions of the lands of Blochairn, or to any other parties they may think proper, without being liable in compensation" to the vassals. This is important as an element of construction, because it shews how the parties thought it necessary to describe the feuars of "parts and portions" of the estate when they intended to make stipulations in their favour. But it is also of very material importance for another reason. As a counterpart of the right to be conferred on other feuars, it is declared that "the said second party and their foresaids shall have right of access and power, so far as the first parties can competently confer the same, to use all streets and common sewers or drains, or portions thereof, which have been or may be formed by the first party or their feuars in the remaining portions of the said lands of Blochairn without being liable in any compensation therefor to the first party or their successors or their feuars in the said lands; and the first party bind and oblige themselves and their successors to insert clauses sufficient to secure these objects in all the future conveyances to be granted by them or their foresaids of the lands of Blochairn or parts thereof."

The pursuers' right to make use of the streets if they were made is thus dependent upon its being conferred upon them by the superiors, and they could not validly confer it except upon condition of their imposing a corresponding obligation on the pursuers themselves. But the superiors have conferred no such right upon the pursuers, and they have imposed no such obligation. It follows that the community of rights and obligations which the contract contemplated as possible has not been brought into existence, and the pursuers can have no title or interest to compel the construction of streets which, when they have been constructed, they will not be entitled to use.

The pursuers' counsel relied upon a well-known series of cases with reference to building restrictions. These cases are not directly in point, because the pursuers are not claiming the benefit of a servitude or restriction, but seeking to enforce a personal obligation *ad factum præstandum*. But the result of the decisions, as the law is laid down by the House of Lords in *M'Ritchie* v. *Hislop*,[1] is that to give neighbouring feuars the benefit of

[1] 8 R. (H. L.) 95.

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restrictions in feu-contracts to which they are strangers, there must be either (1) an express stipulation in their respective contracts with the superior, or (2) a reference in both contracts to a common plan or scheme of building, or (3) an agreement between the feuars themselves. The pursuers' title satisfies none of these conditions.

LORD ADAM concurred.

LORD M'LAREN.—I also concur. I think that in order to give the pursuer a title to sue he must either have assigned to him the creditor's right in the obligation, or he must shew that by some antecedent contract the pursuer had undertaken to make a road for the alleged debtor's benefit. In such a case the principle of *M'Ritchie*[1] applies. If the superior puts the adjacent feuar under such an obligation, the person with whom he has agreed to give a right to enforce that obligation will have the benefit of that obligation. The analysis which Lord Kinnear has made of the titles shews to my mind completely that neither of these conditions applies, and therefore that the pursuers' case is not well founded.

The LORD PRESIDENT concurred.

THE COURT adhered.

MACANDREW, WRIGHT, & MURRAY, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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JANE BARR, Pursuer (Respondent).—*Jameson—Tait.*
P. H. BAIN, Defender (Appellant).—*Salvesen.*

Process—Proof—Parent and Child—Filiation—General averment in defence that pursuer had intercourse with other men—Allowance of proof of averments generally—Competency of specific questions as to such intercourse.—In defence to an action of filiation and aliment relating to an illegitimate child born in December 1895, the defender denied the paternity, and averred "that about 1894 and 1895 the pursuer was indulging in sexual intercourse with several young men living in her own neighbourhood, among them being" three men named, "and that one of them is the father of the child." The parties were allowed a proof "of their respective averments on record."

Held that, whether the averment quoted was irrelevant for want of specification or not, as the defender had been allowed a proof of his averments, he was entitled at the proof to ask the men named in his averment whether they had had intercourse with the pursuer on particular occasions in the period specified.

2D DIVISION. Sheriff of the Lothians and Peebles.

IN April 1896 Jane Barr, with consent of her father as her curator and administrator-in-law, raised an action in the Sheriff Court at Edinburgh against P. H. Bain for payment of inlying expenses and aliment in respect of a female child to which she had given birth, and of which she alleged he was the father, and for damages for breach of promise of marriage and seduction.

The pursuer averred that on 20th July 1894 the defender had offered to marry her, and she had consented to become his wife; that on 10th March 1895 she, yielding to his importunities, and relying on his promise of marriage, had permitted him to have connection

[1] 8 R. (H. L.) 95.

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with her, and that in consequence she had given birth to a daughter on 7th December 1895.

The defender denied the pursuer's averments, and further averred;—The defender "believes and avers that about 1894 and 1895 the female pursuer was indulging in sexual intercourse with several young men living in her own neighbourhood, among them being A. M., J. M., and G. M., and that one of these is the father of her child."

On 1st May 1896 the Sheriff-substitute (Hamilton) pronounced *this* interlocutor:—"Allows both parties a proof of their respective averments on record, and to the pursuer a conjunct probation."

At the proof the pursuer, in cross-examination by the defender, deponed that she knew A. M. and G. M.; that she had met them on certain occasions specified, but that she never, either on these occasions, or at any other time, had had connection with either of them.

A. M., adduced as a witness by the defender, deponed that he was acquainted with the pursuer. "I remember of walking home with her one night about the end of 1893, but I cannot remember the exact date. . . . I sat down by the side of the road with the pursuer. (Q.) Had you connection with the pursuer that night?

"Question objected to.

"Objection sustained."

Witness also spoke to meeting the pursuer on three occasions—in July 1894, on 17th February 1895, and in August 1895—and with reference to each of these occasions the same question was put to him, objecfed to, and the objection sustained.

G. M., adduced by the defender, spoke to meeting the pursuer on the evening of 17th May 1895, and the same question with reference to this meeting was put to him, objected to, and the objection sustained.

On 8th June 1896 the Sheriff-substitute pronounced this interlocutor:—"Finds it proved that the defender is the father of the illegitimate child in question, but finds that the pursuer has failed to prove that the defender promised to marry her, or that she was seduced by him: Decerns against the defender for payment of the inlying expenses and aliment sued for: *Quoad ultra* dismisses the action, and decerns."

The defender appealed, and argued;—The questions ought not to have been disallowed. It might be that more specific notice should have been given on record, but the parties had been allowed a proof of "their respective averments on record," and, apart from the question of notice, no objection could be stated to the competency of the questions.

Argued for the pursuer;—The questions were incompetent. The pursuer was entitled to notice of the time and place of the alleged acts of connection.[1]

LORD JUSTICE-CLERK.—The defender's averment is undoubtedly of a general kind, and I think that a great deal might be said to shew that such an averment should not have been allowed to go to proof. But apparently no objection was taken to that, and no call was made for a more specific

[1] M'Farlane v. Young, May 15, 1824, 3 Murray, 412.

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statement. The case went to proof on the record as it stood. The pursuer was asked questions as to particular acts of connection with men whose names are given on record, all of which she denied. I think that it was competent for the defender to bring evidence to prove that she had connection on these occasions. I think we must remit the case back to the Sheriff-substitute to receive this evidence.

LORD TRAYNER.—I concur.

LORD MONCREIFF.—I think there is no doubt that this evidence is competent. The defender's statement in answer 6 is irrelevant as it stands, and should not have been sent to proof, because it does not name either place or time. But both parties without objection were allowed a proof of the averments on record, and therefore I am of opinion that it was too late for the pursuer to take the objection at the trial. I think, however, both the Sheriff-substitute and this Court, if the case again comes before us, can in deciding the case give weight to the fact that no notice was given.

LORD YOUNG was absent.

THE COURT recalled the interlocutor appealed against, and remitted the case back to the Sheriff-substitute to take the evidence disallowed at the proof.

ANDREW WHITE, W.S.—CHARLES GARROW, Solicitor—Agents.

No. 206.

July 17, 1896. Cameron v. Glenmorangie Distillery Co., Limited.

DUNCAN CAMERON, Complainer (Reclaimer).—*Kennedy—Abel.* THE GLENMORANGIE DISTILLERY COMPANY, LIMITED, AND OTHERS, Respondents.—*Balfour—A. S. D. Thomson.*

Company—Power of company to give gratuities to officials—Issue of new shares to manager at a premium under market value as reward for past services.—Held (*aff.* judgment of Lord Kyllachy) (1) that it was competent for a limited company to give gratuities to its officials in consideration of services rendered, or to be rendered; and (2) that a resolution by the company at a general meeting to issue to its manager unissued shares at a premium less than might have been obtained on the market with the view of rewarding his past services and of securing his future services was not incompetent.

1ST DIVISION. Ld. Kyllachy.

THE GLENMORANGIE DISTILLERY COMPANY, LIMITED, was incorporated under the Companies Acts in 1887, the registered capital being £25,000, divided into 2500 shares of £10 each.

In 1895 1200 shares of the nominal capital of the company had been issued.

In July 1895 the directors of the company, upon the requisition of certain shareholders of the company, called an extraordinary general meeting of shareholders for the purpose of considering, *inter alia*, the following resolution:—"Resolution No. 1.—1200 shares of £10 each of the capital of the company having been already issued to the members, whereby the issued capital now stands at £12,000: Resolved that sanction be given to the directors increasing said capital to the sum of £14,000, and that by the issue to Mr Andrew Maitland, the managing director, of 200 shares of £10 each, upon the following terms and conditions, viz., (1) payment (*a*) of the sum of £10 in respect of each of said shares, (*b*) of a premium of £1 in respect of each of said

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shares, and (*c*) of interest at the rate of 5 per centum per annum upon the *cumulo* sum of £11 thus payable in respect of each of said shares, from 9th October 1894 until payment; and (2) that said issue be entitled to a dividend equally with the already issued shares as and from 9th October 1894." This resolution was duly carried at an extraordinary general meeting of the shareholders of the company held on 14th August 1895, Mr Cameron, bank-agent, Tain, one of the three directors of the company, dissenting.

Thereafter Mr Cameron presented a note of suspension and interdict against the company, Mr Taylor and Mr Maitland, his co-directors, and James Stephen, the secretary of the company, to have the respondents interdicted from acting upon the resolution, and to prevent his co-directors allotting 200 shares of the company to Mr Maitland in terms of the resolution.

The complainer averred that additional capital was not required by the company, but was merely being created in order to give a benefit to Mr Maitland, while what was really accrued dividend on the existing capital was to be made over in part to this favoured director by the last clause of the resolution; that the proposed price at which the shares were to be allotted was grossly inadequate; and that the proposed transaction would be to the prejudice of the existing shareholders and of the company.

The complainer pleaded;—(1) The transactions referred to not being reasonably incidental to or within the reasonable scope of the carrying on of the business of the company, but being in the knowledge of the parties at the time prejudicial and injurious to the company as condescended on, are irregular and illegal, and the complainer is entitled to interdict as craved. (2) The said resolution being *ultra vires* of the shareholders and directors, is invalid and inept.

The respondents denied that the transaction was *ultra vires* of the shareholders or to the prejudice of the company.

A proof was allowed. The material results of the evidence were as follows:—The company had since 1888 been managed most successfully by Mr Maitland, who was an architect in Tain. The sales had increased during this period from under 10,000 gallons to over 79,000. During the first years of his management Mr Maitland had received no remuneration for his services, but merely travelling expenses. In 1890 he got a salary of £100 per annum, and two years later in addition to his salary a commission on sales. His income in 1895 from this commission amounted to £288. In voting for the resolution complained of, the majority of the shareholders were actuated by the desire to reward Mr Maitland for his past services, to secure his services for the company in the future, and to increase his influence with customers.

The complainer led evidence to the effect that in August 1895 the company was not in need of capital, and that the shares could have been sold at a higher premium than £1. Counter evidence on these points was led for the respondents.

On 22d February 1896 the Lord Ordinary (Kyllachy) refused the prayer of the note.*

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* "OPINION.—The complainer here is a shareholder of the Glenmorangie Distillery Company, and he seeks to interdict as illegal the carrying out of a certain resolution passed at a certain meeting of the share-

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The complainer reclaimed, and argued;—(1) The resolution was *ultra vires* of the shareholders. A company had no right to issue new shares unless the capital so raised was to be productive. Otherwise the issue was to the prejudice of the existing shareholders. But here the evidence shewed that new capital was not required by this company in August 1895. (2) It was a fatal objection to the resolution that it mixed up two totally different questions, namely, the necessity of raising new capital and the manner of its disposal. (3) Where, as in the present case, the articles of a company contained no regulation in regard to the allotment of new shares to members, they could only, if issued to members at all, be issued *pro rata* to each.[1] (4) It was doubtful whether a company whose regulations did not expressly permit it had power to vote a gratuity to an official for past services. In *Clouston*[2] and *Newman & Company*[3] gratuities to officials had been disallowed. In *Hampson*[4] and *Henderson*,[5] where they had been allowed, there was evidence before the Court that such payments were sanctioned by the previous practice of the companies.

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holders of the company, whereby the directors were authorised to allot to the respondent, Mr Andrew Maitland (who may be described as the managing director of the company), 200 of the company's unissued shares at a premium of £1 per share—that is to say, £1 per share over their par value.

"The ground of complaint is that the premium was inadequate, so that the shares were allotted at a price below their true value—that there was thus made to Mr Maitland a present of large amount—and that the transaction was not justified by any interest of the company, but was, on the contrary, prejudicial to the company's interests. As the complainer puts it in his amended statement—'The proposed transactions are not reasonably incidental to or within the reasonable or ordinary scope of carrying on the business of the company, but are prejudicial to and will cause loss to the company.'

"The respondents' case, on the other hand, is that Mr Maitland's services had been specially valuable to the company, whose business he had pushed and developed at great expenditure of time and trouble, that it was desired to add to his interest in the concern so as to give him a greater weight with customers, and to encourage him to further exertions in the company's interest, and that the allotment was made with that object, the additional capital being at the time required, and the premium exacted being, if not adequate, at least considered to be so by the shareholders.

"I allowed a proof, because if the complainer's averments were to be taken as true, there was at least a case for consideration. But the proof having been led, the result, in my opinion, is, that the complainer has failed to shew either that the transaction was *ultra vires* of the company, or that being *intra vires*, it involved any abuse of power by the majority of the shareholders.

"It is, I think, quite clear that the transaction was not *ultra vires*. I do

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[1] Reese v. Bank of Montgomery County, 1855, Freeman's American Dec. vol. 72, p. 726; North Midland Railway Co. v. Hudson, 1853, 16 Beavan, 485; Hoole v. Great Western Railway Co., 1867, L. R., 3 Ch. 262; Griffith v. Paget, 1877, L. R., 5 Ch. Div. 894.

[2] Clouston v. Edinburgh and Glasgow Railway Co., Dec. 14, 1865, 4 Macph. 207.

[3] *In re* Geo. Newman & Co., L. R. [1895], 1 Ch. 674.

[4] Hampson v. Price's Patent Candle Co., 1876, 45 L. J. Ch. 437.

[5] Henderson v. Bank of Australasia, 1888, L. R., 40 Ch. Div. 170.

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In *Hudson*[1] it had been laid down that, if shareholders desired to give a gratuity to a director, they should do so by subscribing or giving their own shares. (5) Whether or not a company had power to give gratuities to officials, it had no power to do so by issuing shares at less than their market price to a favoured allottee, or by paying dividend which shares had not earned. Such action was in breach of the rights of the minority of shareholders. It was no valid defence that Mr Maitland's influence with the customers of the company would be increased. (6) The articles of the respondent company contained a regulation as to the mode in which directors were to be remunerated, and any other mode of remuneration was *ultra vires* of the company.*

Argued for the respondents;—(1) The evidence shewed that additional capital was required by the company. At all events the question whether or not that was the case was one for the shareholders. (2) It might have been more expedient to divide the resolution into

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not know that it would have been *intra vires* of the directors. But it was certainly *intra vires* of the company. It is within a company's power to allot, as the shareholders here did, unissued shares forming part of the authorised capital. It is also within its power to fix the premium, if any, at which such shares shall be issued. It is also within its power to select the allottees; and I know of no disability which attaches to a company making allotments, if it so resolve, to existing shareholders, or to its own directors, or other officials. There is, of course, here no question of issuing shares at a discount, or without full payment in cash. In other words, there is no suggestion that the transaction in any way diminished the capital of the company. Neither is there any room for challenge on the ground that the act of the company was *intra vires* but irregular. There is no dispute that the meetings were duly called and duly held, and that everything done was done formally and regularly.

"The complainer therefore requires to make out a case of what I have called abuse of power; and I do not doubt that such cases may occur, and that when they do, the Court may interfere. It is always, however, a delicate matter to interfere as between a majority and minority of shareholders of a going company, with respect to matters connected with the conduct of the company's business, and as to which the shareholders have come to a resolution. *Prima facie*, the shareholders are the best judges of their own affairs, and it is only where it appears that some sinister motive has operated, or that interests other than the interest of the company have plainly prevailed, that the Court will entertain a complaint. The test always is,—Is the thing complained of a thing done in the interest of the company?—or, to put it perhaps more accurately, Is the action of the majority irreconcilable with their having proceeded upon any reasonable view of the company's interest?

"Now, in this point of view, it requires only a glance at the evidence to see that the complainer's case fails. The allotment to Mr Maitland of 200 additional shares was, I see no reason to doubt, a proceeding which was in the interests of the company. I do not doubt that the increase of capital—of which a good deal was said—was a secondary consideration. I have no

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[1] *Per* Sir John Romilly in North Midland Railway Co. v. Hudson, 16 Beavan, at p. 495.

* "(19) The directors shall be entitled to set apart and receive for their remuneration in each and every year such sum as the company in general meeting shall resolve."

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two, but it could not be said that the resolution was illegal because its form was open to criticism. (3) Shareholders had no right to demand a *pro rata* allotment of new shares, and there was nothing in the Companies Acts, or in the regulations of this particular company, to render the issue to a selected shareholder illegal. The American case of *Reese*[1] turned upon the special rules of the corporation there in question. If, therefore, the complainer had any valid objection to the resolution, it could only be on the ground of fraud or unfair dealing. (4) But it was clear from the evidence that there was no ground for any objection of that kind. The motives which prompted the action of the majority of the shareholders were perfectly reasonable. They did not act merely from the desire to give a gratuity to Mr Maitland, but in the belief that what they were doing would advance the interests of the company. But if their action had been prompted solely by a desire to reward Mr Maitland for his past services it would not have been illegal. A company had the right to give gratuities to its officials.[2] In *Hudson*[3] the question was whether the defendant held certain stock of the company in trust for the company or on his own account. In *Clouston*[4] the question was whether a company which had transferred its business could award gratuities to its officials out of the transferred assets. It was apparent that these cases had no bearing on the question whether a going company could vote gratuities to its servants. (5) If a company could vote a grant in money, they could do so in shares provided they did not issue these at a discount. The anticipation of the period at which dividend was due was merely another way of giving a present in money. (6) Assuming that the issue of the shares to Mr Maitland was a gratuity,

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doubt, also, that the shares were worth a premium a good deal larger than £1 per share. It seemed to me, also, that the suggestion of greater weight being desired for canvassing customers was a little fanciful. But Mr Maitland had made the company a success, and, what is more important, he was in the course of making it a greater success; and I cannot imagine anything more natural and reasonable in such circumstances than that the shareholders, having regard to their own interests, should desire to conciliate him,—to attach him to the concern,—and to do so by giving him an additional interest, and therefore an additional motive for active exertion. In any case, the shareholders (the complainer alone dissenting) were of that opinion, and I find no trace in the evidence of any motive which could have influenced them other than their own interest. The case may involve an element of gratuity—perhaps it does. But the gratuity was, I think, largely inspired by a sense of favours to come. In that respect the case differs widely from that of *Clouston* v. *Edinburgh and Glasgow Railway Company*, 4 Macph. 207, and other cases of that description. Where a company is being wound up, gratuities to servants and officials may very well be illegal. But a going concern is in a different position.

"On the whole, I see no reason for holding that the shareholders exceeded their powers, or that the majority abused those powers in this transaction. I shall therefore refuse the note of suspension."

[1] 1855, Freeman's American Dec. vol. 72, p. 726.

[2] Henderson v. Bank of Australasia, 1888, L. R., 40 Ch. Div. 170; Hampson v. Price's Patent Candle Co., 1876, 45 L. J. Ch. 437; *cf.* in re Geo. Newman & Co., L. R. [1895], 1 Ch. 674; Bryce on the Doctrine of *Ultra Vires*, p. 180.

[3] 1853, 16 Beavan, 485.

[4] 4 Macph. 207.

it was given to him as manager, and was in no way excluded by the articles. No. 206.

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At advising,—

LORD PRESIDENT.—I am not surprised that the proceeding complained of has attracted criticism, but I do not think that it is challengeable at law. It is right to add that I see no reason to doubt that the parties to the resolution thought it expedient in the interests of the company. The objection to the resolution is, that it mixes up things which ought to be kept separate, and the mixture of which naturally creates a suspicion of jobbery.

It was lawful to this company to issue the unissued shares of the company at or above par, and if the price were above par, to treat the surplus as profit applicable to the uses of the company, according to its circumstances and requirements. The question, whether shares should be issued and the capital in hand thus added to was a financial question involving no personal questions at all.

It was also in the power of the company to give a gratuity to any of their officials, and that either for services rendered or to be rendered. This is a delicate matter, but one which honest men, such as we have in this case, need not shrink from proposing, so it be done in a distinct and intelligible way, and with full notice to all concerned, why and how much.

I think it unfortunate that these two things, both quite legitimate, were here put into one resolution. The question, do we require more capital? was, as the resolution was framed, inextricably mixed up with the question, ought we not to do something for Maitland? while, according to the respondents' own evidence, no one knew, or knows now, the actual amount of benefit conferred on Mr Maitland, by giving him the shares at the price fixed.

But while I do not applaud this resolution, and think it unbusinesslike, I am satisfied that it was not illegal in any of the things which it did. I think that the company had a right, if it pleased, to select the person to whom the shares should be issued, and it seems intelligible and legitimate to increase the influence of an agent with customers by giving him a larger holding. Again, I think that the reasons for remunerating Mr Maitland for past services were adequate, or at least that the company might well hold them to be so. In substance, it mattered not whether they first sold the shares for what they would bring, and then made a present of the profit to Mr Maitland, or gave them over to him at par, and let him pocket the difference.

A minor objection was stated, which, at first sight, seemed of technical importance, viz., the payment of dividend on a period anterior to the issue of the shares. This again is irregular, but not substantially vicious. The payment was of so much more money which would come out of the general income of the company.

My judgment of course proceeds on the constitution of this company, and I do not wish to be deemed to approve of this mode of issuing and placing shares on a mixed view of the finances of the company and the merits of an influential individual.

I am for adhering.

No. 206. LORD ADAM and LORD KINNEAR concurred.

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THE COURT adhered.

R. CUNNINGHAM, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 207. ALEXANDER M'NAB, Complainer (Respondent).—*D. Dundas—Abel.*
GILBERT METCALFE ROBERTSON AND OTHERS (Sir George Campbell's Trustees), Respondents (Reclaimers).—*Macfarlane—C. K. Mackenzie.*

July 17, 1896.* M'Nab v. Campbell's Trustees.

River—Lease—Lease of water in ponds and "streams leading thereto"—Whether water percolating to pond from spring a "stream."—Under the lease of a distillery the tenant had right to the water in two ponds, "and in the streams leading thereto." A stream from the hills entered the upper pond, which was connected with the lower pond by another stream. A few yards from the lower pond, but not within the lands leased, was a spring, from which water percolated through marshy ground into that pond. After the date of the lease the landlord collected the water from the spring into a tank, and by means of a pipe carried part of this water to the house of another of his tenants, the remainder of the water collected in the tank passing through an overflow pipe into the pond. The tenant of the distillery having brought an action to have the landlord interdicted from interfering with the water from the spring, *held* after a proof (*rev.* judgment of Lord Low) that the tenant was not entitled to interdict, *per* the Lord Justice-Clerk and Lord Trayner, on the ground that water percolating from a spring to a pond did not constitute a stream in the sense of the lease, and *per* Lord Young on the ground that in the circumstances as disclosed by the evidence the tenant had not suffered any prejudice from the landlord's operations.

2D DIVISION. Lord Low.

BY lease dated September 1889 for thirty-one years from Whitsunday 1889, the trustees of the late Sir George Campbell of Succoth, Baronet, let to Alexander Ferguson, wine and spirit-merchant, Glasgow, "All and Whole the distillery of Tambowie, as presently occupied by David Chrystal, with the house occupied by the Inland Revenue officer, and other two cottages adjoining for workpeople, the land extending to about 13½ acres imperial, and forming part of the fields marked Nos. 99 and 142 on the Ordnance Survey map, and with the two ponds marked Nos. 140 and 134 on the said map, all lying in the parish of New Kirkpatrick and county of Dumbarton, together with right to the water in the said ponds and in the streams leading thereto; . . . reserving the right to the first parties to grant liberty to the agricultural tenant of Tambowie farm to use the water-power for thrashing or churning at all reasonable times, and the use of the water for the steading and for agricultural purposes; but declaring that any water returned by the tenant to the said ponds and to the streams leading thereto shall be returned in a pure state . . . which lease the first parties bind and oblige themselves to warrant to the second party from their own facts and deeds only."

In April 1895 Alexander M'Nab, who had become tenant under the foregoing lease, conform to assignation in his favour dated April 1891, brought a note of suspension and interdict against Sir George Campbell's trustees, praying to have them interdicted from abstracting water from the two ponds mentioned in the lease, "or from any

* Decided March 11, 1896.

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of the streams leading to the said ponds, and from diverting any water from any of the said streams, or interfering in any way with any of the said streams, or with the right which the complainer has, as lessee of the said distillery, under the said lease, to the water in the said two ponds and the streams leading thereto: . . . Further, to ordain the respondents to fill up any trenches or other excavations made on the lands let under the foresaid lease, and to restore the ground near to the said two ponds, and the streams leading thereto, and the said ponds and streams themselves to the same condition in which they respectively were prior to the operations complained of."

The action arose in the following circumstances as appearing from the statements of the parties and from a proof:—A stream flowed from the hills above into the upper pond which was connected with the lower pond by another stream. Several yards from the south-west corner of the lower pond was a small spring, and it was certain operations by the respondents in the way of impounding the water originating from this spring which gave rise to the present proceedings. The complainer averred that this water constituted, if left to the course of nature, a stream or streams leading to the pond in the sense of the lease, and he therefore maintained that the respondents' operations were illegal as being an interference with part of the subjects let to him. The spring in question was not situated in the ground leased with the distillery. The respondents denied that the water originating from the spring constituted a stream leading to the pond in the sense of the lease; and the parties were further at issue on the question whether the complainer was prejudiced by the respondents' operations. With respect to this the complainer averred:—(Stat. 3) " . . . The right to the said ponds, and to the whole water therein, and in the streams leading thereto, are essential to the complainer for the requirements of the said distillery, as the quantity of spirits produced by the said distillery depends entirely upon the amount of water which can be got from the said ponds and from the streams and springs leading thereto. The withdrawal of any water from any of the said streams, as threatened by the respondents, will diminish to a corresponding extent the output of the said distillery, and cause loss to the complainer." The respondents denied this averment.

The ground between the spring and the pond prior to the lease, and to the respondents' operations, was described by certain of the witnesses as being soft, marshy, spongy ground, through which the water from the spring, or some of it, "siped" into the pond. One only of the witnesses, a man named Boyne, who had been manager of the distillery prior to the complainer's tenancy, spoke to there having been any sort of defined channel between the spring and the pond. After the date of the lease, but prior to the complainer's acquisition of it, Galbraith, the tenant of Tambowie farm, in order to drain the marsh, put in a tile drain with an iron pipe three feet long leading into a tub sunk in the ground close to the pond. From this tub he drew water for domestic purposes, while the overflow passed into the pond.

After the complainer acquired the lease, he increased the output of the distillery very considerably, and had thus a larger quantity of draff to dispose of. In order to consume part of the draff and also to dispose of the pot ale, which had previously been sent down the stream—a course to which the lower proprietors objected—he in 1893 and 1894, erected piggeries for about 300 pigs. The sewage from

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these piggeries ran over the neighbouring fields, and polluted the water supply of another of the respondents' tenants—a blacksmith, whose house was about 160 yards to the east of the piggeries. The blacksmith having complained to the respondents' factor, they carried out the operations at the spring to which the complainer objected. These operations consisted in collecting the water from the spring in a tank, and in carrying part of the water thus collected by pipes to the blacksmith's house, and also to a cottage let to the agricultural tenant and to his garden. The overflow was carried by another pipe into the pond.

The evidence upon the question whether the quantity of water passing into the pond from the overflow pipe was less than had reached the pond before the operations complained of was very conflicting. The most material circumstance founded on by the respondents, to shew that it was not, was that in addition to the water collected in the tank from the spring in question, the water from another spring (from which as it rather appeared the blacksmith's former supply had been derived) was puddled back so that it also passed into the tank. The pipe to the blacksmith's was fitted with a stop-cock.

The complainer pleaded, *inter alia*;—(1) The respondents having threatened, in violation of the complainer's rights under the said lease, to withdraw water from one of the streams leading to the said two ponds, in the manner above stated, the complainer is entitled to suspension and interdict and warrant for restoration as craved, with expenses.

The respondents pleaded;—(2) The respondents having, in any view, a right to take water from said ponds and streams for agricultural purposes, the note should be refused, and the respondents found entitled to expenses. (3) The respondents being within their right in carrying on the operations complained of, the note should be refused, and the respondents found entitled to expenses. (4) In any event, as no appreciable injury is threatened to the complainer, interim interdict should be refused.

On 4th February 1896 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds (1) that by the lease of Tambowie Distillery granted by the respondents, and to which the complainer has acquired right, the two ponds therein mentioned were let to the lessee, together with the water in the said ponds and in the streams thereto; (2) that the water of the spring situated upon the banks of the lower pond, and which flowed into the pond, was a stream leading into the pond within the meaning of the lease, although the said water did not flow into the pond by any definite or visible channel, but by percolation through marshy ground; (3) that the respondents have interfered with said spring by impounding the water thereof in a cistern for the purpose of providing a supply of water for certain cottages, and that only the overflow from the cistern now passes into the said pond; (4) that a supply of water for the said cottages is not among the uses of the water of the said ponds and streams leading thereto, which the respondents reserved right to make in said lease; (5) that the respondents have failed to prove that their operations have not diminished the supply of water to the said pond to the injury of the complainer: In these circumstances, finds in law that the respondents were not entitled to interfere with the spring, or to divert the water thereof, and that they are bound to remove the said

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cistern, and restore the ground to its former condition, so that the whole water of said spring shall flow as formerly into the said pond: Therefore, to that extent and effect, sustains the reasons of suspension and interdict, prohibits and discharges the respondents from abstracting water from or interfering with or diverting the said spring, and ordains the respondents to remove the said cistern, and to restore the ground at the place where the said cistern is situated to the condition in which it was prior to the operations complained of, so that the water of the said spring may flow into the said pond as formerly; reserving always, and without prejudice to, the respondents' right, in terms of said lease, to grant liberty to the agricultural tenant of Tambowie farm to use the water power for thrashing or churning at all reasonable times, and to have the use of the water for the steading and for agricultural purposes, and decerns." *

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* "OPINION.—The first question is whether a certain spring of water is to be regarded as one of the 'streams leading' into the pond to which the complainer is given right by his lease.

"The complainer's occupation of the distillery began in 1891, when he obtained an assignation of the lease which is dated in 1889. The point of time therefore which must be kept in view in determining whether the spring is a 'stream' within the meaning of the lease is 1889. That is of importance, because after 1889, but before the assignation in the complainer's favour, a tile drain was put in connecting the spring with the pond, and through which a stream of water ran from the spring into the pond. Before the drain was put in there was no visible stream from the spring to the pond, but from the lie of the ground the water of the spring undoubtedly found its way through a marsh into the pond.

"In 1889 the output of the distillery was very much smaller than it now is, and there was not the same necessity for economising all the available water, and accordingly I think that very probably Mr Macfarlane was right when he argued that the parties to the lease had not the spring in view when they made the contract. Even, however, if that was the case it would not affect the construction of the lease. Assuming that there was a stream of water within the meaning of the lease, of which the parties did not know, that stream would nevertheless fall within the lease.

"By the lease, two ponds are let to the tenant, 'together with right to the water in the said ponds, and in the streams leading thereto.' That, in my opinion, includes, as between lessor and lessee, all the sources of supply of the ponds. Thus the upper pond is supplied by a stream coming down from the hills, and a stream runs from the upper to the lower pond. I do not think that the lessor could divert a spring by which either of these streams was fed, even although the water of the spring did not find its way into the stream by any defined channel. In like manner, seeing that the water of the spring in question naturally and necessarily flowed into the pond, I do not think that it makes any difference that the flow was not in any defined or visible channel, but was of the nature of percolation.

"If, then, the water of the spring was part of the subjects let to the complainer, *prima facie*, the respondents were not entitled to interfere with it in spite of the complainer's remonstrances, and the *onus* lies with them to shew that the complainer has not been prejudiced by their operations.

"The conformation of the ground in the neighbourhood of the spring appears to be peculiar. One spring, which is the strongest of the springs discovered, undoubtedly flowed into the pond, but other springs, rising within a few feet or yards of the first, appear to have been carried by the lie of the ground in an opposite direction. The respondents have formed a cistern into which the first spring is carried, and from the cistern pipes are taken to the blacksmith's house, to a cottage, and to the adjoining farm.

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LORD YOUNG.—This is a case of importance to both parties, and we have had a full and I think quite satisfactory argument on both sides presenting the case of the parties respectively before us in a manner which I think enables us to deal with the case now.

The lease of this distillery and a few acres of ground was granted in 1889, and the present complainer acquired right to the distillery in 1891. By the lease his predecessor acquired what he is now in right of—the two ponds marked 140 and 134 on the map referred to in the lease, together

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The respondents, however, say that the overflow of the cistern which goes into the pond is not less than the whole natural flow of the spring before their operations, because they have dammed back the water of certain other springs which previously flowed away from the pond, and diverted it also into the cistern. If that was clearly established I think that it would be a good answer to the present complaint, especially as I have little doubt that the old supply to the blacksmith's house was polluted, and a new supply rendered necessary by the discharge of the sewage of the complainer's piggeries."—(His Lordship then considered the evidence on this point.)

"The question upon the evidence is very narrow, but I have come to the conclusion that the respondents have failed to prove that, by interfering with the spring, they have not injured the complainer's water supply. Of course the intention of the respondents was to compensate the complainer for any water drawn out of the cistern by the additional springs which were made to flow in that direction; but it is well known that the effect of operations upon springs of water is uncertain, and I should think that it was especially so at a place where the natural flow of springs, rising within a few yards of each other, is in opposite directions. Further, I am unable to disregard or to explain away the evidence of the complainer and his manager, that the flow into the pond is greatly less than it formerly was.

"The next question is, whether the use which the respondents have made of the water is within the reservation in the lease. The lessor there reserves right 'to grant liberty to the agricultural tenant of Tambowie farm to use the water power for thrashing or churning at all reasonable times, and the use of the water for the steading and for agricultural purposes.'

"I am of opinion that the use which the respondents have made of the spring does not fall within that reservation. The occasion of the respondents' operations was the pollution of the blacksmith's water supply. If it had not been for that the spring would not have been touched, and it is plain that a supply of water to the blacksmith's house is not a supply for the steading or for agricultural purposes. The same thing may, I think, be said in regard to the cottage to which a branch pipe is taken. A branch pipe was also taken to the farmer's garden, but I do not think that that fact aids the respondents. It does not appear that the farmer wanted an additional supply of water, and he says that it is of little use to him now that it is there. It is plain that it is equally convenient for him to draw water with a pail where the spring flows into the pond; indeed, it is apparently more convenient, because the practice is still continued.

"I am, therefore, of opinion that I must pronounce decree in the complainer's favour."

[1] *Authorities cited by the Reclaimers.*—Rawstron v. Taylor, 1855, 11 Ex. 369; Broadbent v. Ramsbotham, 1856, 11 Ex. 602; Chasemore v. Richards, 1859, 7 H. L. Cases (Clark), 349; Magistrates of Linlithgow v. Elphinstone, 1769, M. 12,805.

Authorities cited by the Respondent.—Holker v. Porritt, 1875, L. R., 10 Ex. 59; Stevenson v. Hogganfield Bleaching Co., Nov. 18, 1892, 30 S. L. R. 86.

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with right to the water in the said ponds and in the streams leading thereto. He proceeded shortly after entering into possession to erect piggeries—very extensive piggeries—upon the ground let to him. His business as a distiller required, as he quite intelligibly explains, that he should have pigs to consume a lot of the draff and refuse which were produced at the distillery, and with some profit to himself. But these piggeries had the effect of polluting in a distressing manner the water which formerly supplied the needs of some tenants of the respondents, particularly a blacksmith, who complained that he must have another supply of water unless this pollution ceased. That led the factor upon the estate to consider how this evil could be remedied, and he appears to have proceeded—I am speaking from the evidence here—very cautiously and circumspectly, and with due attention to the legitimate interests of the parties with whose interests he was concerned, and it appeared to him that he could carry off the water in a pipe through a part of the estate without at all interfering with either of the streams or with the legitimate supply of water to the pond.—(His Lordship then adverted to certain parts of the correspondence between the parties, and also between the complainer and his manager, in the course of which his Lordship observed)—I may say that, without a strict regard to legal rights—strict legal rights—I should be much disposed to stop any wanton or unduly selfish proceedings on the part of a landlord which would interfere with the legitimate interests of a tenant which he knew the tenant had been relying upon, even although it could not be said that he was not proceeding strictly in the exercise of a legal right. It would be a matter to be taken into consideration in an application for interdict to stop him whether the proceedings which he was taking were necessary in his own legitimate interests, and also whether he was paying a due regard to the legitimate interests of the tenant, which he knew he had in view in taking and in keeping the lease.—(His Lordship then further adverted to the correspondence.)

Now, I am disposed, without any antecedent prejudice against the landlord interfering in these circumstances to provide pure fresh water for his tenants, to consider whether he was exceeding his legal right or violating any right—which would of course be exceeding his—which he had granted to a tenant. I keep in view that consideration, and I refer to it in connection with the purpose for which I have read these letters, which was to explain how the landlord was prompted to take action in this matter at all. I may also observe that the lease reserves right to the first parties to grant liberty to the agricultural tenants of Tambowie farm to use the water-power for thrashing or churning at all reasonable times, and the use of the water for the steading and for agricultural purposes. I should be disposed to think that even an interference with the supply to the distillery for the legitimate supply of a house like the smith's house here, whose former supply had been diminished by the distiller's proceedings, would not be unfavourably regarded if it was kept within due bounds, that is, such bounds as were shewn to be necessary in consequence of the pollution of which the distiller was the author. But I am of opinion upon the evidence, and I am speaking now distinctly and directly to the question whether the operations sought to be interdicted interfered with the streams running into the pond

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or the supply of water theretofore made through these springs to the pond, I am disposed to hold upon the evidence, and that I confess without any serious doubt, that the operations did not so interfere. If that be so, then that is a conclusive answer to this action, for the averment upon which it proceeds is stated in statement 3.—(His Lordship read the averment quoted above.) Now, I cannot affirm that. On the contrary, I am prepared to negative it, and therefore to affirm the respondents' third plea in law, which is to the effect that the whole operations, which are the subject of complaint here, were within their legal right, and were no interference with the complainer's legal rights in a question between them and the complainer. In that view I should be prepared to recall the interlocutor of the Lord Ordinary, and to give a decree to that effect, and, of course, with expenses.

LORD TRAYNER.—I agree. I think there has been no invasion or violation of the complainer's rights. The lease in question lets to the complainer the two ponds with the water therein, and right to the water in the streams leading thereto. The lower of the ponds is fed by a stream (in the ordinary and popular sense of that term) flowing out of the upper pond, and the upper pond is fed by a similar stream flowing from the hill above. To hold that these are the ponds "and streams leading thereto" let to the complainer seems to me to satisfy completely the terms of the lease without looking for anything else as included to which these terms would not, in popular language, directly apply. The spring which the complainer claims, and the interference with which is the immediate subject of complaint, does not appear to me to fall within the subjects let. A spring and a stream are different things. The water from a spring may flow away in a stream, no doubt, and that is said by the complainer to have been the case here. But that is not supported by the evidence. It rather appears that the water from the spring in question simply gathered on the land round the spring, and formed a kind of marsh. That some of that collected water found its way by percolation through the earth into the lower pond, I think, is certain; how much or how little has not been, and probably could not be, ascertained. But I am quite clear that such percolation cannot be regarded as a stream leading into the pond in the sense of the lease.

LORD JUSTICE-CLERK.—I am entirely of the same opinion. I think that the terms of the lease as to the streams are completely covered. There were two streams, and that is quite sufficient. There is therefore no ground for suggesting that the word "streams" referred to anything else than the two visible streams upon the field which were therefore to be taken into consideration and disposed of. I think that when you have a stream in the sense of a stream which might be diverted from its course, or the water of it removed, it must be a tangible running stream. It may be very small, but it must have a water channel for itself. I do not think that any question such as was referred to in some of the cases which were cited, viz., the question relating to the water disappearing from a stream underground and reappearing, or not reappearing till it came out at the bottom of a lake, affects the question here. That question really is, whether at the place you are dealing with there is a stream. It may afterwards disappear, and it

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may afterwards re-emerge. But if any water emerging does not form a stream, but merely a marsh upon the ground with no defined outflow which is visible, then I think that is not water which can be held to fall under the definition of the words in the lease here. It is quite in accordance with the common law upon the matter that a proprietor is entitled to impound and get possession of such water, and to keep it, not being water flowing in a stream upon the surface of his land, and not in fact running down on the surface to the lower ground, or to a pond or lake, or another stream. Although by doing so he may possibly affect the water interests of other heritors further down, perhaps miles down below, nevertheless that is his right.

Upon the whole matter I agree entirely with your Lordships that the complainer has not established that any stream has been taken away from him which he was entitled to under the lease, and that we ought to recall the interlocutor, and, as Lord Young has suggested, sustain the third plea in law for the respondent, with expenses.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor reclaimed against: Repel the reasons of suspension and interdict: Sustain the third plea in law for the respondents: Therefore refuse the note of suspension and interdict, and decern."

GILL & PRINGLE, W.S.—TAIT & CRICHTON, W.S.—Agents.

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JOHN MESS (Laing Brothers & Company's Trustee), Pursuer (Reclaimer).—*D.-F. Asher—D. Dundas.*
JOHN LAING LOW, Defender (Respondent).—*Johnston—Macfarlane.*

Partnership—Constitution—Contract—Construction—Advance to firm—Share of Profits—Payment of prior debt out of profits—Partnership Act, 1890 (53 *and* 54 *Vict. c.* 39), *sec.* 2, *subsec.* 3.—By minute of agreement which proceeded on the narrative that the first parties, Laing Brothers & Company, and the individual partners thereof, had applied to the second party, Low, "for an advance by way of loan to enable them the better to carry on their business," Low agreed to advance £1000 for three years (during which period the agreement was to continue), the first parties agreeing to pay interest at five per cent per annum. It was further agreed that the whole profits should remain in the business until the expiry of the agreement, when the £1000 was to be repaid and the profits equally divided between the parties, Low agreeing that his share should be applied by him in reduction *pro tanto* of a debt of £13,700 due to his father's estate by the individual partners and their father, to one-half of which Low was entitled.

The 5th article was as follows:—"The books of the said business shall be brought to a balance as on the 30th April and 31st October in each year, and should any of such balances shew that the capital, including loan in this account, has been reduced to £500, this agreement shall come to an end as at the date of said balance, and the amount then remaining shall be paid by the first parties to the second party, but under no circumstances shall the second party be liable for any sum beyond the £1000 he is to advance on loan." By the last article it was declared that Low should not be deemed in any respect a partner of the firm of Laing Brothers & Company.

The firm having been sequestrated, the trustee on its estate raised an action against Low, *inter alia*, to have it declared that he was a partner of

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the firm under the agreement. The Court (*aff.* judgment of Lord Low) *held* that the defender was not a partner of the firm.

Partnership—Bankruptcy—Title to sue—Sequestration of firm—Title of trustee to sue solvent partner for payment of debts due to firm's creditors.—Question whether the trustee on the estate of a firm which has been sequestrated has a title to sue a solvent partner for payment of the debts due by him as a partner to the creditors of the firm.

1st Division. Lord Low.

On 28th August 1891, Laing Brothers & Company, merchants and spinners in Dundee, and William R. Laing and David C. C. Laing, the individual partners, as such partners and as individuals, of the first part, entered into a minute of agreement with John Laing Low, of the second part, in the following terms:—"Whereas the first parties have applied to the second party for an advance by way of a loan to enable them the better to carry on their business: And whereas the second party has agreed to advance the sum of £1000 to be used by the first parties in their business upon the conditions hereinafter mentioned.

"(First) The second party hereby agrees to advance to the first parties the sum of £1000 in loan as above mentioned, and that for the period of three years from the 31st day of October 1891, upon which loan interest shall be paid by the first parties to the second party at the rate of £5 per centum per annum from the said 31st day of October 1891 to the term of payment, and that half-yearly. . . .

"(Second) The first parties agree that they shall retain in their business, and in order to secure the foresaid loan, the amount that may stand at their credit in the books of their firm as at 31st October 1891, at the expiry of a spinning account which will then come to an end, less the sum of £300 to be paid by them to Peter Matthew, merchant in Dundee.

"(Third) The whole profits made in the business during the foresaid period of three years during which the foresaid loan is to continue shall, under deduction of payments for management, wages, jute, and other ordinary and necessary outgoings requisite for carrying on the business, remain in the business, without any deduction other than that above specified until the expiry of this agreement, and on the expiry of the foresaid period the first parties shall repay in cash to the second party his said loan of £1000, and the whole of said profits shall be divided between the first parties and the second party equally.

"(Fourth) In estimating the profits of the said business the said first parties shall be entitled to charge against the said business" certain specified sums for rent, &c.

"(Fifth) The books of the said business shall be brought to a balance as on the 30th April and 31st October in each year, and should any of such balances shew that the capital, including loan in this account, has been reduced to £500, this agreement shall come to an end as at the date of said balance, and the amount then remaining shall be paid by the first parties to the second party, but under no circumstances shall the second party be liable for any sum beyond the £1000 he is to advance on loan.

"(Sixth) The second party hereby agrees to apply the share of the profits falling to him, as above mentioned, at the expiry of this agreement, in reduction or extinction of the debt secured by bonds and dispositions in security for £5700 and £8000, granted by the said John Laing and his sons, the said William Robert Laing, and David Colville Carruthers Laing, in favour of the late Andrew Beharie Low,

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Esquire of Butterstone, the father of said second party, over the said Stobswell Works and machinery, and Dens Road factory and machinery, and the lands of Kellyfield and others, the half of the said debt to which he is entitled in the apportionment of the estate of his said father being reduced or extinguished *primo loco*.

"(Seventh) The said first parties shall have the sole power of buying and selling, and generally of conducting the said business, but they shall supply a monthly statement, shewing the quantity of jute in stock and to arrive, and the extent of orders for yarns to execute, to the said second party, and the said second party shall also be entitled to see the said half-yearly balance-sheets, declaring, however, that the first parties shall not be entitled to purchase or to have at any time in their possession a larger stock of jute than one or two months' supply in excess of yarns sold. . . .

"(Lastly) It is hereby declared, that notwithstanding the loan made in terms of this agreement by the second party, the said second party shall not be deemed or held to be in any respect a partner in the said firm of Laing Brothers & Company, and shall not be liable for the debts and obligations of that firm."

A receipt was indorsed upon the minute in the following terms:—"Dundee, 31st October 1891.—Received from the within named John L. Low, Esquire of Butterston, by the hands of Shiell & Small, solicitors, Dundee, the sum of £1000 sterling, falling to be paid to us, in terms of the foregoing minute of agreement. LAING BROS. & Co. W. R. LAING. DAVID C. C. LAING. £1000 stg."

On 9th March 1895 the estates of Laing Brothers & Company, as a company, and William R. Laing and David C. C. Laing as partners of the company, and as individuals, were sequestrated, and John Mess, accountant, Dundee, was appointed trustee on the several estates.

On 4th June 1895 Mr Mess raised the present action against John Laing Low, concluding for declarator that, in terms of the agreement of 28th August 1891, the defender was a partner of the firm of Laing Brothers & Company, and liable as such for the debts of the firm, and that the pursuer, as trustee, was entitled to recover from the defender such sums of money as might be necessary to pay the debts of the creditors of the firm after the estate of the firm had been exhausted. Decree was asked for payment of £25,000.

The pursuer pleaded;—(1) On a sound construction of the said minute of agreement, the defender incurred the full liabilities of a partner of the firm of Laing Brothers & Company.

The defender stated, *inter alia*, that he was a nephew of William R. Laing and David C. C. Laing; that in making the advance in question he did not intend to enter, and did not enter, into any partnership with his uncles, and that he was at the time when the agreement was entered into, and for at least two years thereafter, an undergraduate at Cambridge with the intention of taking orders.

The defender pleaded;—(1) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the summons. (2) The defender not being, and never having been, a partner of the firm of Laing Brothers & Company, is not liable for its obligations, and is entitled to absolvitor.

On 14th December 1895 the Lord Ordinary (Low) assoilzied the defender.*

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* "OPINION.— . . . The pursuer contends that the agreement was

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The pursuer reclaimed.

The defender was thereafter allowed to amend his record by adding, *inter alia*, the plea "No title to sue."

The arguments of the parties on the construction of the agreement sufficiently appear from the opinions of the Court and of the Lord Ordinary. The parties referred to the Partnership Act, 1890, section 2,* and to the undernoted authorities.[1]

On the question of title to sue, the pursuer argued;—It had never been doubted that a trustee in the position of the pursuer was entitled to sue a partner. *Speirs* v. *Dunlop*[2] decided that he was. The opinions in *Mann* v. *Sinclair*[3] were to the same effect. It was admitted that the defender, if a partner, was liable to pay the creditors of the firm, and it was absurd to maintain that each several creditor would require to sue the defender.

The defender argued;—Assuming that the defender was a partner, the trustee had no title to sue. There was no question of the defender being liable still to contribute to the capital of the firm, or

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one by which a partnership was constituted; the defender, on the other hand, maintaining that it was an agreement fixing the terms upon which he agreed to lend £1000 to the firm for the purposes of their business.

"The agreement proceeds upon the narrative that the first parties (that is, the firm and the individual partners thereof) have applied to the second party for a loan 'to enable them the better to carry on their business,' and that the second party (the defender) has agreed to advance to them the sum of £1000, to be used in their business upon the conditions thereinafter mentioned.

"By the first article of the agreement the second party agreed to advance the sum of £1000 'in loan as above mentioned, and that for the period of three years from the 31st day of October 1891,' and the first parties bind themselves to pay interest 'upon the loan' at the rate of five per cent per annum.

"By the second article the first parties agree to retain in their business,

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* The Partnership Act, 1890 (53 and 54 Vict. c. 39), sec. 2, enacts,—"In determining whether a partnership does or does not exist regard shall be had to the following rules:— . . . (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business; and in particular (*a*) the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business, or liable as such. . . . (*d*) The advance of money by way of loan to a person engaged, or about to engage, in any business on a contract with that person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such. . . ."

[1] *Pursuer's Authorities.*—Davis v. Davis, L. R. [1894], 1 Ch. 393; Pooley v. Driver, 1876, L. R., 5 Ch. D. 458; *Ex parte* Delhasse, 1877, L. R., 7 Ch. D. 511; Adam v. Newbigging, 1888, L. R., 13 A. C. 308.

Defenders' Authorities.—Mollwo, March, & Co., 1872, L. R., 4 P. C. 419; Badeley v. Consolidated Bank, 1888, L. R., 38 Ch. D. 238; Eaglesham & Co. v. Grant, July 15, 1875, 2 R. 960.

[2] Speirs v. Dunlop, May 9, 1777, 2 Paton, 437.

[3] Mann v. Sinclair, June 20, 1879, 6 R. 1078; *cf.* Hay v. Mair, Jan. 27, 1809, F. C.

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of his being indebted to it directly on a trade account, and these were the only debts for which the pursuer might have had a title to sue.[1] The liability of a partner for the firm's debts only arose after the firm's estate was exhausted,[2] and was not an asset of the firm's estate and carried to the trustee under the Bankruptcy Act, 1856 (19 and 20 Vict. c. 79), sec. 102. The defender being a solvent partner the creditors of the firm had an undoubted right each and all to sue him,[3] and if the pursuer was right he would thus be liable to double action. On the other hand, not being sequestrated, the defender could not claim a discharge from the trustee or from a majority of the creditors.[4] The trustee's title was no higher or wider than that of the bankrupt, except, perhaps, with regard to preferences, and he was allowed to sue a reduction of these in order to vindicate the bankrupt's estate. The proper way for the trustee to sue was to obtain an assignation from each creditor of his claim against the defender. That was the course followed in *Dunlop* v. *Speirs*.[5] In *Mann* v. *Sinclair*[6] the point was not decided, but the opinion of Lord Young favoured the present defender's contention.

'to secure the foresaid loan,' the amount that may stand at their credit in the books of the firm at a specified date, after deduction of a certain sum.

"So far the agreement is one in regard to a loan and nothing else, and the third article contains the first of the stipulations upon which the pursuer founds as shewing that a partnership was truly constituted, although under cover of an agreement bearing to be for a loan.

"The third article is to the following effect:—'The whole profits made in the business during the foresaid period of three years during which the foresaid loan is to continue shall, under deduction of payments for management,' and other payments of a like nature, 'remain in the business, without any deduction other than that above specified, until the expiry of this agreement, and on the expiry of the foresaid period the first party shall repay in cash to the second party his said loan of £1000, and the whole of said profits shall be divided between the first parties and the second party equally.'

"The pursuer, of course, founded upon the provision as to the division of profits, and argued that the fact that the defender was to be entitled to one-half of the profits was inconsistent with any other idea than that he was to be a partner, because it could not be said that he was to receive a share of the profits as interest upon the loan, interest having already been stipulated for by the first article. Now, no doubt, the receipt by a person of a share of profits is *prima facie* evidence that he is a partner, and if he was to receive a share of the profits in addition to interest at a full rate upon money lent by him to the firm the presumption of partnership might be very difficult to rebut.

"In this case, however, when the third article of the agreement is read along with the sixth article, it becomes clear that the defender was not to be entitled to a share of the profits in the ordinary sense of putting it into his pocket, but that the one-half of the profits which was apportioned to him by the third article was, under the sixth article, to be applied in a particular way.

"It appears that the defender's father had lent a large sum of money to

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[1] 2 Bell's Comm., 7th ed., 549.

[2] 2 Bell's Comm. 508.

[3] 2 Bell's Comm. 561, 562; Dunbar v. Remington, Wilson, & Co., March 10, 1810, F. C.

[4] 2 Bell's Comm. 566.

[5] Dunlop v. Speirs, M. 14,610, *sub voce* Society, App. No. 2, 2 Paton, 437.

[6] Mann v. Sinclair, 6 R. 1078, at p. 1081.

No. 208. At advising,—

July 17, 1896. Laing Brothers & Co.'s Trustee v. Low.

LORD KINNEAR.—After the Lord Ordinary's decision in this case had been given the defender added a plea that the pursuer had no title to sue, but it does not appear to me that his position is materially altered by the new plea. If we were to consider the plea on the assumption that the defender was, in fact, a partner so as to render him liable jointly with the other partners, as well as severally, to the entire body of creditors of the bankrupt firm, I should not, as at present advised, be disposed to sustain it, but I am of opinion with the Lord Ordinary, and for the reasons he has given, that the defender was not a partner of the bankrupt firm, and has incurred no liability to its creditors.

The law as now established may be stated in the words of Lord Justice Lindley:—"No person who does not hold himself out as a partner is liable to third persons for the acts of those whose profits he shares unless he and they are really partners *inter se*. At the same time persons may find that

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the firm, which was secured to the extent of £5700 over one property, and to the extent of £8000 over another property. The defender was under his father's settlement entitled to one-half of these debts.

"In these circumstances the defender agreed, in the sixth article of the agreement, to apply the share of the profits falling to him under the third article in extinction of the debts to which I have referred, 'the half of the said debt to which he is entitled in the apportionment of the estate of his said father being reduced or extinguished *primo loco*.'

"Apparently the parties did not contemplate that one-half of the profits for three years could possibly exceed the debts, because there is no provision for the disposal of any balance of profits remaining after payment of the debts.

"It seems to me that the arrangement set forth in article sixth entirely meets the argument which the pursuer founds upon article third. If in addition to interest at the rate of 5 per cent upon the £1000, the defender had been entitled to put one-half of the profits into his pocket, the argument would have been very difficult to resist, because the inference would have been that the consideration which the defender was to give for the share of the profits was the obligation of a partner for the liabilities of the firm. It is different, however, when, upon the face of the agreement, the consideration is a prior debt of the firm. I see nothing inconsistent with an agreement for the loan of money, that the lender should stipulate that during the period for which the loan was given part of the profits should be used as a sinking fund for the payment of a prior debt. If the business had been successful, and there had been accumulated profits at the end of the three years, the defender would not have received payment of the amount, but would simply have written off an equivalent portion of the debt.

"Returning now to the intervening articles of the agreement, I do not think that the fourth is of any importance, as it only provides that in estimating the profits certain sums shall be deducted in name of rent for the business premises, and a salary of £100 a year for an assistant. The fifth article, however, is the one upon which the pursuer's case chiefly depends. It provides that the books of the business shall be brought to a balance twice in each year, 'and should any such balances shew that the capital, including loan in this account, has been reduced to £500, this agreement shall come to an end as at the date of said balance, and the amount then remaining shall be paid by the first parties to the second party, but under

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they are partners for all purposes although they only intended to be so for purposes beneficial to themselves."

The question, therefore, is whether the defender and the bankrupts, Laing Brothers & Company, did or did not become partners *inter se* by virtue of the agreement on which the pursuer relies.

The agreement is in form an agreement for a loan, but it is said that it is in substance a contract of copartnery. In 1891, when the agreement was made, the bankrupts, William Laing and David Laing, were carrying on business under the name of Laing Brothers & Company, and the defender, who is their nephew, advanced to them a sum of £1000 for three years, on which they undertook to pay interest at the rate of 5 per cent. By the third article of the agreement it was stipulated that the whole profits made in the business during the foresaid period of three years should, under deduction of payments for management, and so on, remain in the business until the expiry of the agreement, and on the termination of the foresaid period the first parties, the borrowers, should repay to the

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no circumstances shall the second party be liable for any sum beyond the £1000 he is to advance on loan.'

"The pursuer contended that that article shewed that the parties recognised that the defender would be liable to creditors, and that the concluding words were an attempt to limit his liability to creditors, by an agreement between the partners. Further, just as the first article provided for the case of the business being successful, so the fifth article provided for the case of the business being unsuccessful. In the former case the defender was to be paid the £1000 in cash; in the latter case he was only to be paid the balance of capital of £500 or under which might remain. That stipulation, the pursuer contended, was entirely inconsistent with the idea that the defender was merely a lender to the firm, because no mere lender would agree, in the event of the firm to which he had lent money proving unsuccessful to give up his debt and content himself with any balance of capital to the amount of one-half of the loan or less which might remain.

"I am unable to assent to the pursuer's construction of the fifth article. I think that it is designed as a protection to the defender as a lender to the firm. By the previous part of the agreement, the £1000 which he lent was to become part of the capital of the firm and be used in the business, and there was to be no obligation to repay it until the lapse of three years. During that period the firm were entitled to trade with and risk the £1000, but if at any time it should appear that the firm had lost all their own capital, and one-half of the £1000 in addition, the defender was to be entitled at once to put an end to the agreement, and demand that the balance of capital still remaining should be handed over to him. There is no stipulation that the defender is to accept the balance of capital as in full payment of his debt, and I do not think that the obligation undertaken by the firm and the individual partners in the third article to repay the loan in cash would, in the event contemplated in the fifth article, be discharged or extinguished.

"The stipulation or declaration that the defender should in no circumstances be liable beyond the £1000 which he was to advance was, I think, unnecessary, and was, I imagine, inserted with the view of making it perfectly clear as between the parties to the contract, that although the defender took the risk of losing the £1000, or part of it, that was the limit of his risk and of his obligation. It is true that the article does not treat the defender simply as an ordinary creditor of the firm, because he is only to be entitled to claim the amount of capital brought out upon a balance of the books, that is to say, after the trade creditors are provided for. But

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lender his loan of £1000, and the whole of the profits should be equally divided between the parties. I agree with the Lord Ordinary that if this stipulation had stood alone it would have afforded a very formidable argument against the defender, but then it is qualified in a very material manner by the sixth article of the agreement, which restricts what had appeared under the third article to be an absolute right to share in the profits. For by the sixth article the lender agrees to apply the share of the profits falling to him at the expiry of the agreement in reduction or extinction of a certain debt secured by bonds and dispositions in security for £5700 and £8000, which were granted by the father of the borrowers, who was at one time in partnership with them, and by the borrowers themselves in favour of the father of the lender over the Stobswell Works and machinery, and certain other subjects belonging to them, the half of the said debt to which the lender was entitled being reduced or extinguished *primo loco*.

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that is just the legal position of a lender to a firm who receives a share of the profits, under the third section of the Partnership Act of 1890. I am therefore of opinion that if the agreement, apart from the stipulation or declaration, does not make the defender a partner, the declaration does not do so.

"The seventh article of the agreement was also founded on by the pursuer as pointing to partnership rather than to the loan. It provides that the first parties shall have the sole power of buying and selling, and generally of conducting the business; and they shall supply a monthly statement to the defender of the amount of jute in stock, and the extent of the orders for yarn; and that the defender shall be entitled to see the half-yearly balance-sheets. It is then declared that the first parties shall not be entitled to have in stock a larger amount of jute than one or two months' supply in excess of yarns sold.

"No doubt these provisions might have been suitable enough for the case of a partner who was contributing capital, but who was taking no active part in the conduct of the business. They seem to me, however, to be equally suitable to the case of a lender who has advanced money necessary to enable the partners to carry on the business, and who, as a condition of the loan, has stipulated that the profits shall be accumulated for a certain period, and then applied in paying off a prior debt.

"The eighth and ninth articles do not touch the point at issue at all, but the last article declares that 'notwithstanding the loan made in terms of this agreement by the second party, the said second party shall not be deemed or held to be in any respect a partner in the said firm of Laing Brothers & Company, and shall not be liable for the debts and obligations of that firm.'

"I agree with the pursuer's counsel that that declaration would not prevent a partnership being constituted if the effect of a fair construction of the agreement otherwise was to shew that there was a partnership. But the declaration shews what the intention of the parties was—that they did not intend to make a partnership—and of course in the question of the construction of the agreement the intention of the parties to it is a matter of importance.

"For the reasons which I have stated, I am of opinion that the agreement, upon a fair construction, is not one whereby a partnership was constituted, but one for fixing the conditions upon which the defender should lend £1000 to the firm. And that is sufficient for the decision of the case, because it is not said that the defender held himself out as a partner, or that any one gave the firm credit upon the faith of his being a partner.

"I shall therefore pronounce decree of absolvitor."

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The effect of these two articles taken together seems to me to be that the defender is not to receive a share of the profits as a partner, but that the share which by the third article is nominally appropriated to him, is in reality to be applied towards payment of a prior debt of the true partners in which he was himself a creditor to the extent of one-half. It is not a part only, as I read the contract, but the whole of the profits acquired by the defender that are to be applied in this manner; and the agreement is in substance that the defender undertakes to lend £1000 at interest, on condition that the borrower shall give further security for payment of debt already due to his father's representatives, of whom he was one, by retaining the profits of the business for three years, and at the end of that time applying or enabling him to apply one-half of these profits in reduction or extinction of the debt. One-half of the profits therefore is to go into the pockets of the borrowers—the true partners—and the other half in payment of their debt.

I do not think it necessary in considering the law applicable to such a contract as this to examine the number of previous cases in which the liability of a person lending money to a trading firm has been discussed, because the whole law on the subject has now been embodied in the Partnership Act. According to the provisions of that statute the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner, but it does not of itself make him a partner, and in particular it does not make him a partner that he receives payment of a debt or other liquidated amount by instalments, or otherwise out of the accruing profits of a business, or that he lends money to a person engaged in business on a contract that he should receive a share of the profits; and therefore in order to establish a partnership between the lender in this case and the borrowers, it is necessary that we should look for something more than that *prima facie* evidence of partnership which the statute says is not enough of itself to constitute that relation, something which indicates more clearly than participation in the profits, or which in conjunction with participation in profits clearly indicates, that the relation between the parties *inter se* was that of partnership, so that each was agent for the other in the conduct of a business for their joint benefit. Now, I am unable to find anything further in the contract than the clauses which I have already considered to indicate a relation of partnership. The pursuer urged very strongly upon our consideration the effect of the fifth clause, by which it is provided,—(Quoted *supra*, p. 1106).

It is said that that shews that the lender was to share the losses as well as the profits of the copartnery, and that there could be no stronger indication that the relation of partnership existed. Now, undoubtedly it is a note of partnership that a person who advances money to the firm is to risk his money in the business. But then the effect of this particular clause does not appear to me to put the lender in the position of sharing losses as a partner, but, on the contrary, to indicate a relation towards the borrowers entirely different from that of partnership. He had undertaken to advance money to remain in the hands of the firm for three years; but then he stipulates for a right to call it up if at any time it shall appear that the capital has been reduced to £500. It is said, I think quite correctly, that

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the stipulation that in that event the amount of the capital then remaining shall be paid by the borrowers to the lender, and that the lender shall be satisfied with such payment because the agreement has then come to an end, is not in accordance with the ordinary rights of a lender in a simple contract of loan, because the lender is to be entitled only to claim the amount of capital brought out by the balance of the books,—that is to say, after the creditors have been provided for. But then I think the Lord Ordinary's observation on that point is equally just, that under the third section of the Partnership Act that is the legal position of a lender to a trading firm who receives a share of profits. And therefore in so far as the stipulation in question gives the lender his money, or so much of it as may be extant only after the trade creditors have been satisfied, it is not a necessary inference that the relation between the parties was any other than that of lender and borrower. But then it is said he not only allows his right to be postponed to that of trade creditors, but that in the event provided for he consents to lose one half of his advance, and possibly more, because he is to be satisfied with what is left of the capital when the agreement comes to an end. Now, I agree that that is not generally the position of a creditor. The distinction between a creditor in an ordinary loan and a partner is undoubtedly that the creditor is indemnified against loss. But then neither is it the position of a partner. The stipulation is that the capital being to a large extent gone, the lender shall have paid over to himself in his own absolute right all that is left of it, and that he shall not be liable, under any circumstances, to pay anything more than the sum he had already advanced, with the right to what shall be left in the hands of the borrowers when the capital has been reduced. That is not the position of a partner, nor is it a liability for the losses of the firm. A partner's liability for losses arises from this, that he is answerable jointly with all the other partners, and also severally for all the debts of the firm, and therefore he must contribute his own proportion of the losses after the capital has been exhausted. The stipulation that the lender shall be under no liability to make such contributions is the negation of an elementary condition of partnership, and therefore I do not find in this stipulation any more than in that for the application of profits any indication that the parties were partners *inter se*.

I do not quite agree with the Lord Ordinary in an observation which he makes, that the condition that the second party should in no circumstances be liable for anything more than the sum advanced is superfluous. It may be that it might have been inferred, even if it had not been expressed in words. But I think the expression is material as shewing the true intention of the contract. For, since participation in profits is *prima facie* evidence to instruct partnership, every term of the contract must be of importance which goes to confirm or to displace that conclusion. From this point of view the remaining clauses, except the last, do not appear to me to be of much significance. But the last is very material, because it negatives the relation of partnership in express terms. It declares that the second party shall not be deemed or held to be in any respect a partner in the said firm, and shall not be liable for the debts and obligations of that firm. Now, if the law is, as I apprehend it to be, that the liability which the pursuer seeks

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to enforce against the defender depends upon his establishing that there was a contract of copartnery between him and the borrowers, making them partners *inter se*, this stipulation appears to me conclusive. If sharing of profits is not enough, then what is further required in order to constitute partnership must be something which shews that the parties were agents for each other in carrying on business, and were entitled to bind each other by contracts for the common benefit, and that cannot, in my opinion, be maintained on a fair construction of this contract. On the whole matter, therefore, I agree with the Lord Ordinary.

LORD M'LAREN.—It is important in a case of this description to distinguish clearly between the question of partnership and the somewhat allied question of representation. While it is true that a man may be subject to the liabilities of a partner without actually being one, if he holds himself out, or suffers himself to be held out, as a partner, the benefit resulting from that liability is always confined to the persons who have been deceived by the representation. The principle is very clearly recognised in the 14th section of the Partnership Act of 1890.

Now, this is not an action for the purpose of rendering Mr Low liable as a partner on the ground that he held himself out, or allowed himself to be held out, as a partner of the bankrupt firm. The ground of liability alleged is that by contract he is a partner with other two gentlemen whose estates, as well as those of the firm, have been sequestrated.

The question, whether the defender has entered into the contract of partnership, must be determined on similar principles to those which govern the construction of other contracts; that is to say, we must endeavour to find out what is the true meaning of the agreement upon which the trustee founds his action. Now, within a period which some of us remember, some of the conditions of this agreement would most probably have been held to amount to a partnership, but since the passing of Lord Justice Bovill's Act (1865), the provisions of which are in substance included in the Partnership Act, 1890, it has been established law that the receipt of a share of profits as remuneration for services, or in place of interest on a loan, does not of itself constitute the relation of partnership. That is now provided in the 3d subsection of sec. 2 of the Partnership Act of 1890, and amongst other examples which are given of the cases in which the receipt of profits will not make a man a partner, the first is, "the receipt by a person of a debt or other liquid amount by instalments or otherwise out of the accruing profits of a business."

Now, the two chief notes of partnership under this agreement are (1) that the annual return for the sum of £1000 lent by Mr Low is given in the shape of interest and a share of the profits; and (2) that the surplus profits are divided between the first parties and the second party, under the condition that the share coming to Mr Low is to be applied in repayment of an old debt. These two conditions are therefore such as are declared by Act of Parliament not in themselves to constitute partnership, and when we come to inquire what other conditions there are, which, taken along with these, will amount to partnership, I can find none. One of the points insisted on by counsel is that the parties had been at pains to state in very clear terms,

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and in more than one of the articles of the agreement, that Mr Low was not to be responsible for losses, or to incur any other liability than the loss of his £1000. I think the argument to which I have referred rests upon what seems to me to be a confusion of ideas in applying to the construction of a contract a principle which is often applied quite legitimately to the consideration of evidence. If a witness is continually protesting that he has not committed himself to something, that is an element which may lead to the suspicion that he has done it, and is anxious to get out of it. But when the question is not one of evidence, but of the construction of a written document, why should the statement of the parties that they do not intend to subject one of their number to the liabilities of a partner not have the same effect accorded to it as any other statement in the deed, the question always being, what is the meaning of the words used to express their intention?

The pursuer's counsel also made a point on the 5th article, which they say involves the unnecessary surrender of a contract right if Mr Low is not a partner. I agree with Lord Kinnear in his observations on this article, as well as in all the rest of his Lordship's judgment, and I shall say nothing more on this head except this, that I think nothing could be more reasonable on the part of a person lending his money as a friendly loan, seeing that he is debarred from all control of the business, than that he should stipulate that after a suitable interval the books should be examined, and he should be allowed to do what he can to get something out of the assets of the estate. I fail to see that there is in this article the slightest indication of intention to constitute partnership, though there are expressions which are perhaps open to criticism.

Being clearly of opinion that Mr Low is not a partner under the agreement, it is not necessary for me to enter into the question of the trustee's title. But I may say that, if that point were gone into, I think the trustee would find difficulty in establishing a title to call on anyone outside the trust to contribute towards the fund for distribution. Where a deed of partnership provides for further contributions the trustee no doubt has the right to enforce the obligation. But there is no obligation under this agreement to contribute anything beyond the original sum of £1000. Mr Low's estates have not been sequestrated; he is assumed to be solvent, and so there is neither a relation of contract nor a proprietary interest so far as I can see, on which the trustee can base his title. In the clause of the Partnership Act constituting the special law of Scotland on this subject all that is said is that the firm is a separate person in law, but that a partner is liable to be charged to meet the obligations of the firm. Now, sequestration is not a process for rendering a party liable to meet the obligations of a firm—it is a process for attaching the assets of those who are members of the firm, and who have been made bankrupt, and I am unable to see how this sequestration is to be converted into an active title for the purpose of putting persons under the trust who are not named in the trustee's appointment.

The LORD PRESIDENT and LORD ADAM concurred.

THE COURT adhered.

DUNDAS & WILSON, C.S.—HENDERSON & CLARK, W.S.—Agents.

No. 209.

July 17, 1896.*
Davidson's Trustee v. Simmons.

DAVID STEWART (Mr and Mrs Davidson's Trustee), Pursuer (Reclaimer).—*Salvesen.*
MRS ISABELLA STEWART OR SIMMONS AND SPOUSE, Defenders (Respondents).—*Clyde.*

Expenses—Taxation—Expenses between agent and client, or between party and party—Process—Interlocutor—Trust.—In an action by a sole testamentary trustee for his discharge, to which defences were lodged, the Court pronounced an interlocutor decerning for the balance due to him on an accounting, finding him entitled to "expenses," appointing him to denude of the trust-estate on receiving payment of said balance and of his expenses, and thereafter discharging him.

The Auditor taxed the pursuer's account of expenses as between party and party. The pursuer objected to the Auditor's report, on the ground that the account should have been taxed as between agent and client. The defenders pleaded that the objection came too late.

Held that the intention of the Court in finding the pursuer entitled to expenses was that he should be kept *indemnis* in respect he was denuding of the whole trust-estate, and therefore that the account fell to be taxed as between agent and client.

2D DIVISION. Lord Low.

DAVID STEWART, solicitor, Dundee, sole surviving trustee acting under a mutual trust-disposition and settlement, granted by John Davidson, formerly mason in Lochee, and his wife, brought an action against Isabella Stewart or Simmons, Lochee, and her husband as her administrator-in-law and as guardian of his pupil children, concluding for declarator that the pursuer and his co-trustees, now deceased, had fully accounted for his and their whole intromissions, and for a discharge for himself and his co-trustees upon his granting a valid and sufficient conveyance of certain heritable property in favour of the defenders for their respective rights of fee and liferent.

Mrs Simmons and her husband lodged defences, raising certain questions of accounting between the parties.

On these questions the parties were, in the Outer-House, each found to be in part in the right, the result being brought out in the following interlocutor of the Lord Ordinary (Low), pronounced on 19th March 1896:—"Having considered the cause, decerns against the defender Mrs Simmons for payment to the pursuer of the sum of £6, 4s., being the balance brought out as due by her" in an accountant's report, "and on said sum being paid, appoints the clerk of the process to deliver up to Mrs Simmons the disposition No. of process, executed by the pursuer in conformity with the interlocutor of 4th February last, and on said delivery being made, discharges the pursuer of the office of trustee referred to on record, and also exoners and discharges the pursuer and his co-trustees conform to the conclusions of the summons thereanent: And after hearing counsel on the question of expenses, finds the pursuer entitled to expenses, subject to modification to the extent of one-half of the taxed amount thereof: Allows an account," &c.

The pursuer reclaimed against this interlocutor, but at the hearing intimated that he acquiesced in the Lord Ordinary's judgment on the questions of accounting and in the finding as to expenses, and explained that the purpose of the reclaiming note was to have it made a condition of the disposition being delivered to the defenders that the

* Decided July 9, 1896.

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July 17, 1896. Davidson's Trustee v. Simmons.

expenses should first be paid to the pursuer, the Lord Ordinary having refused a motion to that effect.

The defenders stated that they did not object to the Lord Ordinary's interlocutor in any respect.

On 5th June the Court pronounced the following interlocutor:—"Recall the interlocutor reclaimed against, and decern against the defender Mrs Simmons for payment to the pursuer of the sum of £6, 4s. sterling . . . Further, find the pursuer entitled to expenses in the Outer-House, subject to modification to the extent of one-half of the taxed amount thereof, as also to the whole expenses of his reclaiming note, and on said sum of £6, 4s. sterling and the said expenses being paid to the pursuer, appoint the clerk of the process to deliver to Mrs Simmons the disposition No. of process, duly executed, and thereafter discharge the pursuer and his co-trustees in terms of the conclusions of the action, and decern: Remit the said accounts of expenses to the Auditor to tax and to report."

The Auditor taxed the pursuer's accounts of expenses as between party and party, but also reported that £183, 10s. 5½d. would be the total amount of one-half the Outer-House expenses and the whole of the Inner-House expenses, both taxed as between agent and client.

The pursuer lodged a note of objections to the Auditor's report, maintaining that his accounts (both Outer and Inner-House) should be taxed as between agent and client.

Argued for the pursuer;—The presumption was that a trustee who was not in breach of duty was to be kept *indemnis*, which the pursuer here would not be if he were held entitled only to expenses as between party and party. In most cases it would be a matter of no practical moment to a trustee which scale of taxation was adopted, for the trustee had the trust-estate to fall back on for his indemnity. Here, however, the pursuer had not that relief, for on payment of the expenses found due to him he had to denude of the whole trust-estate. It was nothing to the present point that the pursuer was found entitled to one-half only of his Outer-House expenses. The pursuer might have been wrong in acquiescing in the Lord Ordinary's judgment on that matter, but he had acquiesced, so that the Court's affirmance of the Lord Ordinary's finding as to expenses was merely formal. Nor was there any technical objection to the pursuer's contention. The Court were entitled to construe their finding as to expenses.[1] *Fletcher's Trustees*,[2] founded on by the defenders, did not establish any rule to the contrary. All that the Court there decided was that they did not intend by their finding as to expenses to give expenses as between agent and client. The reason was obvious. The action was a multiplepoinding in which all parties were found entitled to expenses out of the fund *in medio*. That in the case of the unsuccessful parties plainly meant expenses as between party and party; and the finding as to expenses could not receive a different construction in the case of the other parties.

Argued for the defenders;—It was too late to raise this question now. A finding as to expenses without qualification meant expenses as between party and party, and such an interlocutor could not be qualified after it had been pronounced.[2] The reason was that the question of expenses ought to be settled when the Court had the

[1] Henderson's Trustees v. Tulloch, Feb. 4, 1834, 12 S. 399.
[2] Fletcher's Trustees v. Fletcher, July 7, 1888, 15 R. 862.

merits of the action before them. In any event, this was not a case for expenses as between agent and client. The Lord Ordinary's finding that the pursuer was entitled to half only of the expenses, which finding the pursuer had not questioned, displaced any presumption that there might be in favour of a trustee being kept *indemnis*.

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Davidson's Trustee v. Simmons.

LORD YOUNG.—*Prima facie* the trustee must be kept *indemnis*. This is a debt for which the trust-estate is liable. I am not disposed to let any technicality interfere with the trustee getting what he asks for.

LORD TRAYNER concurred.

LORD MONCREIFF.—It would have been better if this question had been decided when expenses were awarded. But our intention was that the trustee should be kept *indemnis*, and this could not be done if he only gets expenses as between party and party, as he is bound to denude of the whole trust-estate on payment of expenses.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced the following interlocutor:—"Having heard counsel on the note of objections by the pursuer to the Auditor's report on his account of expenses, sustain the same: Find that the proper taxed amount thereof is £183, 10s. 5½d., and subject to this alteration approve of said report and decern," &c.

J. SMITH CLARK, S.S.C.—DRUMMOND & REID, S.S.C.—Agents.

JOHN RAESIDE, Petitioner (Appellant).—*W. Campbell—Younger.*
JOHN WHITE (Master of Works for the City of Glasgow), Respondent.—*Lees—Craigie.*

No. 210.

July 17, 1896.*

Raeside v. White.

Police—Regulation of buildings—Free space for air—Statute—Implied repeal—Glasgow Police Act, 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *secs.* 370 *and* 372—*Glasgow Building Regulations Act*, 1892 (55 *and* 56 *Vict. cap. ccxxxix.*) *sec.* 33.—The Glasgow Police Act, 1866, sec. 370, enacts that in the case of apartments used for sleeping in, the back windows shall have a certain amount of free space for air in front of them. Section 372 of the same Act enacts that this regulation shall not apply to "any apartment in a building at the corner . . . of a turnpike road or public street and of another public street."

The Glasgow Building Regulations Act, 1892, sec. 33, enacts,—"The free space mentioned in section 370 of the Act of 1866 shall mean space free upwards and outwards . . . and the same free space, measured on and extending outwards over a radius from the window to the distance specified, shall not be available for any other sleeping apartment whose window is not on the same plane," it being declared that this provision should not be applicable "to the back windows in a tenement forming the corner of two streets, or in tenements adjoining and in line with such corner tenement, provided there is left at one gable of each such corner tenement a through space or opening from the street to the back ground 10 feet wide and open for the space of 15 feet upwards."

Held that the exemption, in section 372 of the Act of 1866, of corner buildings from the provisions requiring a certain amount of free space for air, was not repealed by section 33 of the Act of 1892, the purpose of the

* Decided June 13, 1893.

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latter section being merely to define the character of the requisite free space in the case of buildings which under the principal Act were required to have free space, but not to enact that buildings which had previously been exempt should for the future comply with the provisions regarding free space.

2D DIVISION. Dean of Guild Court, Glasgow.

IN April 1893 John Raeside, proprietor of certain subjects which were bounded on the south by Onslow Drive, Dennistoun, Glasgow, and on the west by Meadow Park Street, presented a petition in the Dean of Guild Court, Glasgow, for authority to erect seven tenements of buildings on these subjects, conform to plans produced.

The Master of Works for the city objected to Nos. 1 and 2 of the proposed tenements on the ground that the back windows of these tenements did not comply with the requirements of the Glasgow Police Act, 1866, and the Glasgow Buildings Regulations Act, 1892, with respect to free space.*

From the plans produced, it appeared that tenement No. 1 wholly faced Meadow Park Street, and its back wall was wholly parallel with that street. No. 2 partly faced Meadow Park Street and partly faced Onslow Drive, but its back wall was wholly parallel with Onslow Drive. The back walls of the two tenements thus formed a right angle.

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* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.) enacts, section 370,—"Except as after mentioned, it shall not be lawful for any proprietor to let, or for any person to take in lease or to use or suffer to be used for the purpose of sleeping in, any apartment, unless one-third at least of its height is above the level of the turnpike road or public or private street or court adjoining or near to it, and unless there be in front at least one-third of every window in such apartment, including any turnpike road or public or private street or court, a free space equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall."

Section 372 provides,—"The said provisions shall not apply to the following cases, viz., to any apartment in a building at the corner of a turnpike road or public street and of a private street, or at the corner of a turnpike road or public street and of another public street, provided such apartment is wholly above the level of the said road and street, and provided the building in which it is situated does not extend along the narrowest of them for a greater distance than 50 feet. . . . ."

The Glasgow Building Regulations Act, 1892 (55 and 56 Vict. cap. ccxxxix.), section 33, enacts,—"The free space mentioned in section 370 of the Act of 1866 shall mean space free upwards and outwards beyond any obstruction or impediment from overhanging balconies, and the same free space, measured on and extending outwards over a radius from the window to the distance specified, shall not be available for any other sleeping apartment whose window is not in the same plane unless such window overlooks a public or private street; provided always that where the free space measured as aforesaid extends over land belonging to or that may belong to another owner, the erection of buildings in conformity with this provision shall confer no servitude or right of restriction over such land. The provision that the same free space shall not be available for any other sleeping apartment whose window is not on the same plane shall not apply . . . to the back windows in a tenement forming the corner of two streets, or in tenements adjoining and in line with such corner tenement, provided there is left at one gable of each such corner tenement a through space or opening from the street to the back ground 10 feet wide and open from the height of 15 feet and upwards."

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The Master of Works in his objections stated:—"In the plans lodged in Court the same free space is treated as available for sleeping apartments in both of said tenements, the windows of which are not in the same plane, and these windows overlook a court or area and not a public or private street. Further, the said buildings do not fall under the exception" in "section 33, because there is not left at the gable of the corner tenement a through space or opening from the street to the back ground 10 feet wide, and open from the height of 15 feet upwards. In these particulars the objector submits that the proposed buildings are not in accordance with the requirements of the Acts before mentioned. With regard to the petitioner's statement that the buildings to be erected by him are within the excepted cases mentioned in section 372 of the Glasgow Police Act, 1866, the objector maintains that that section must be read in conjunction with section 33 of the Glasgow Building Regulations Act, 1892. The free space in section 370 of the 1866 Act is defined in said section 33 of the Building Regulations Act, and said definition controls the provisions of said section 370 of the 1866 Act and the subsequent sections thereof, viz., sections 371 and 372. . . . In section 33 of the Building Regulations Act there is a provision that the free space as defined by that section shall not apply to the back windows in a tenement forming the corner of two streets, provided there is left at one gable of each such corner tenement the through space or opening mentioned in the objections—that exception being applicable to the same class of buildings as are specified in section 372 of the 1866 Act. It is therefore clear that the free space, as defined by said section 33 of the Building Regulations Act, 1892, supersedes the free space defined in section 370 of the 1866 Act, and supersedes the exception in section 372 thereof."

The petitioner admitted that he did not propose to leave at the gable of tenement No. 2 a through space or opening from the street to the back 10 feet wide, and open from the height of 15 feet upwards; but he maintained that tenement No. 2 being a corner tenement and so exempt under section 372 of the Act of 1866 from the provisions regarding free space was not affected by section 33 of the Act of 1892, which merely defined the character of the free space requisite in the case of buildings which under the principal Act were required to have free space, but did not enact that buildings which had previously been exempt should for the future comply with the provisions regarding free space. As therefore tenement No. 2 did not, *quoad* the statutes, require to have any free space, the whole free space at the back of the two tenements was available in the sense of the statutes for tenement No. 1, and that free space being sufficient for tenement No. 1 *per se*, a passage between the two tenements was not necessary.

On 26th May 1893 the Dean of Guild pronounced the following interlocutor:—"Sustains the objections stated by the Master of Works to the plans produced, in so far as the same do not shew, in the tenement at the corner of Onslow Drive and Meadow Park Street, a through space or opening from the street to the back ground 10 feet wide, and open from the height of 15 feet upwards, as required by section 33 of the Glasgow Building Regulations Act, 1892: Finds that the said provision is something in addition to, and over and above, the provisions as to free space in sections 370 and 371 of the Glasgow Police Act of 1866, and that the exception to the said last mentioned provisions in section 372 thereof does not and cannot be

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held to apply to the said additional provision in section 33 of the Act of 1892, which must be complied with by the petitioner: Allows the petitioner to amend his plans to make them conform to the foresaid provision in section 33 of the Act of 1892."

The Dean of Guild having subsequently granted leave to appeal the petitioner appealed.

LORD JUSTICE-CLERK.—The appellant here desires to get a lining from the Dean of Guild Court in Glasgow, and the question which has arisen relates to certain windows in the corner of the back part of the tenement he proposes to build. Now, if section 370 applies to the appellant directly, of course there would be an end of the case. He must conform to section 370 if it applies. The first question therefore is, whether that section applies to his tenement? By section 372 certain exceptions are made to the application of section 370, and it is conceded that if these exceptions, and in particular the first exception, are in full operation and unmodified, then the provisions of section 370 do not apply to the appellant's tenement. Now, section 370 prescribes that there shall be a certain air space "equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall." But the first exception to the application of that rule is, that it shall not apply to "any apartment in a building at the corner of a turnpike road or public street and of a private street, or at the corner of a turnpike road or public street and of another public street, provided such apartment is wholly above the level of the said road and street, and provided the building in which it is situated does not extend along the narrowest of them for a greater distance than 50 feet."

Now, it is not matter of dispute between the parties that every word of that applies to the present case, and therefore if this had been a case arising solely under the Act of 1866, the Dean of Guild would have been bound to grant a lining. But then the Glasgow Building Regulations Act of 1892 was passed, and section 33 deals with section 370 by way of defining what is the meaning of free space in the Act of 1866, and the respondent contends that the building which the appellant proposes to erect offends against that definition; but if that definition is such that the building could not be erected under section 370 as qualified by section 33 of the Act of 1892, it would make no difference, because clause 372 would still remain, and the first paragraph of it would apply to except the appellant's tenement. But after defining the meaning of free space in the Act of 1866, section 33 further provides that that shall still not apply to certain specified cases, and Mr Craigie maintains that these provisions for the purpose of limiting the application of the definition given in the commencement of the section have the effect of repealing the exemption contained in section 372. Now, I think that if the Act of 1866, standing by itself, places the appellant in this position—that clause 372 does apply to him, it is impossible to find anything—I can find nothing—in clause 33 of the Glasgow Buildings Act of 1892 which shall deprive him of the benefit of the exception provided for by the Act of 1866. I do not see that the proviso on which Mr Craigie relies has any relation whatever to clause 372. The Act of 1866 must be

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looked at by itself, and if the case in question is found to be under the clause 372, we have no need to look to what is the provision or the proper interpretation of these provisions in section 370 at all, or whether anything is added to them by the Act of 1892. Holding as I do, without the slightest doubt, that between 1866 and 1892 the Dean of Guild would have been bound to give this appellant a lining under his present application, I hold that the position of the Dean of Guild in the matter is not the least affected by clause 33 of the Glasgow Building Regulations Act of 1892, and that it does not in any way affect the appellant's rights under the first proviso of clause 372, and that therefore the judgment ought to be recalled and the Dean of Guild ordered to give a lining.

LORD RUTHERFURD CLARK.—I think it plain that the buildings which the appellant proposes to erect fall under clause 372 of the Act of 1866. Therefore it is equally plain that they are not affected by provisions in the 370th section of the Statute of 1866. The only question that remains is, whether the 372d clause has been repealed or affected by the 33d clause of the Act of 1892. I am clear that it has not. That clause is a clause of definition only, defining the free space mentioned in the 370th section of the Act of 1866, and making some exceptions from that definition.

LORD TRAYNER.—I think the buildings of the appellant fall within the description given in section 372 of the Act of 1866, and it is obvious that if that is so the petitioner is entitled to his lining, unless the Dean of Guild is right in saying that section 33 of the Act of 1892 introduces a new provision in addition to and over and above the provisions as to free space contained in the Act of 1866. That is a reading of the Act of 1892 which I think is absolutely untenable, and as it is the only ground of the Dean of Guild's judgment, I agree with your Lordship that the judgment ought to be reversed.

LORD YOUNG was absent.

THE COURT, on 13th June 1893, pronounced this interlocutor:—"Find that the buildings objected to fall within the exception contained in section 372 of the Glasgow Police Act, 1866: Find that the provisions of sections 370 and 371 of said Act, and the provisions of section 33 of the Glasgow Building Regulations Act, 1892, do not apply to said buildings: Therefore sustain the appeal: Recall the interlocutor appealed against: Remit to the Dean of Guild to grant the lining craved by the petitioner, and decern: Find the petitioner entitled to the expenses of the appeal, and the expenses incurred by him in the Dean of Guild Court, in so far as these were caused by the opposition to the prayer of the petition," &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

AGENT AND PRINCIPAL—*Continued.*

cipal, whose name he had ascertained, and against whom he had founded jurisdiction by arrestments. The defender pleaded that he was not liable to be sued on the contract, in respect that he had not given the agent authority to make him a party to the contract. *Held* (1) that the question whether the foreign principal was liable to be sued on the contract was a dispute arising under the contract, and fell to be determined according to the law of England; (2) that according to that law a foreign principal was not bound by the contract of his agent unless he had given the agent authority to make him a party to the contract; and (3) that the order contained nothing which amounted to such an authority—and defender *assoilzied.*

Opinions reserved as to whether on the question of the liability of a foreign principal the laws of England and Scotland are identical. Girvin, Roper, & Co. v. Monteith, Nov. 20, 1895, p. 129.

Shipbroker—Right of party to terminate agreement at pleasure.

2. A firm of brokers offered to take £500 in shares in the Arethusa Ship Company, "provided that we are appointed sole chartering brokers for the Arethusa, and that all her charters are to be done through us . . . it of course being always understood that we are able to do as well as any other brokers regarding rates and terms. . . ." The offer was accepted by the company. The brokers took the shares, and the agreement was acted on for several years. *Held* that the agreement was not terminable at the pleasure of the company. Galbraith & Moorhead v. Arethusa Ship Co., Limited, July 9, 1896, p. 1011.

Responsibility of principal for agent—Knowledge of agent.

3. Evidence upon a consideration of which it was *held* that an accident insurance company were not entitled to take advantage of a misdescription in a policy of insurance issued by them, in respect of the knowledge of their agent through whom the policy was effected. Cruikshank v. Northern Accident Insurance Co., Limited, Nov. 21, 1895, p. 147.

Factor's right of retention—Right in Security—Effect of assignation to rents in bond and disposition in security.

4. *Held* that factors who had been authorised by their principal to collect and retain rents in repayment of advances made by them to him were entitled to retain the rents in competition with creditors who held bonds over the property duly recorded, and containing assignations to rents in ordinary form, but who had not brought an action of maills and duties against the tenants. Stevenson, Lauder, & Gilchrist v. Dawson, Feb. 5, 1896, p. 496.

Factor's right of retention—Right in Security—Retrocession of bankrupt.

5. A, the proprietor of heritage, appointed a firm of house factors to be factors of his property, and authorised them to retain the rents which they collected in repayment of an advance which they had made to him on his acceptance. Subsequently a petition for sequestration of A's estates was presented three days before the term of Martinmas, and the first deliverance was pronounced on the same day. At Martinmas the factors uplifted the rents and retained them in repayment of their advance. The trustee who was appointed on A's sequestrated estates made no objection to the retention of the rents by the factors, and they lodged no claim in the sequestration. A having thereafter been discharged on a composition, and retrocessed in his estates, claimed the rents retained by the factors on the ground that it was property falling under the sequestration which belonged to him in virtue of his retrocession. *Held* that the factors were entitled to retain the rents claimed. Stevenson, Lauder, & Gilchrist v. Dawson, Feb. 5, 1896, p. 496.

ALIMENT. See *Husband and Wife*, 3, 4.

ANNUITY. *Right in Security—Catholic Security—Contribution of separate estates to common burden.*

Where two heritable estates, which were both subject to the common burden of an annuity, passed into the possession of separate proprietors, *held*, in a question between these proprietors, that each estate was bound to contribute to the annuity from year to year, in proportion to the amount of its free rental after deduction of the interest on prior burdens. Ferrier v. Cowan, March 20, 1896, p. 703.

See *Marriage-Contract*, 7.

APPEAL TO HOUSE OF LORDS. *Interim execution pending appeal—Appeal in forma pauperis.*

1. It is not a ground for refusing interim execution for expenses pending appeal that the appellant has applied for leave to appeal *in forma pauperis*. Gibson v. Clark, Jan. 14, 1896, p. 389.

Findings in fact.

2. Per *Lord Herschell*,—"*I think it would be extremely desirable that, in the case of these appeals from the Sheriff Court, all the facts material to the contentions of either of the parties, even though not material to the point on which the judgment proceeds, should be found in the interlocutor.*" Little v. Stevenson & Co., March 19, 1896, H. L., p. 12.

APPEAL TO COURT OF JUSTICIARY. See *Justiciary Cases*, 14, 22.

APPEAL TO COURT OF SESSION. See *Process*, 35 to 40.

APPROPRIATION. See *Trust*, 1, 5.

ARBITRATION. *Reference of differences with respect to matters referred to in a section of private Act—Jurisdiction—Lanarkshire and Dumbartonshire Railway Act*, 1891, *sec.* 6.

1. By the Lanarkshire and Dumbartonshire Railway Act, 1891, sec. 6, subsec. (4), it was enacted that a railway company should carry their line under certain ground belonging to the North British Railway Company in tunnel, and that in the construction of the tunnel the company should not "without the previous consent of" the North British Company break open the surface of the ground. By subsec. (7) it was enacted that bridges and works passing over or under lands belonging to the North British Company should be according to plans approved of by the engineer of that company. By subsec. (10) it is enacted that "if any difference shall at any time arise between the company and the North British Company or their respective engineers, with respect to any of the matters above referred to in this section, such difference shall be determined by an engineer to be appointed by the Board of Trade. . . ." The tunnel having been completed, the North British Company raised an action against the company to have them ordained to remove a ventilating shaft which they had constructed from the roof of the tunnel to the surface of the ground belonging to the North British Company. The questions raised in the action were whether certain plans which had been submitted by the company to and approved of by the engineer of the North British Company disclosed the ventilating shaft, and if they did, whether the engineer's approval was equivalent to the consent required by subsec. (4), or otherwise barred the North British Company from challenging the shaft. The defenders pleaded the reference clause. The pursuers maintained that the questions did not constitute a difference in the sense of subsec. (10), in respect (1) that the erection of the shaft was altogether outwith the statutory powers of the defenders; and (2) that the questions were essentially questions of law. *Held* that a difference had arisen which fell to be referred in terms of subsec. (10). North British Railway Co. v. Lanarkshire and Dumbartonshire Railway Co., Nov. 5, 1895, p. 76.

ARBITRATION—*Continued.*

Award—Ambiguity—Extrinsic Evidence.

2. *The Great North of Scotland Railway Company and the Highland Railway referred to A B as arbiter the following question:—"Whether the proviso of section* 82 *of the Highland Railway Act,* 1865, *applies to traffic exchanged under the Great North of Scotland Act,* 1884, *between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rules of the Clearing House?" The arbiter in his award found "that the proviso of section* 82 *of the Highland Railway Act,* 1865 . . . *does not apply to traffic exchanged under the Great North of Scotland Act,* 1884, *between the two companies at Elgin," and further, "that the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rules of the Clearing House." In an action raised by the Great North of Scotland Railway Company for implement of the award, the defenders made and asked to be allowed a proof of the following averment:—"The terms 'traffic exchanged under the Act of* 1884 *between the two companies at Elgin,' occurring in the question submitted to A B do not include, and were not intended to include, passenger traffic. This was explained to A B, and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."* Held (aff. *judgment of Second Division*) *that the award was unambiguous, and must receive effect.* Highland Railway Co. v. Great North of Scotland Railway Co., July 16, 1896, p. 80.

Questions under the Lands Clauses (Consolidation) Act, 1845. See *Railway,* 1, 2, 3.

ARMORIAL BEARINGS. *Revenue—Excise—Licence to carry armorial bearings—Customs and Inland Revenue Duties Act,* 1869, *sec.* 19, *subsec.* 13.

Held that a device upon a ring consisting of a shield charged with a crowned lion rampant was an armorial bearing in the sense of subsec. 13 of sec. 19 of the Customs and Inland Revenue Duties Act, 1869. Milligan v. Cowan, May 16, 1896, p. 731.

ARRESTMENT. *Arrestment on the dependence—Amendment of summons—Court of Session Act,* 1868, *sec.* 29.

1. An action was raised at the instance of five pursuers, on separate grounds of action, concluding for payment to each of separate sums, and arrestments were used on the dependence of the action. Subsequently, on the motion of the pursuers, the names of four of the pursuers were deleted from the summons, together with the conclusions applicable to them respectively. The remaining pursuer afterwards obtained a decree. *Held* (1) that the original summons was incompetent; and (2) that the alteration on the summons was an amendment in the sense of the Court of Session Act, 1868, sec. 29, and did not validate the arrestments so as to confer a preference on the remaining pursuer in competition with other creditors of the defender at the date of the arrestment. Fischer & Co. v. Andersen, Jan. 15, 1896, p. 395.

Arrestment jurisdictionis fundandæ causa—Delay in raising action—Nexus.

2. A foreign ship arrested *jurisdictionis fundandæ causa* on the 5th June sailed from the country before the end of the month. An action was raised against the owners on 30th August. *Held* that the arrestment had not become invalid because of delay in raising the action, and the jurisdiction of the Court *sustained.*

Opinions that there might be such unreasonable delay in following

ARRESTMENT—*Continued.*
up arrestment *jurisdictionis fundandæ causa* that the Court would refuse effect to the arrestment.
Observed that arrestment *jurisdictionis fundandæ causa* imposed no *nexus* on the subjects arrested. Craig v. Brunsgaard, Kjosterud, & Co., Feb. 7, 1896, p. 500.

ASSESSMENT. See *Police*, 2 *to* 6—*Statute*, 7.

ASSIGNATION. See *Lease*, 1.

ASSOCIATION (VOLUNTARY). *Sporting Club—Property—Right of majority of members to alienate property of club as a donation.*
1. In 1869 a silver cup was presented to the curling clubs of Dumfriesshire for competition as a trophy, and these clubs (which were not incorporated societies) framed rules, under which the cup was to become the property of the club which won the cup twice in succession. In 1893 the cup was so won by the Upper Annandale Club. Thereafter, at a meeting of that club, it was resolved, by a majority of the members present, to present the cup to M. J., who had been skip of the rink which obtained the highest score on the two successive occasions on which the club had won the cup. In an action brought against M. J. by certain members of the club, who had objected to the presentation, *held* that the club not being an incorporated society the cup was the joint property of all the individual members of the club; that it was *ultra vires* of a majority of the members thus to give away the joint property against the wishes of the minority; and therefore that the presentation to M. J. was ineffectual. Murray v. Johnstone, July 8, 1896, p. 981.

Association for sport—Reparation—Slander—Privilege.
2. Letter complaining of player sent by football referee to committee of football association—Publication of resolution of committee in newspapers. Murdison v. Scottish Football Union, Jan. 30, 1896, p. 449.

Association for sport—Suspension from playing football—Patrimonial loss.
3. *Held* that a resolution of a football union suspending a member of a club belonging to the union from playing did not entitle the member to an issue that the resolution had been "wrongfully, incompetently, and unwarrantably passed and caused to be published by the committee to his loss, injury, and damage," in respect that the alleged resolution was not one which affected any question of property or patrimonial interest, the appropriate issue, so far as the resolution affected reputation, being an issue of slander. Murdison v. Scottish Football Union, Jan. 30, 1896, p. 449.

See *Church*, 5 *to* 9.

BALLOT ACT, 1872. See *Election Law*, 4.

BANK. *Claim of bank to retain against debt of deceased customer funds lodged by his executors.*
Held that a bank to whom a debt was owing by a deceased customer, whose estate was found to be insolvent, was not entitled to withhold payment of sums lodged with the bank by his executors either on the plea of retention or of compensation. Gray's Trustees v. Royal Bank, Nov. 27, 1895, p. 199.

See *Cautioner*, 1—*Loan*, 2—*Trust*, 6.

BANKRUPTCY. *Illegal Preference—Action by creditor for delivery of estate assigned by bankrupt within sixty days of bankruptcy—Competency—Act* 1696, *c.* 5—*Bankruptcy (Scotland) Act*, 1856, *sec.* 10.
1. Where a debtor within sixty days of bankruptcy assigns part of his estate in violation of the Act 1696, c. 5, any creditor at the date of the alienation has a title to reduce the assignation, but he has no title to

BANKRUPTCY—*Continued.*

recover the subject of the assignation for behoof of himself and the other creditors. Cook v. Sinclair & Co., July 2, 1896, p. 925.

Sequestration—Right of trustee to delivery of bankrupt's books and papers—Public-house Certificate.

2. *Held* that the trustee upon the sequestrated estate of a publican was *prima facie* entitled to get delivery from the bankrupt of his permit-book and certificate. Fraser's Trustee v. Fraser, July 8, 1896, p. 978.

Sequestration—Preference—Poinding of the ground—Ground-annual—Bankruptcy (Scotland) Act, 1856, *sec.* 118.

3. *Held* that the creditor under a contract of ground-annual is entitled to the benefit of the proviso in sec. 118 of the Bankruptcy (Scotland) Act, 1856, the annual payments under the contract being truly the interest on a debt of which the principal is the capitalised value of the annual payments. Bell's Trustees v. Copeland & Co., March 13, 1896, p. 650.

Sequestration—Retrocession of Bankrupt—Right in Security—Factor's right of retention.

4. A, the proprietor of heritage, appointed a firm of house factors to be factors of his property, and authorised them to retain the rents which they collected in repayment of an advance which they had made to him on his acceptance. Subsequently a petition for sequestration of A's estates was presented three days before the term of Martinmas, and the first deliverance was pronounced on the same day. At Martinmas the factors uplifted the rents and retained them in repayment of their advance. The trustee who was appointed on A's sequestrated estates made no objection to the retention of the rents by the factors, and they lodged no claim in the sequestration. A having thereafter been discharged on a composition, and retrocessed in his estates, claimed the rents retained by the factors on the ground that it was property falling under the sequestration which belonged to him in virtue of his retrocession. *Held* that the factors were entitled to retain the rents claimed. Stevenson, Lauder, & Gilchrist v. Dawson, Feb. 5, 1896, p. 496.

Sequestration—Abandonment of action—Judicature Act, 1825, *sec.* 10.

5. The trustee in a sequestration, who had sisted himself as pursuer, and carried on an action raised by the bankrupt prior to sequestration, lodged a minute craving leave to abandon the action. The minuter did not found on the Judicature Act, 1825, sec. 10, and did not propose to pay the defenders' expenses. The Court *refused* the minute. Scott v. Thurso River Harbour Trustees, Dec. 11, 1895, p. 268.

Sequestration of firm—Title of trustee to sue solvent partner for payment of debts due to firm's creditors.

6. *Question,* whether the trustee on the estate of a firm which has been sequestrated has a title to sue a solvent partner for payment of debts due by him as a partner to the creditors of the firm. Laing Brothers & Co.'s Trustee v. Low, July 17, 1896, p. 1105.

BETTING. See *Police,* 10.

BILL OF EXCHANGE. *Value—Promissory-notes granted for one day's delay in exacting payment of debt.*

1. On 5th June 1895 a money-lender lent a lady £104, in return for two promissory-notes for £100 and £24, 16s. respectively, payable on demand. On 3d July 1895, the borrower being called on to pay, and being unable to do so, the lender induced her in consideration of twenty-four hours' delay, to grant him three additional promissory-notes payable on demand, for a further sum of £250. On 23d July the lender registered protests for non-payment of the five notes, and charged for payment of £200, the amount of two of the notes. In a suspension of the charge, in which the above facts were admitted, the suspender tendered payment of the first two promissory-notes for £124,

BILL OF EXCHANGE—*Continued.*

16s. In respect of this tender, and of the fact that no value had been given for the three promissory-notes for £250, the Court *suspended* the charge, and found the respondent liable in the whole expenses of the cause, and directed the Clerk of Court to deliver to the complainer the five promissory-notes. Young v. Gordon, Jan. 23, 1896, p. 419.

Proof—Parole—Competency—Bills of Exchange Act, 1882, *sec.* 100.

2. In defence to an action for the amount due under a promissory-note, the debtor stated that, under an arrangement between him and the creditor, the promissory-note was to be renewed when due, and from time to time thereafter until he should be in a position to repay it without detriment to his business engagements, and that he had been assured by the creditor that the date of repayment would be left to himself so long as interest was paid. The Court *held* that the defender was not entitled to a proof of his averment, on the ground that if the agreement meant that the defender was not bound to pay the principal sum, but an annuity, it contradicted the written obligation; and that if the agreement meant a promise by the creditor not to press for payment, the agreement not being in writing, it was not binding on his executors.

Opinion reserved whether it would be open to an obligant to prove a verbal agreement that a bill should be renewable for a definite time, or that the debt should subsist for a definite time, the bill being treated as a mere security for its ultimate payment. Gibson's Trustees v. Galloway, Jan. 22, 1896, p. 414.

Protest for non-payment—Bill payable at drawer's office—Form of protest where acceptor fails to appear or provide funds—Bills of Exchange Act, 1882, *sec.* 51, *subsec.* (7).

3. A bill payable on demand at the drawer's office was protested for non-payment. The protest bore that the notary "presented the said bill at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly." *Held* that the drawer could not be regarded as agent of the acceptor for payment to himself, and therefore that the protest was invalid, as it failed to state that the acceptor could not be found. Bartsch v. Poole & Co., Dec. 18, 1895, p. 328.

Protest for non-payment—Demand for payment.

4. *Held* by Lord Kincairney that an extract registered protest was not invalid because it did not state expressly that a demand for payment had been made, but merely stated that the bill had been presented and that payment had been refused. Bartsch v. Poole & Co., Dec. 18, 1895, p. 328.

Protest for non-payment—Demand for payment when sum already paid to account.

5. *Held* by Lord Kincairney that an extract registered protest which set forth that a bill had been presented, and that payment had been refused, and that the notary protested the bill against the acceptor, but always under deduction of a sum paid to account, was not invalid because it did not state that the demand on presentation was limited to the balance due on the bill. Bartsch v. Poole & Co., Dec. 18, 1895, p. 328.

BONA ET MALA FIDES. *Lease—Landlord and Tenant—Lease by bona fide possessor without title—Assignation.*

The title of a *bona fide* possessor of land, who had granted a lease of minerals for twelve years, was reduced when 3½ years of the lease had still to run. He then granted an assignation of the lease in favour of the true owner, who undertook to implement the granter's obligations. In an action by the lessee against the granter and the assignee for declarator that the pursuer was not bound by the lease, *held* that the lease was not binding on the true owner when he established his right

BANKRUPTCY—*Continued.*

recover the subject of the assignation for behoof of himself and the other creditors. Cook v. Sinclair & Co., July 2, 1896, p. 925.

Sequestration—Right of trustee to delivery of bankrupt's books and papers—Public-house Certificate.

2. *Held* that the trustee upon the sequestrated estate of a publican was *prima facie* entitled to get delivery from the bankrupt of his permit-book and certificate. Fraser's Trustee v. Fraser, July 8, 1896, p. 978.

Sequestration—Preference—Poinding of the ground—Ground-annual—Bankruptcy (Scotland) Act, 1856, *sec.* 118.

3. *Held* that the creditor under a contract of ground-annual is entitled to the benefit of the proviso in sec. 118 of the Bankruptcy (Scotland) Act, 1856, the annual payments under the contract being truly the interest on a debt of which the principal is the capitalised value of the annual payments. Bell's Trustees v. Copeland & Co., March 13, 1896, p. 650.

Sequestration—Retrocession of Bankrupt—Right in Security—Factor's right of retention.

4. A, the proprietor of heritage, appointed a firm of house factors to be factors of his property, and authorised them to retain the rents which they collected in repayment of an advance which they had made to him on his acceptance. Subsequently a petition for sequestration of A's estates was presented three days before the term of Martinmas, and the first deliverance was pronounced on the same day. At Martinmas the factors uplifted the rents and retained them in repayment of their advance. The trustee who was appointed on A's sequestrated estates made no objection to the retention of the rents by the factors, and they lodged no claim in the sequestration. A having thereafter been discharged on a composition, and retrocessed in his estates, claimed the rents retained by the factors on the ground that it was property falling under the sequestration which belonged to him in virtue of his retrocession. *Held* that the factors were entitled to retain the rents claimed. Stevenson, Lauder, & Gilchrist v. Dawson, Feb. 5, 1896, p. 496.

Sequestration—Abandonment of action—Judicature Act, 1825, *sec.* 10.

5. The trustee in a sequestration, who had sisted himself as pursuer, and carried on an action raised by the bankrupt prior to sequestration, lodged a minute craving leave to abandon the action. The minuter did not found on the Judicature Act, 1825, sec. 10, and did not propose to pay the defenders' expenses. The Court *refused* the minute. Scott v. Thurso River Harbour Trustees, Dec. 11, 1895, p. 268.

Sequestration of firm—Title of trustee to sue solvent partner for payment of debts due to firm's creditors.

6. *Question*, whether the trustee on the estate of a firm which has been sequestrated has a title to sue a solvent partner for payment of debts due by him as a partner to the creditors of the firm. Laing Brothers & Co.'s Trustee v. Low, July 17, 1896, p. 1105.

BETTING. See *Police*, 10.

BILL OF EXCHANGE. *Value—Promissory-notes granted for one day's delay in exacting payment of debt.*

1. On 5th June 1895 a money-lender lent a lady £104, in return for two promissory-notes for £100 and £24, 16s. respectively, payable on demand. On 3d July 1895, the borrower being called on to pay, and being unable to do so, the lender induced her in consideration of twenty-four hours' delay, to grant him three additional promissory-notes payable on demand, for a further sum of £250. On 23d July the lender registered protests for non-payment of the five notes, and charged for payment of £200, the amount of two of the notes. In a suspension of the charge, in which the above facts were admitted, the suspender tendered payment of the first two promissory-notes for £124,

BILL OF EXCHANGE—*Continued.*

16s. In respect of this tender, and of the fact that no value had been given for the three promissory-notes for £250, the Court *suspended* the charge, and found the respondent liable in the whole expenses of the cause, and directed the Clerk of Court to deliver to the complainer the five promissory-notes. Young v. Gordon, Jan. 23, 1896, p. 419.

Proof—Parole—Competency—Bills of Exchange Act, 1882, *sec.* 100.

2. In defence to an action for the amount due under a promissory-note, the debtor stated that, under an arrangement between him and the creditor, the promissory-note was to be renewed when due, and from time to time thereafter until he should be in a position to repay it without detriment to his business engagements, and that he had been assured by the creditor that the date of repayment would be left to himself so long as interest was paid. The Court *held* that the defender was not entitled to a proof of his averment, on the ground that if the agreement meant that the defender was not bound to pay the principal sum, but an annuity, it contradicted the written obligation; and that if the agreement meant a promise by the creditor not to press for payment, the agreement not being in writing, it was not binding on his executors.

Opinion reserved whether it would be open to an obligant to prove a verbal agreement that a bill should be renewable for a definite time, or that the debt should subsist for a definite time, the bill being treated as a mere security for its ultimate payment. Gibson's Trustees v. Galloway, Jan. 22, 1896, p. 414.

Protest for non-payment—Bill payable at drawer's office—Form of protest where acceptor fails to appear or provide funds—Bills of Exchange Act, 1882, *sec.* 51, *subsec.* (7).

3. A bill payable on demand at the drawer's office was protested for non-payment. The protest bore that the notary "presented the said bill at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly." *Held* that the drawer could not be regarded as agent of the acceptor for payment to himself, and therefore that the protest was invalid, as it failed to state that the acceptor could not be found. Bartsch v. Poole & Co., Dec. 18, 1895, p. 328.

Protest for non-payment—Demand for payment.

4. *Held* by Lord Kincairney that an extract registered protest was not invalid because it did not state expressly that a demand for payment had been made, but merely stated that the bill had been presented and that payment had been refused. Bartsch v. Poole & Co., Dec. 18, 1895, p. 328.

Protest for non-payment—Demand for payment when sum already paid to account.

5. *Held* by Lord Kincairney that an extract registered protest which set forth that a bill had been presented, and that payment had been refused, and that the notary protested the bill against the acceptor, but always under deduction of a sum paid to account, was not invalid because it did not state that the demand on presentation was limited to the balance due on the bill. Bartsch v. Poole & Co., Dec. 18, 1895, p. 328.

BONA ET MALA FIDES. *Lease—Landlord and Tenant—Lease by bona fide possessor without title—Assignation.*

The title of a *bona fide* possessor of land, who had granted a lease of minerals for twelve years, was reduced when 3½ years of the lease had still to run. He then granted an assignation of the lease in favour of the true owner, who undertook to implement the granter's obligations. In an action by the lessee against the granter and the assignee for declarator that the pursuer was not bound by the lease, *held* that the lease was not binding on the true owner when he established his right

BONA ET MALA FIDES—*Continued.*

to the lands, and therefore that it was not binding on the tenant, and that the assignation had no effect, as the granter had nothing to assign, *diss.* Lord Young, who was of opinion (1) that as the lease had been granted by a *bona fide* possessor in the course of ordinary administration, it was binding upon the true owner, and (2) that if the lease was not binding upon him originally he was entitled to validate it by homologation, and had done so. Reid's Trustee v. Watson's Trustees, March 13, 1896, p. 636.

BOND OF PROVISION. See *Marriage-Contract*, 1.

BURGH. *Royal Burgh—Common Good—Petty Customs—Liability to petty customs of area added by statute to royal burgh—General Police and Improvement (Scotland) Act*, 1862, *sec.* 13.

1. A royal burgh, the magistrates of which under its charter, dated in 1600, had power to levy petty customs within the area of the burgh as described in the charter, was extended in terms of the General Police Act, 1862. *Held* that the magistrates had no power to levy petty customs in the portions of the burgh which were outside the ancient royalty. Graham v. Magistrates of Perth, March 12, 1896, p. 602.

Royal Burgh—Common Good—Causeway-mail—Roads and Bridges (Scotland) Act, 1878, *secs.* 3 *and* 33.

2. *Held* that dues levied under the charter of a royal burgh on cattle, horses, &c., passing through the ancient royalty to and from markets within portions of the burgh added under the powers of the General Police Act, 1862, were within the definition of causeway-mail in section 3 of the Roads and Bridges Act, 1878, and were therefore illegal under section 33 of that Act. Graham v. Magistrates of Perth, March 12, 1896, p. 602.

Dean of Guild—Right to refuse petition ex proprio motu—Ultra vires.

3. The Corporation of Edinburgh presented a petition to the Dean of Guild Court of Leith for warrant to erect a hospital within the burgh of Leith. The petition was served upon the Leith Local Authority, who entered appearance, but stated no objections. The Dean of Guild refused the petition *in hoc statu* on the ground that the petitioners had no right to erect a hospital within the burgh of Leith without the consent of the Local Authority. In an appeal *held* that the Dean of Guild was not entitled to give effect to the objection *ex proprio motu.* Magistrates of Edinburgh v. Beatson, Oct. 29, 1895, p. 44.

Dean of Guild—Process—Form of warrant when buildings erected before warrant granted.

4. *Held* that a warrant by a Dean of Guild granting leave to erect a building which had in fact been erected before the warrant was applied for, though inaccurate and inappropriate, was not invalid.

Observations as to the form which a warrant in such circumstances should take. Wilson & Sons v. Mackay's Trustees, Oct. 18, 1895, p. 13.

Dean of Guild—Process—Answers lodged for first time on appeal—Competency.

5. In a petition to the Dean of Guild for warrant to alter a building the Burgh Engineer appeared on behalf of the Lord Provost and Magistrates, who were called as respondents, and objected verbally to the petition being granted. The Dean of Guild having refused the petition, the petitioners appealed, and thereafter answers were tendered for the Lord Provost and Magistrates, embodying the verbal objections previously stated on their behalf. The petitioners objected to the answers being received. The Court *allowed* the answers to be received, and remitted the case to the Dean of Guild to proceed. Lord Saltoun v. Magistrates of Edinburgh, July 3, 1896, p. 956.

BURGH—*Continued.*

Dean of Guild—Heritable Right—Competing Titles.

6. The owner of premises within a burgh having applied to the Dean of Guild for warrant to erect a flue inside the subjects belonging to him—the title to which he produced—an adjoining proprietor objected that the proposed operation would encroach on his property. The Dean of Guild, considering that the answers raised a question of heritable right which was outwith his jurisdiction, sisted process for twenty-one days to enable the respondent to bring an action for its determination in a competent Court. The respondent not having done so, the Dean of Guild granted the warrant prayed for. The respondent appealed on the ground that the *onus* should have been laid upon the petitioner of proving his right. *Held* that the petitioner having produced a title to the subjects occupied by him, which was *ex facie* good, the *onus* had been properly laid upon the appellant of disproving it. Wilson & Sons v. Mackay's Trustees, Oct. 18, 1895, p. 13.
7. In a petition by the Police Board of Greenock to the Dean of Guild under the Greenock Police Act, 1877, to recover the expense of repairing the retaining wall of a stream which bounded a street, the petitioners alleged that the wall was the property of the respondent. The respondent, who admitted that he was proprietor of the *solum* on which the wall rested, alleged that the wall was the retaining wall of the street and the property of the Police Board, and pleaded that a question of heritable right having been raised the Dean of Guild had no jurisdiction. The Dean of Guild allowed a proof. In an appeal the Court *held* that there was no question of heritable right, and *repelled* the plea of no jurisdiction. Greenock Police Board v. Shaw Stewart, June 4, 1896, p. 776.

See *Church*, 1—*Police—Public Health.*

BYE-LAW. See *Fishing*, 4 *to* 7.

CARRIER. See *Railway*, 11.

CAUTION FOR EXPENSES. See *Process*, 6.

CAUTIONER. *Fraudulent Misrepresentation—Mercantile Law (Scotland) Amendment Act*, 1856, *sec.* 6.

1. *In an action of damages against a bank and against S., the agent at one of its branches, the pursuers averred that S., knowing that D. R. & Company, customers of the bank, were largely indebted to the bank, and were insolvent, or at least were in great financial difficulties, conceived, along with a partner of D. R. & Company, a fraudulent design of obtaining the pursuers' acceptances in favour of D. R. & Company in order to apply them* pro tanto *in reducing D. R. & Company's debt to the bank. That in pursuance of this scheme D. R. & Company applied to the pursuers for accommodation and referred them to S., who falsely assured them* (1) *that D. R. & Company were in a thoroughly sound condition financially, and only required temporary accommodation;* (2) *that the sum due to the bank was very trifling;* (3) *that D. R. & Company had made up certain losses which it was known they had incurred; and* (4) *that no portion of the proceeds of any acceptances by the pursuers would be applied in extinction of the bank's debt, or of any obligation to the bank.* [*The pursuers did not aver that these representations were made in writing.*] *That in reliance on these assurances the pursuers granted acceptances to D. R. & Company. The pursuers further averred that the proceeds of these acceptances were placed to the credit of D. R. & Company's overdrawn account, and that if they had not been so applied the bank's ultimate loss would have been so much the greater. That D. R. & Company were sequestrated, and the pursuers, as the bills fell due, paid them under protest.* Held *that the action was not relevant, in respect* (1) *that the pursuers were not entitled to rely on the oral*

CAUTIONER—*Continued.*

representations 1, 2, *and* 3 *as to the credit of D. R. & Company, section* 6 *of the Mercantile Law Amendment Act making such oral representations of no effect; and* (2), *as regarded the* 4*th alleged representation, that the pursuers had not alleged that the bank did not give credit to D. R. & Company after the date when it received the proceeds of the bills.* Clydesdale Bank, Limited, v. Paton, May 12, 1896, H. L., p. 22.

Contract—Sale.

2. B, a builder, in the course of erecting certain houses became unable to get building materials on his own credit and applied to S. S. carried on the work, employing B as a servant and paying him wages, and also paying for materials which B ordered. S informed C & Co. of the arrangement and promised to see them paid for any materials supplied to B's order. *Held* that C & Co. had a claim against S as buyer of the goods. Stevenson's Trustee v. Campbell & Sons, March 20, 1896, p. 711.

CESSIO. *Process—Appeal—Competency—Value of cause—Affidavit and claim—Sheriff Court Act*, 1853, *sec.* 22—*Sheriff Courts Act*, 1876, *sec.* 26 (4).

1. A creditor who had poinded some of his debtor's effects, thereafter lodged an affidavit and claim in the latter's cessio in which he stated the amount of the debt due to him to be £42, and claimed a preferable ranking to the effect of receiving full payment of his debt out of the poinded effects. The trustee admitted his claim to an ordinary ranking only, and his deliverance was sustained by the Sheriff. The value of the poinded effects was £18. The creditor appealed to the Court of Session. The trustee objected to the competency of the appeal on the ground that the only question was the creditor's right to a preferable ranking, and that the actual sum in dispute was therefore below £25. *Held* that the appeal was competent, the value of the cause falling to be ascertained as in an ordinary Sheriff Court action, viz., by the amount of the claim made in the conclusions of the summons, or other initial writ, which here was the affidavit and claim.

Observations by Lord M'Laren on the right of appeal in cessio by reclaiming note under 6 and 7 Will. IV. c. 56. Henderson v. Grant, March 17, 1896, p. 659.

Poinding—Delay in selling poinded effects—Supervening cessio of debtor—Right of poinding creditor to a preference.

2. A creditor executed a poinding of his debtor's effects on 25th July 1893, but took no further steps in the poinding, the debtor having from time to time made payments to account. Sixteen months thereafter the debtor took out cessio, and the poinding creditor lodged a claim to a preferable ranking in the cessio. *Held* that there had been undue delay on the creditor's part in following out his diligence by a sale of the poinded effects, and that the poinding was in consequence inept to found a preference.

Opinion on the question whether there is a complete transference to the creditor of the property in the poinded effects before their sale has been carried through *reserved* by Lord Kinnear. Henderson v. Grant, March 17, 1896, p. 659.

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS. *Ex officio trustee—Chairman of Parochial Board—Parish Council succeeding to Parochial Board—Local Government (Scotland) Act*, 1894, *secs.* 21 *and* 22.

1. A truster in 1885 nominated among her trustees "the chairman of the Parochial Board of the parish of K. and his successor in office for the time being, so long as such board shall exist." *Held* that the chairman of the Parish Council of K. was not entitled *ex officio* to act as a trus-

CHARITABLE, &c. BEQUESTS—*Continued.*
tee under the deed. Parish Council of Kilmarnock v. Ossington's Trustees, June 20, 1896, p. 833.

Church—Alteration of purposes—Petition by persons named as trustees before accepting office—Title to sue.

2. A testator, who died in 1879, directed his trustees on the occurrence of a certain event to pay £3500 to the minister and kirk-session of a church in Edinburgh in trust for maintaining a male and a female missionary in connection with the congregation. In 1895, when the sum became payable, the minister and kirk-session presented a petition to the Court stating that a mission-hall was essential to the successful prosecution of mission work, and that the income of the fund, which would not probably exceed £100, would be insufficient to support two missionaries, and praying the Court to approve a scheme giving authority to the petitioners to spend £1000 in erecting a mission-hall and to employ the income of the remainder in supporting one missionary. The Court, having regard to the fact that the trustees had not accepted office, and considering that it had not been shewn that the testator's scheme was impracticable, *refused* the petition. Watt, Oct. 23, 1895, p. 33.

Church—Trust—Powers—Object of power—Process—Declarator—Relevancy.

3. A church in Manchester was held by trustees under a trust-deed which entitled them to sell the church, it being declared that in the event of a sale the proceeds should be held by the trustees for such purposes as the majority of the Presbytery of Edinburgh should direct. The church was sold, and in consequence the congregation was dissolved. The minister raised an action against the Presbytery of Edinburgh and the trustees for declarator that a majority of the Presbytery might competently direct the trustees to make payment to the pursuer of such sums as the majority of the Presbytery might appoint by way of compensation to the pursuer for loss of stipend or otherwise. The pursuer averred that a majority of the members of the Presbytery were willing to direct an allowance to be made to him if they were satisfied of the competency of doing so. *Held* that the action was not relevant, as the pursuer's statement did not shew that he was an object of the power given to the majority of the Presbytery of Edinburgh. Mackie v. Presbytery of Edinburgh, March 17, 1896, p. 668.

Church—Conditional Bequest—Forfeiture.

4. A testatrix, who died in 1876, by a settlement, dated in 1875, directed her trustees to set apart the sum of £3000, and to pay the interest arising therefrom to the incumbent for the time being of St James's Episcopal Church, Aberdeen, "so long as the congregation worshipping in said church shall not be united to, or in connection with, the Scottish Episcopal Church." She further declared that in the event, *inter alia*, of the congregation at any time "uniting or being in connection with" the Scottish Episcopal Church, the trustees should be bound to pay over the £3000 among her residuary legatees. In an action raised by the residuary legatees in 1895 for declarator that the legacy had become payable to them, on the ground that St James's Church was in connection with the Episcopal Church, the Court, after a proof, *granted* decree, *holding* that no overt act on the part of the congregation as such was necessary to create a connection in the sense of the trust-deed, and that such a connection was instructed by the facts proved, and in particular by the fact that the incumbents openly and in the knowledge of the congregation accepted the licence of the Scottish Episcopal Bishop of Aberdeen, and presented to him candidates for confirmation, thereby obtaining for themselves and the congregation many of the benefits arising from a connection with the

ARITABLE, &c. BEQUESTS—*Continued.*
Scottish Episcopal Church. Bannerman v. Bannerman's Trustee, July 4, 1896, p. 959.
School—Alteration of scheme framed under Educational Endowments Act, 1882.
In a petition presented by the Governors of a charitable institution for the alteration of a scheme framed by the Educational Endowment Commissioners for the administration of the charity, the Court sanctioned a scheme for transferring the use of school buildings and funds applicable to teachers' salaries, which had hitherto been devoted to the free elementary education of poor children, to a school board for the sole purpose of providing efficient secondary education to which a certain number of poor children should be admitted without charge, secondary education being a purpose for which the school board was not entitled to levy rates. Governors of Jonathan Anderson Trust, March 12, 1896, p. 592.
Trustees of an educational endowment, who were bound by the scheme framed for the administration of the fund to maintain a primary school for the benefit of a particular district, applied to the Court to amend the scheme by providing for the application of the fund to the establishment of bursaries, to enable scholars to prosecute their studies at secondary schools. They proposed that the bursaries should be open to scholars from a wider area than that previously benefited. The Court, while approving of the purpose to which it was proposed to apply the fund, *declined* to sanction the extension of its benefits to a wider area than that to which it had been destined by the testator. Governors of Bell's Trust, June 9, 1896, p. 780.
School—Petition for amendment of scheme for administration of educational endowment—Consent of Scotch Education Department—Educational Endowments (Scotland) Act, 1882, *sec.* 20.
A petition for the amendment of a scheme framed for the administration of an educational endowment by the Educational Endowments Commissioners bore to be presented with the consent of the Scotch Education Department, as required by section 20 of the Educational Endowments Act, 1882, but in point of fact the consent of the Department was not given until after the date of an interlocutor appointing intimation and service. *Held* that although the presentation of the petition was a reprehensible irregularity, the consent given *pendente processu* entitled the Court to entertain the application. Governors of Bell's Trust, June 9, 1896, p. 780.

EMIST. See *Justiciary Cases*, 5, 6.

URCH. *Minister—Stipend—Burgh.*
In 1809 the magistrates and town-council of a burgh and certain of the proprietors of a chapel of ease in the burgh, brought a summons in the Court of Teinds, concluding for the disjunction of certain portions of an existing parish, partly burghal and partly landward, the erection of these disjoined portions into a new parish under the proviso that the landward portion should be annexed *quoad sacra* only, and concluding further for declarator that the magistrates should be bound to provide the minister of the new parish in a "competent stipend." In this action the Court pronounced an interlocutor, by which they decerned, "in the disjunction, erection, and annexation *quoad sacra* as libelled, on the magistrates . . . engaging to be answerable for a stipend of £200 per annum." The magistrates thereupon by an act of council undertook to be answerable for a stipend of "not less than £200 per annum." In 1895 the minister of the parish brought an action for declarator that the magistrates were bound to provide him in a competent stipend suited to the circumstances of the time and the

CHURCH—*Continued.*

position of the benefice, and for decree for payment of £400 a year as such stipend, contending that the words "as libelled" applied, *inter alia*, to the conclusion for declarator that the magistrates should be bound to provide the minister "in a competent stipend." The Court *assoilzied* the defenders, holding that the Court of Teinds had decerned "as libelled" only in regard to the conclusions for disjunction, erection, and annexation *quoad sacra*, and that the magistrates were liable for a stipend of £200 a year only. Thomson v. Magistrates of Greenock, Jan. 17, 1896, p. 405.

Glebe—Feuing—Expenses which fall to be imposed as permanent burden on glebe—Roads necessary for advantageous feuing—Avenue to manse—Glebe Lands (Scotland) Act, 1866, *secs.* 14 *and* 18.

2. *Held* that the cost of a new avenue to a manse, the construction of which had become desirable for its amenity in consequence of the feuing of the glebe, could not, under secs. 14 and 18 of the Glebe Lands (Scotland) Act, 1866, be imposed as a permanent burden on the glebe. Robertson, Feb. 21, 1896, p. 526.

Glebe—Designation—Act 1593, *cap.* 165.

3. *In a question as to the right to certain salmon fishings in the river Dee, which depended in part upon whether the glebe of Banchory-Devenick, which was designated in* 1602, *had been designated from the abbot's lands of Banchory and Ardoe, or from the bishop's lands of Kirkton of Banchory*, held (*in* rev. *the judgment of the First Division*) *that in the absence of direct evidence as to the lands from which the glebe had been designated, it was to be inferred that it had been designated from the abbot's lands of Banchory and Ardoe, and not from the bishop's lands of Kirkton of Banchory, the presumption being that the presbytery, in making the designation, followed the direction of the Act* 1593, *cap.* 165. Ogston v. Stewart, March 26, 1896, H. L., p. 16.

Trust—Powers—Object of power—Process—Declarator—Relevancy.

4. A church in Manchester was held by trustees under a trust-deed which entitled them to sell the church, it being declared that in the event of a sale the proceeds should be held by the trustees for such purposes as the majority of the Presbytery of Edinburgh should direct. The church was sold, and in consequence the congregation was dissolved. The minister raised an action against the Presbytery of Edinburgh and the trustees for declarator that a majority of the Presbytery might competently direct the trustees to make payment to the pursuer of such sums as the majority of the Presbytery might appoint by way of compensation to the pursuer for loss of stipend or otherwise. The pursuer averred that a majority of the members of the Presbytery were willing to direct an allowance to be made to him if they were satisfied of the competency of doing so. *Held* that the action was not relevant, as the pursuer's statement did not shew that he was an object of the power given to the majority of the Presbytery of Edinburgh. Mackie v. Presbytery of Edinburgh, March 17, 1896, p. 668.

Dissenting Church—Missionary—Trust—Alteration of purposes—Nobile officium—Petition by persons named as trustees before accepting office—Title to sue.

5. A testator, who died in 1879, directed his trustees on the occurrence of a certain event to pay £3500 to the minister and kirk-session of a church in Edinburgh in trust for maintaining a male and a female missionary in connection with the congregation. In 1895, when the sum became payable, the minister and kirk-session presented a petition to the Court stating that a mission-hall was essential to the successful prosecution of mission work, and that the income of the fund, which would not probably exceed £100, would be insufficient to support two missionaries, and praying the Court to approve a scheme giving

CHURCH—*Continued.*

authority to the petitioners to spend £1000 in erecting a mission-hall and to employ the income of the remainder in supporting one missionary. The Court, having regard to the fact that the trustees had not accepted office, and considering that it had not been shewn that the testator's scheme was impracticable, *refused* the petition. Watt, Oct. 23, 1895, p. 33.

Dissenting Church—Conditional Bequest—Forfeiture.

6. A testatrix, who died in 1876, by a settlement, dated in 1875, directed her trustees to set apart the sum of £3000, and to pay the interest arising therefrom to the incumbent for the time being of St James's Episcopal Church, Aberdeen, "so long as the congregation worshipping in said church shall not be united to, or in connection with, the Scottish Episcopal Church." She further declared that in the event, *inter alia*, of the congregation at any time "uniting or being in connection with" the Scottish Episcopal Church, the trustees should be bound to pay over the £3000 among her residuary legatees. In an action raised by the residuary legatees in 1895 for declarator that the legacy had become payable to them, on the ground that St James's Church was in connection with the Scottish Episcopal Church, the Court *granted* decree, *holding* that no overt act on the part of the congregation as such was necessary to create a connection in the sense of the trust-deed, and that such a connection was instructed by the facts proved, and in particular by the fact that the incumbents openly and in the knowledge of the congregation accepted the licence of the Scottish Episcopal Bishop of Aberdeen, and presented to him candidates for confirmation, thereby obtaining for themselves and the congregation many of the benefits arising from a connection with the Scottish Episcopal Church. Bannerman v. Bannerman's Trustee, July 4, 1896, p. 959.

Dissenting Church—Suspension of Minister—Reduction—Restoration to status.

7. A minister of the United Presbyterian Church was served with a libel for an alleged offence, and was suspended from the ministry till the decision of the case. After a proof, the Presbytery found the charge proved. The minister appealed to the Synod, who remitted the case to a commission. The commission found certain counts in the libel proved, and suspended the minister *sine die*. The minister brought an action (1) for declarator that he had been libelled and suspended contrary to the rules of the Church; (2) "in case it may be necessary," for reduction of the decree of suspension pronounced by the commission; and (3) for interdict against the defenders proceeding to fill his charge, or deprive him of the status or emoluments of his office. He reserved his right to claim damages. The pursuer having intimated that he did not insist in the conclusions for declarator and interdict, but only in that for reduction of the sentence of the commission, the Court *dismissed* the conclusion for reduction, on the grounds (1) that that conclusion was merely ancillary to the conclusions for declarator and interdict; and (2) that reduction of the sentence by the commission would leave the pursuer under the original suspension, and would not restore his status as a minister, or lead to the establishment of any patrimonial right. Skerret v. Oliver, Jan. 30, 1896, p. 468.

Dissenting Church—Contract—Suspension of Minister—Reduction—Specific Implement—Restoration to office.

8. In an action by a minister of a congregation of the United Presbyterian Church against the Synod concluding (1) for reduction of a sentence of suspension pronounced against him by a committee of the Synod to whom the Synod had remitted the trial of a libel against him, on the allegation that it was *ultra vires* of the Synod to make the remit, and (2) for interdict against the defenders filling up his charge, *held* by

CHURCH—*Continued.*

Lord Kincairney (1) that the pursuer had relevantly averred a breach of contract, causing an injury which was of a patrimonial character, or of a character equivalent to patrimonial; (2) that the suspension by the committee being alleged to be *ultra vires*, appeal to the Court was not excluded by a provision in the contract that members should not have recourse to the civil Courts against judgments of the Courts of the Church; but (3) that reduction of the sentence of suspension, to the effect of restoring the pursuer to office, was not a remedy which the Court ought to grant, or was in use to grant, in similar cases, and that the action fell to be dismissed. Skerret v. Oliver, Jan. 30, 1896, p. 468.

Dissenting Church—Action to reduce decree of suspension—Who must be called as defenders—Citation of Synod and Presbytery.

9. In an action by a minister of the United Presbyterian Church, for reduction of a decree suspending him from his office, and for restoration to his office, with its emoluments, *held* by Lord Kincairney (Ordinary), and acquiesced in (1) that it was sufficient to call as defenders the prosecuting members of the Presbytery, the Synod, and a commission of the Synod by whom the sentence complained of had been pronounced; (2) that the Synod was validly cited by its office-bearers being called; and (3) that the Presbytery was not a proper defender, but was validly cited for its interest, by its office-bearers being called. Skerret v. Oliver, Jan. 30, 1896, p. 468.

CITATION. See *Justiciary Cases* 11, 12, 13—*Process*, 1, 2.

COLLEGE. See *University.*

COMPANY. *Transfer of assets of private partnership to public company—Stamp—Conveyance on sale—Identity of partners and shareholders—Consideration—Company—Stamp Act*, 1891, *secs.* 54 *and* 55—*First Schedule.*

1. Where a private partnership conveyed its whole assets to a joint stock company limited by shares, consisting exclusively of the same partners, in consideration of each partner getting shares in the new company equal in value to his holding in the old partnership, *held* that the conveyance was a conveyance on sale within the meaning of the Stamp Act, 1891, and that the disposition was chargeable with *ad valorem* stamp-duty on the value of the stock transferred. John Wilson & Son, Limited, v. Inland Revenue, Oct. 22, 1895, p. 18.

Promoter—Remuneration—Law-agent's and engineer's expenses incident to passing Act of Parliament—Trust—Auctor in rem suam—Edinburgh Northern Tramways Act, 1884, *sec.* 78.

2. The Edinburgh Northern Tramways Act of 1884 by section 78 enacted that "the company shall pay all costs charges and expenses of and incident to the preparing for obtaining and passing of this Act or otherwise in relation thereto." *Held* that the engineer and law-agent of the Edinburgh Northern Tramways Company were not barred from receiving remuneration for professional services rendered by them incident to the preparation for obtaining and passing the company's Act of Parliament, or otherwise in relation thereto, by reason of their being promoters of the Act at the time when such services were rendered. Edinburgh Northern Tramways Co. v. Mann, July 15, 1896, p. 1056.

Promoter—Preliminary Expenses—Cost of procuring parliamentary deposit—Edinburgh Northern Tramways Company Act, 1884, *sec.* 78.

3. The Edinburgh Northern Tramways Act, 1884, sec. 78, provides that "the company shall pay all costs charges and expenses of and incident to the preparing for obtaining and passing of this Act or otherwise in relation thereto." *Held* that a promoter of a company who had

COMPANY—*Continued.*

obtained from a bank on his own individual credit the sum required for the parliamentary deposit in connection with the Company's Act, was not entitled to charge a commission for so doing against the company. Edinburgh Northern Tramways Co. v. Mann, July 15, 1896, p. 1056.

Promoter—Remit to Taxing-Master of the House of Commons to tax promoter's account—Finality of report.

4. In an action of accounting brought by a public company against one of its promoters, the defender lodged certain counter claims. The account of these lodged by the defender was remitted to the Taxing-Master of the House of Commons, who taxed the account. The pursuer lodged objections to the report, mainly on the ground that the Taxing-Master did not state in detail the method adopted by him in dealing with disputed items. The Lord Ordinary pronounced an interlocutor remitting these objections to the Taxing-Master. The Court *recalled* his interlocutor, in respect that it did not appear that the reporter had mistaken the duty entrusted to him, or come to a wrong conclusion on any matter of principle. Edinburgh Northern Tramways Co. v. Mann, July 15, 1896, p. 1056.

Alteration of Memorandum of Association—Extension to new business—Confirmation by Court—Conditions—Change of name to indicate extended business—Companies (Memorandum of Association) Act, 1890, *sec.* 1.

5. The Scottish Accident Insurance Company, incorporated in 1877, under the Companies Acts, 1862 and 1867, for the purpose of carrying on the business of insurance against accident, presented a petition under the Companies (Memorandum of Association) Act, 1890, for confirmation of a special resolution altering its memorandum of association so as to extend its business to life, sickness, employers' liability, and fidelity insurance. The Court *granted* the petition on condition that the name of the company was changed to the Scottish Accident, Life, and Fidelity Insurance Company, or to such other name as might be approved of by the Board of Trade, and by the Court, to indicate the extended nature of the company's business. Scottish Accident Insurance Co., Limited, March 12, 1896, p. 586.

6. A limited company formed for the purpose of carrying on the business of employers' liability and accident insurance presented a petition craving the Court to confirm a special resolution altering the company's memorandum of association so as to make the objects of the company include sickness and guarantee insurance. The Court *held* that, before the petition could be granted, the name of the company must be altered so as to indicate the proposed extension of its business. Scottish Employers' Liability, &c., Assurance Co., Limited, July 11, 1896, p. 1016.

Alteration of memorandum of association—Extension to new business—Petition for confirmation—Intimation.

7. A company formed for the purpose of carrying on the business of employers' liability and accident insurance presented a petition craving the Court to confirm a special resolution altering the company's memorandum of association so as to make the objects of the company include sickness and guarantee insurance. *Held* that intimation of the proposed extension of the company's business must be made by advertisement.

Observations by the Lord President to the effect that in preparing petitions more attention should be paid to the question of what intimation should be craved. Scottish Employers' Liability, &c., Assurance Co., Limited, July 11, 1896, p. 1016.

Shares—Ultra vires—Allottees of illegal preference shares—Whether ordinary shareholders or creditors of company.

8. A limited company which, by the terms of its memorandum and

COMPANY—*Continued.*

original articles of association, was precluded from creating preference shares, by special resolution resolved that the remaining unissued shares of the nominal capital should be preference shares subject to these conditions: that they should bear a fixed rate of dividend; that any failure of the annual profits to meet the dividend should be made good from the profits of subsequent years; that after ten years the company had right to redeem these shares at par; that preference shareholders were not entitled to vote or take part in any meeting, or in the management of the company, or to share in the rights of ordinary shareholders. Preference shares were applied for and allotted. In a special case presented by an allottee of preference shares and the company, the company contended that, although the preference given to these shares was invalid, the allottee was to be regarded as a holder of ordinary shares. *Held* that, as the allottee of preference shares had not applied for or agreed to take ordinary shares, he was not to be regarded as an ordinary shareholder, but as a creditor of the company, and that he was entitled to repayment of the price of the shares, with interest at 4 per cent, less any dividend which he had received. Waverley Hydropathic Co., Limited, v. Barrowman, Nov. 20, 1895, p. 136.

Shares—Power of company to issue new shares to manager at a premium under market value as reward for past services.

9. *Held* (1) that it was competent for a limited company to give gratuities to its officials in consideration of services rendered, or to be rendered; and (2) that a resolution by the company at a general meeting to issue to its manager unissued shares at a premium less than might have been obtained on the market with the view of rewarding his past services and of securing his future services was not incompetent. Cameron v. Glenmorangie Distillery Co., Limited, July 17, 1896, p. 1092.

Reduction of capital—Dispensation with words "and reduced"—Motion for dispensation on presentation of petition for confirmation—Companies Act, 1877, sec. 4, subsec. 2.

10. On the presentation of a petition by a limited company for an order confirming the reduction of its capital, the Court, in virtue of the powers conferred by section 4, subsection 2, of the Companies Act, 1877, on the motion of the petitioners, *dispensed* in the meantime with the addition of the words "and reduced" to the name of the company. Albany Steam Shipping Co., Limited, Dec. 11, 1895, p. 272.

11. A limited company presented a petition for an order confirming a reduction of its capital resolved on by special resolution duly passed and confirmed by the company. In Single Bills the petitioners, on moving for intimation and advertisement, craved the Court to dispense, in the meantime, with the addition of the words "and reduced" to the name of the company, in virtue of the powers conferred by subsection 2 of section 4 of the Companies Act, 1877. The Court pronounced an interlocutor granting the dispensation "from this date, and until disposal of the petition." Colonial Real Property Co., Limited, March 2, 1896, p. 547.

Reduction of capital—Necessity for shewing loss of capital.

12. Petition by a company registered under the Companies Acts, 1862 to 1886, for an order confirming a resolution to reduce the capital of the company, *refused* on the ground that the company had failed to satisfy the Court that any capital had been lost. City Property Investment Trust Corporation, Limited, v. Thorburn, Jan. 17, 1896, p. 400.

Reduction of capital—Ultra vires—Alteration of status of shareholders.

13. The memorandum of association of a company registered under the Companies Acts, 1862 to 1886, whose capital consisted of preferred

COMPANY—*Continued.*

stock and deferred shares, the holders of the former being entitled to a preferential dividend of 5 per cent, and to preferential repayment of capital in the event of a liquidation, the deferred shareholders being entitled to the surplus profits and assets, set forth as one of the objects of the company,—"From time to time to convert the shares of capital . . . into shares or stock of one class, and with like privileges." Preferred stock was issued to the amount of £129,880, and deferred capital to the amount of £24,771, in all £154,651. Some years after its incorporation the company, on account of alleged loss of capital, adopted a scheme under which consolidated ordinary stock was to be issued in lieu of the existing capital of the company, the holders of preferred stock getting the new stock in the proportion of 95 per cent of their holdings, and the holders of deferred shares getting that stock in the proportion of 90 per cent of their holdings. In this way the capital of the company would be reduced from £154,651 to £145,679, 18s. The company having by a majority of votes passed and confirmed a resolution to reduce the capital from £154,651 to £145,679, 18s. by cancelling the existing preferred stock and deferred shares, and issuing ordinary stock to the smaller amount, presented a petition for confirmation of the proposed reduction of capital. *Question*, whether it was within the power of the company under the cover of a resolution to reduce capital to reconstruct the company on a basis essentially different from that on which it was constituted. City Property Investment Trust Corporation, Limited, v. Thorburn, Jan. 17, 1896, p. 400.

Voluntary Liquidation — Supervision Order — Additional Liquidator —Companies Act, 1862, *secs.* 147, 149, *and* 150.

14. A person alleging himself to be the principal ordinary creditor of a company which had gone into voluntary liquidation presented a petition for a supervision order, and for the appointment of an additional liquidator. The company had prior to the liquidation disputed the petitioner's claim against the company, and the company and its liquidator in their answers did not admit the claim. If established the petitioner's claim amounted to about four-fifths of the whole debts of the company. The respondents averred that (apart from uncalled capital) the assets would on realisation be sufficient to meet the entire claims against the company, including that of the petitioner. The petitioner denied this. The Court *granted* a supervision order, but *refused* to appoint an additional liquidator. Macquisten v. Adam, Sons, & Co., Limited, and Liquidator, June 27, 1896, p. 910.

Voluntary Liquidation—Petition for delivery of minute-book retained by secretary — Competency — Companies Act, 1862, *secs.* 100 *and* 138.

15. *Held* that a petition presented under sections 100 and 138 of the Companies Act, 1862, by the liquidator of a company which was being voluntarily wound up, to have the company's secretary ordained to deliver up its minute-book, was competent. Gladstone v. M'Callum, June 16, 1896, p. 783.

Retention—Lien—Minute-book of Company.

16. *Held* that a person who had been secretary of a company prior to its liquidation had no right of retention or lien over its minute-book for a debt due to him by the company. Gladstone v. M'Callum, June 16, 1896, p. 783.

COMPENSATION. *Executor—Mutuality of debt and credit—Bank—Claim of bank to retain against debt of deceased customer funds lodged by his executors.*

Held that a bank to whom a debt was owing by a deceased customer, whose estate was found to be insolvent, was not entitled to withhold

COMPENSATION—*Continued.*
payment of sums lodged with the bank by his executors either on the plea of retention or of compensation. Gray's Trustees v. Royal Bank, Nov. 27, 1895, p. 199.
See *Lease*, 9, 10.

COMPENSATION FOR IMPROVEMENTS. See *Lease*, 11.

COMPULSORY POWERS. See *Railway*, 1 *to* 7.

CONDITION. See *Insurance*, 2.

CONSIGNATION. *Court of Session Consignations (Scotland) Act*, 1895, *secs.* 2, 3, *and* 5—*Titles to Land Consolidation Act*, 1868, *sec.* 122—*Consignation by bondholder of surplus price—Accountant of Court—Statute—Construction.*
Held that the Court of Session Consignations Act, 1895, did not apply to surplus moneys deposited by a bondholder under sec. 122 of the Titles to Land Act, 1868.
Opinions as to the effect of any Act of Parliament directing money to be consigned subject to the orders of the Court *reserved*. Antrobus, July 15, 1896, p. 1032.

CONTRACT. *Executory Contract—Trade Discount—Notice—Invoice.*
1. A brewer entered into a verbal agreement with a retail dealer to supply him with beer, and to allow him 35 per cent discount when he paid an account. No arrangement was made as to the length of credit to be allowed, but with each consignment of beer an invoice was sent, on which was a printed notice which stated that accounts not paid within three months were not subject to discount. The attention of the dealer was not specially called to the terms of the invoices, and on more than one occasion during a course of dealing extending over two years, the dealer was allowed the usual discount upon accounts not paid within three months. In an action by the brewer for payment of the full amount of an account not paid within three months, *held* that by the original contract between the parties the price of the beer was fixed at 65 per cent of the nominal price; that this contract was not qualified by the terms of the invoices, and therefore that the defender was only liable for the amount of the account after deduction of 35 per cent. Buchanan & Co. v. Macdonald, Dec. 10, 1895, p. 264.
Sale—Cautioner.
2. B, a builder, in the course of erecting certain houses became unable to get building materials on his own credit and applied to S. S carried on the work, employing B as a servant and paying him wages, and also paying for materials which B ordered. S informed C & Co. of the arrangement and promised to see them paid for any materials supplied to B's order. *Held* that C & Co. had a claim against S as buyer of the goods. Stevenson's Trustee v. Campbell & Sons, March 20, 1896, p. 711.
Construction—Specialia derogant generalibus—Sale of medical practice, including book debts.
3. A firm of medical practitioners was dissolved by the death of one of the partners on 15th April 1894. On 21st July 1894 his widow and executrix agreed to sell to the assistant of the late firm "the deceased's whole right and interest in the practice carried on" by the firm, "consisting of (first) the deceased's share, right, and interest in the horses, harness, machines, and others"; (second) his share in the medical and surgical instruments and books; and (third) "the deceased's share, right, and interest in the book debts, including the goodwill of the business belonging to the firm," for £485, the purchaser undertaking to free and relieve the seller and the representatives of the deceased "of all debts and obligations due by the said firm . . . in any manner

CONTRACT—*Continued.*

of way whatsoever." *Held* that the sale embraced the deceased's whole interest in the assets of the firm, including not merely the book debts outstanding at the date of the agreement, but all fees received by the firm since the last division of profits on 31st January 1894. Alexander v. Alexander, May 13, 1896, p. 724.

Right of party to terminate agreement at pleasure—Shipbroker.

4. A firm of brokers offered to take £500 in shares in the Arethusa Ship Company, "provided that we are appointed sole chartering brokers for the Arethusa, and that all her charters are to be done through us . . . it of course being always understood that we are able to do as well as any other brokers regarding rates and terms. . . ." The offer was accepted by the company. The brokers took the shares, and the agreement was acted on for several years. *Held* that the agreement was not terminable at the pleasure of the company. Galbraith & Moorhead v. Arethusa Ship Co., Limited, July 9, 1896, p. 1011.

See *Association (Voluntary)—Church*, 7, 8, 9—*Custody—Insurance*, 2—*Relief.*

CONTRIBUTION. See *Relief.*

CROFTERS HOLDINGS ACTS. *Right of crofter to take sea-ware—Right in question with singular successors—Crofters Holdings Act*, 1886, *sec.* 12.

In 1894 the proprietor of lands within a crofting parish sold part of these lands, and thereafter the purchaser brought an action against crofters on the remaining portion of the seller's lands praying to have the defenders interdicted from gathering sea-ware on the sea-shore *ex adverso* of the lands sold. In defence the crofters averred that from time immemorial they and their predecessors in the crofts had been in use and had right to gather sea-ware from the sea-shore in question, and that in 1887 their rents were fixed by the Crofters Commission on the footing that they had that right. *Held* that the defenders were entitled to proof of their averments as to their right to gather sea-ware. Macdonald v. Macdougall, July 2, 1896, p. 941.

COUNTY COUNCIL. *Assessment—Water—Whole parish supplied by one system of water-works—Burgh formed within parish after* 1889, *and created a special water supply district—Residue of parish formed into a separate water supply district—Management and maintenance—Local Government (Scotland) Act*, 1889, *sec.* 99.

1. In 1876 the Parochial Board of Wemyss, as the Local Authority under the Public Health Act, 1867, introduced a water supply for the whole parish from a source outside the parish, the only works within the parish being the distributing mains. On the passing of the Local Government (Scotland) Act, 1889, the Kirkcaldy District Committee of the County Council of Fife came in place of the Parochial Board as Local Authority, and the water-works were vested in them. The requisite expenditure was levied upon the whole property in the parish. In 1891 a district of the parish was created a police burgh, and subsequently formed into a special water supply district. In 1892 the remaining part of the parish was formed into a special water supply district. The existing system of water-works for the supply of the whole parish was continued. In a question between the District Committee of the County Council and the Police Commissioners of the burgh, *held* (1) that the water supply and water-works fell to be managed by the subcommittee of the District Committee appointed under sec. 81 of the Local Government Act, 1889, and the Police Commissioners (or so many of the Police Commissioners as the Sheriff should fix as a committee) jointly; and (2) that the Police Commissioners were alone entitled to impose and levy the necessary assess-

COUNTY COUNCIL—*Continued.*
ments within the burgh. Kirkcaldy District Committee v. Police Commissioners of Buckhaven, Nov. 16, 1895, p. 107.
Assessment—Statute—Construction—Local Government (Scotland) Act, 1889, secs. 11, 26, *and* 27.
2. In an action brought by a parliamentary burgh against a county council for declarator that the defenders were not entitled to assess the pursuers' lands within the burgh for county general assessment under the County General Assessment Act, 1868, *held* (1) that by secs. 26 and 27 of the Local Government Act, 1889, the whole assessing powers derived by a county council from prior Acts were merged in the power given to assess for consolidated rates, and that a county council had no other power to assess; and (2) that a county council's power to assess being limited to lands and heritages within the county as defined by the Act, they were not entitled to assess lands or heritages within a royal or parliamentary burgh. Corporation of Galashiels v. County Council of Selkirk, June 18, 1896, p. 818.
Road—Action to negative alleged right of way—Process—Sist—Sist to give County Council opportunity to intervene—Local Government (Scotland) Act, 1894, *sec.* 42.
3. The proprietor of an estate brought an action against R., concluding for declarator that he held the estate free of any public right of way over a certain part of it, and for interdict against the defender entering upon it. R., who had used a path over the part of the estate in question for sixteen years, lodged defences. The Lord Ordinary allowed a proof. Shortly before the diet fixed for proof the defender moved the Lord Ordinary to sist the action, upon the ground that, his funds being exhausted, he was unable to make the necessary preparations for the proof, and that the case was being considered by the County Council, who were entitled under the Local Government Act, 1894, to take steps to vindicate rights of way. The Lord Ordinary refused the motion, and the defender having failed to appear at the proof the Lord Ordinary granted decree against R. as concluded for. On a reclaiming note the Court *recalled* the interlocutor of the Lord Ordinary, and *sisted* the action *hoc statu* upon an undertaking by the defender not to use the path during the sist. Alston v. Ross, Dec. 12, 1895, p. 273.

CROWN. See *Fishings*, 1.

CURATOR BONIS. See *Judicial Factor*, 1.

CUSTODY. *Agreement to winter a horse—Injury to horse—Liability of custodier—Proof—Onus.*
A farmer undertook to winter a colt belonging to a postmaster. In the course of the winter the colt was found to have sustained a serious injury to its right eye. The postmaster raised an action of damages against the farmer, averring that the injury to the colt's eye was caused by its being struck in the face by the defender, or some person for whom she was responsible; or otherwise, that the injury was caused through the colt's eye having come in contact with some of the sharp edges of the reed fence in which the colt, with culpable negligence, was enclosed, and pleaded that the injury having been caused by the fault or neglect of the defender, she was liable in damages. The Court *assoilzied* the defender, on the ground that the pursuer had failed to prove that the accident to the colt had been caused by the fault of the defender. Sutherland v. Hutton, May 12, 1896, p. 718.

DEAN OF GUILD. See *Burgh*, 3 *to* 7.

DECREE. *Construction of interlocutor declaring a right of fowling over lands belonging to another person—Extent of privilege—Right to let shooting—Res Judicata—Heritable Right—Servitude.*

1. In 1808 Innes, proprietor of Ballogie, was infeft in that estate *cum privilegio et libertate aucupandi* in the Forest of Birse, which belonged to the Earl of Aboyne. By a judgment of the Court of Session in 1812, affirmed by the House of Lords in 1819, in an action by the Earl against Innes, it was found that the liberty and privilege of fowling was "a franchise conferred as a heritable right rendered an appendage to the property of Ballogie," and further, "that the said privilege may lawfully be exercised by the defender personally, or by his gamekeeper duly authorised for that purpose, or by any qualified friends whom he may permit, whether his tenants on Ballogie or not, or whether the defender be personally present or not, but always in such way and manner as not to be abusively exercised or encroach unreasonably on or absorb the general right of fowling as well as hunting belonging to the pursuer over the said forest." In 1896, in an action at the instance of the Marquis of Huntly, a successor of the Earl of Aboyne, to have the right of Ballogie defined, *held* that under the interlocutor of 1812 Ballogie was entitled, *inter alia*, (1) to let his right of shooting in the forest to any persons whether they were or were not tenants on Ballogie; and (2) to sell the game killed by him for sport. Marquis of Huntly v. Nicol, March 12, 1896, p. 610.

Correction of interlocutor by Clerk of Court before extract—Diligence—Suspension—Nobile officium.

2. In writing the interlocutor in a cause in which the Court had pronounced judgment for £41 in favour of the pursuer, the Clerk of Court, by a clerical error, wrote £14 for £41, and the interlocutor was signed by the presiding Judge. The Clerk corrected the error before extract, but failed to have the alteration authenticated by the Judge. The interlocutor having been extracted, the defender was charged to make payment, and the days of charge having expired without payment being made, the defender's goods were poinded. The defender thereupon presented in the Bill-Chamber a note of suspension of the decree and the proceedings thereon. The agents-disbursers of the pursuer, in whose name decree had been extracted and the charge given, presented a petition praying the Court to confirm and authenticate the Clerk of Court's amendment. The Lord Ordinary on the Bills reported the suspension. The Court *informed* the Lord Ordinary on the Bills that the interlocutor as amended correctly expressed the judgment of the Court, and *held* it to be unnecessary to pronounce any order on the petition. Clark & Macdonald v. Bain, Nov. 16, 1895, p. 102.

See *Process*, 13, 14, 15.

DELEGATION (Power of). *Power of Police Commissioners to delegate to a committee—Imposition of Assessment—Burgh Police Act*, 1892, *sec.* 54. *Held* that under sec. 54 of the Burgh Police Act, 1892, Police Commissioners are entitled to delegate to a committee the power of hearing and deciding appeals under section 368 against assessments. Brown v. Magistrates of Leith, March 17, 1896, p. 654.

DELIVERY. See *Trust*, 2.

DEPOSIT. See *Custody*.

DEPOSIT-RECEIPT. *Term of payment—Trust—Liability of trustees—Power to retain securities on which funds invested at truster's death.*

1. A testator empowered his trustees to retain securities upon which his estate might be invested at his death. The trustees accordingly retained certain deposit-receipts with a foreign bank which were not

DEPOSIT-RECEIPT—*Continued.*

yet payable, under a guarantee from two of their number to indemnify them from all loss which they or the trust-estate might incur by continuing to hold the said deposit-receipts. Before the deposit-receipts matured the bank suspended payment. *Held* that neither the trustees nor the guarantors were liable to make good the loss sustained by the bank suspending payment, as it did not appear that the deposit-receipts could have been realised before they matured. Scott's Trustees v. Scott, Nov. 1, 1895, p. 52.

Succession—Donation—Destination.

2. On 20th September 1892 a brother and a sister took a deposit-receipt from a bank in these terms,—"Received of" the brother and the sister "the sum of £400 as a deposit with" the bank, "to be repaid on 15th July 1895 to them or the survivor of them, and bearing interest at the rate of 5 per cent per annum." Of the £400, £350 was contributed by the sister and £50 by the brother. Both the brother and the sister died before the date of repayment of the deposit-receipt, the brother being the survivor of the two. The sister was in possession of the deposit-receipt at her death. In an action by the executrix of the brother against the executor of the sister for delivery of the deposit-receipt, on the ground that its contents had passed to the brother as the survivor, *held* that the deposit-receipt had not the effect of transferring the property of the predeceaser to the survivor, and consequently that the pursuer's only right was to receive the £50 deposited by the brother, with interest. Dinwoodie's Executrix v. Carruthers' Executor, Dec. 6, 1895, p. 234.

Foreign—Deposit-receipt issued by English bank to Scottish depositors—Whether rights of depositors inter se regulated by English law.

3. Two persons, domiciled and resident in Scotland, placed a sum of money, belonging in part to each, upon deposit-receipt with an English bank in their joint names. *Held* that all questions as to the right of the depositors *inter se* in the money deposited fell to be determined by Scots law, and not by the law of England. Dinwoodie's Executrix v. Carruthers' Executor, Dec. 6, 1895, p. 234.

DILIGENCE. *Process—Decree—Correction by Clerk of Court before extract—Suspension—Nobile officium.*

In writing the interlocutor in a cause in which the Court had pronounced judgment for £41 in favour of the pursuer, the Clerk of Court, by a clerical error, wrote £14 for £41, and the interlocutor was signed by the presiding Judge. The Clerk corrected the error before extract, but failed to have the alteration authenticated by the Judge. The interlocutor having been extracted, the defender was charged to make payment, and the days of charge having expired without payment being made, the defender's goods were poinded. The defender thereupon presented in the Bill-Chamber a note of suspension of the decree and the proceedings thereon. The agents-disbursers of the pursuer, in whose name decree had been extracted and the charge given, presented a petition praying the Court to confirm and authenticate the Clerk of Court's amendment. The Lord Ordinary on the Bills reported the suspension. The Court *informed* the Lord Ordinary on the Bills that the interlocutor as amended correctly expressed the judgment of the Court, and *held* it to be unnecessary to pronounce any order on the petition. Clark & Macdonald v. Bain, Nov. 16, 1895, p. 102.

DISCHARGE. *Reparation—Master and Servant.*

In defence to an action of damages for personal injuries sustained by the pursuer when in the employment of the defenders, the defenders pleaded that the action was excluded by a receipt signed by the pursuer, and bearing that he had received from the defenders the sum of £10 as

DISCHARGE—*Continued.*

compensation for his injuries, "and this sum I accept in full discharge of all claims I can or may make in respect of said injury, either under the Employers Liability Act, 1880, or otherwise." With reference to this discharge the pursuer averred that the defenders' manager "called upon the pursuer within a week of his leaving the infirmary, and induced him, when he was in a weak state of body and mind, and without advice, to sign the receipt." The Court *dismissed* the action, holding that no relevant grounds had been stated for setting aside the discharge. Mackie v. Strachan, Kinmond, & Co., July 15, 1896, p. 1031.

See *Stamp*, 2.

DOMICILE. See *Judicial Factor*, 1.

DONATION. *Succession—Deposit-receipt—Destination—Foreign.*

On 20th September 1892 a brother and a sister who were domiciled in Scotland took a deposit-receipt from an English bank in these terms,—"Received of" the brother and the sister "the sum of £400 as a deposit with" the bank, "to be repaid on 15th July 1895 to them or the survivor of them, and bearing interest at the rate of 5 per cent per annum." Of the £400, £350 was contributed by the sister and £50 by the brother. Both the brother and the sister died before the date of repayment of the deposit-receipt, the brother being the survivor of the two. The sister was in possession of the deposit-receipt at her death. In an action by the executrix of the brother against the executor of the sister for delivery of the deposit-receipt, on the ground that its contents had passed to the brother as the survivor, *held* that the deposit-receipt had not the effect of transferring the property of the predeceaser to the survivor, and consequently that the pursuer's only right was to receive the £50 deposited by the brother, with interest. Dinwoodie's Executrix v. Carruthers' Executor, Dec. 6, 1895, p. 234.

See *Husband and Wife*, 5—*Marriage-Contract*, 5.

ELECTION LAW. *Franchise—Lodger Franchise—Claim and declaration—Presumption—Wilful refusal of claimant to answer citation as witness—The Registration Amendment (Scotland) Act*, 1885, *sec.* 14.

1. The Registration Amendment (Scotland) Act, 1885, by section 14, enacted,—"In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *prima facie* evidence of his qualification." A person, claiming the lodger franchise in respect of a bedroom occupied by him in his father's house, produced at the Registration Court a notice of claim accompanied by the statutory declaration. The claim was objected to upon the allegation that the claimant had no contract with his father. The objector proposed to prove this by the evidence of the claimant himself, whom he had duly cited to attend. The claimant having failed to attend the diet, the Sheriff continued the case to an adjourned diet, to which the claimant was again cited. The claimant again failed to attend, and the objector led no evidence against the claim. The Sheriff sustained the claim. In a special case obtained by the objector, the Sheriff stated that he considered himself bound by the case of *Dalgleish* v. *Dodds*, 22 R. 198, to admit the claim, otherwise he would have held the claimant as confessed, and rejected it. The Court *held* that the case of *Dalgleish* v. *Dodds* did not apply, and that the Sheriff should have given effect to his view of the evidence and refused the claim. Stirling v. Fletcher, Nov. 19, 1895, p. 120.

Franchise—Service Franchise—Representation of the People Act, 1884, *sec.* 3.

2. A coachman had the exclusive use and control of a room over the stable furnished as a bedroom, in which he kept his clothes and dressed, but he took his meals in the mansion-house occupied by his master, and

slept there as caretaker. He claimed to be enrolled as a voter in respect that he inhabited the room over the stable as a dwelling-house by virtue of service in the sense of section 3 of the Representation of the People Act, 1884. *Held* that he was not entitled to the franchise, in respect that the dwelling-house which he inhabited was not the room over the stables but the mansion-house, which was inhabited by the person under whom he served. Campbell v. Morris, Nov. 19, 1895, p. 118.

Election—Returning officer's charges—Presiding officers and clerks—"Travelling expenses"—Hotel expenses—Returning Officers (Scotland) Act, 1891, sec. 3, Schedule, Part I.

3. *Held* that the expression "travelling expenses" in the schedule to the Returning Officers (Scotland) Act, 1891, included hotel and other personal expenses necessarily incurred by a presiding officer. Ivory v. Macrae, Nov. 21, 1895, p. 155.

Election—Returning officer's charges—Deputy returning officer—Ballot Act, 1872, sec. 8.

4. *Held* that a deputy returning officer, remunerated as such, was not entitled to any fee for acting as a presiding officer at a parliamentary election. Ivory v. Macrae, Nov. 21, 1895, p. 155.

Election—Expenses incurred in the conduct and management of the election—Return of Expenses—Corrupt and Illegal Practices Prevention Act, 1883, sec. 8.

5. In February 1894 A was invited by a local Conservative Association to become the Unionist candidate for the county in the event of a Parliamentary election. A, in reply, stated, that in the event of an election he would consider the matter. Between that time and October he spent several weeks in the constituency, and addressed a large number of political meetings. He was absent from the county from the end of October till the end of May 1895, when he returned. On 21st June the ministry were defeated and a dissolution became imminent. A then became the recognised Unionist candidate. *Held* that the expenses incurred by A prior to 21st June 1895 were not expenses incurred "on account of, or in respect of, the conduct or management of" the election in the sense of sec. 8 of the Act. Hood v. Gordon, Nov. 23, 1895, p. 178.

Election—Polling Agent—Employment as subagent—Corrupt and Illegal Practices Prevention Act, 1883, sec. 17.

6. *Held* that the fee paid to a person as polling agent for a Parliamentary candidate was not to be regarded as to any extent a payment to him as a subagent merely because the polling agent voluntarily canvassed certain electors. Hood v. Gordon, Nov. 23, 1895, p. 178.

Election—Expenses—Political Associations.

7. In an election petition raising a question as to the sums to be included in the respondent's account of election expenses, it was proved that for two years prior to the election he had contributed £120 per annum to a local political association. The petitioner proposed to ask a witness to state the amount of the contributions by other persons. The Court *disallowed* the question.

Observations (*per* Lord M'Laren) on the expenditure of political associations. Hood v. Gordon, Nov. 23, 1895, p. 178.

Election—Election Agent—Payments.

8. *Observation* upon the duty of an election agent in regard to payments. Hood v. Gordon, Nov. 23, 1895, p. 178.

Election Petition—Application for leave to amend petition against the return of member—Inner-House—Election Judges—Remit—Corrupt and Illegal Practices Prevention Act, 1883, sec. 40, subsec. (2).

9. *Held* (1) that an application under sec. 40, subsec. (2), of the Corrupt and Illegal Practices Prevention Act, 1883, for leave to amend a petition against the return of a member of Parliament must be pre-

sented to one of the Divisions and not to the Election Judges; and (2) that, on the application being granted, it is not necessary for the Division to remit the petition to the Election Judges to enable the latter to exercise the powers by statute conferred upon them. Hood v. Gordon, Oct. 16, 1895, p. 4.

Election Petition—Bribery—Treating—Illegal Practices—Statement of particulars—Specification.

10. In an election petition *held* that in the "statement of particulars" provided by rule 1 of the Additional Parliamentary Election Petition Rules, 1869, (1) with reference to allegations of bribery and treating, it was necessary to set forth the places where the alleged acts were committed, and the form in which the bribery was effected; (2) with reference to allegations of illegal payments made by political associations or clubs, it was necessary to state the individuals through whom the alleged payments were made, and the particular items complained of. Hood v. Gordon, Nov. 23, 1895, p. 171.

Election Petition—Jurisdiction—Diligence for recovery of documents—Citation of witnesses and havers—Parliamentary Elections Act, 1868, *secs.* 2, 26, *and* 58.

11. *Held* that the Judges in an election petition have no jurisdiction to grant a diligence for recovery of documents prior to the trial, but may grant warrant to cite witnesses and havers in common form. Hood v. Gordon, Nov. 23, 1895, p. 171.

Election Petition—Expenses—Taxation—Agent and Client—Fees to third counsel—Corrupt and Illegal Practices Prevention Act, 1883, *sec.* 68, *subsec.* 17.

12. Section 68, subsection 17, of the Corrupt and Illegal Practices Prevention Act, 1883, enacts that the expenses in an election petition should be taxed as between agent and client. *Held* that in taxing the expenses in an election petition, the Auditor had rightly refused to allow the successful party the fees of a third counsel. Hood v. Gordon, March 18, 1896, p. 675.

ENTAIL. *Direction to entail—Succession—Condition—Direction to entail "on my heirs so long as the estate of C. is theirs"—Clause of devolution.*

1. Robert Moubray died in 1875, leaving a holograph will, by which he directed his trustees to accumulate the income of his estate until it reached £41,000, and with the accumulated sum to purchase lands "as near to the estate of Cockairnie as possible, and as strictly as the law of Scotland will allow to entail such lands purchased as above on my heirs direct or collateral so long as the estate of Cockairnie is theirs." At the date of this will the estate of Cockairnie belonged in fee-simple to William Moubray, the immediate younger brother of the testator. William Moubray died in 1885, leaving a trust-disposition and settlement dated in 1879, by which he directed his trustees to hold the estate of Cockairnie for the use and behoof of Captain Moubray, his eldest son, and the heirs of Captain Moubray's body, whom failing of his second and other sons in their order respectively, and the heirs of their bodies respectively, subject to the condition, *inter alia*, that in respect that he, William Moubray, was next heir to the estates of Upwood and Woodwalton in England, and that it was his wish that the heir who should succeed after him to these estates should not also take the estate of Cockairnie, his trustees were to convey Cockairnie to the child who might be entitled thereto other than the heir who should succeed to Upwood and Woodwalton. At the adjustment of a deed of entail after the £41,000 had been accumulated, the younger brother of Captain Moubray, and the first substitute under the Cockairnie trust, contended that—having regard (1) to Robert Moubray's clearly expressed intention that the lands to be purchased should be possessed

ENTAIL—*Continued.*

along with the lands of Cockairnie, and (2) to the fact that Cockairnie was held upon a title which provided for a devolution of that estate from the heir in possession to the next heir in the event of the former succeeding to the estates of Upwood and Woodwalton—the trustees in framing a deed of entail of the estates to be purchased were bound to insert a clause of devolution to the same effect to secure that the lands to be purchased should be possessed along with Cockairnie. *Held* that no clause of devolution fell to be inserted. Moubray's Trustees v. Moubray, June 16, 1896, p. 809.

Trust-disposition—Construction—"Heirs-female."

2. *A truster, "in order to make and secure additional provision for" his second son "and the other heirs of entail succeeding him in the lands and estates of Cromartie . . . to enable them to support the dignity and title of Earl of Cromartie," conveyed to trustees certain securities, and directed them, after his death, to pay the free proceeds thereof to his second son and the heirs-male of his body, whom failing to certain substitutes, "whom failing to the heirs-female of the body" of the said second son. The second son, the Earl of Cromartie, died leaving only two daughters, of whom the elder succeeded her father in the title and estates of Cromartie.* Held (rev. *judgment of Second Division*) *that the direction to the trustees to pay the income to the "heirs-female" of the body of the second son being unambiguous, must receive effect, and that each of the two daughters was entitled to one half of the income of the trust funds.* Mackenzie v. Duke of Devonshire, May 15, 1896, H. L., p. 32.

Provision by heir of entail for younger children—Succession—Vesting—Trust—Marriage-Contract.

3. C, an heir of entail in possession, by his marriage-contract, in the exercise of a power under the deed of entail, bound the succeeding heirs to pay to the trustees a sum equal to three years' rent of the entailed estate, in trust for behoof of the children of the marriage not succeeding to the entailed estate, in such shares as C should appoint, and failing appointment, to be held by the trustees for the younger children alive at C's death equally, or their issue. As a further provision for his younger children, he assigned to his trustees certain policies of assurance on his life under similar conditions as to apportionment. In contemplation of the marriage of R, his third son, C executed a deed appointing to R or his lawful issue or assigns £1500 as his share of the total trust funds. This deed was declared to be delivered on execution, and to be irrevocable, and R was taken bound to assign his rights under it to his marriage-contract trustees. R predeceased his father. *Held* that R's right to the £1500 was not contingent on his surviving his father, and that it vested at the date of the appointment in his favour. Chancellor's Trustees v. Sharples' Trustees, Jan. 24, 1896, p. 435.

Restriction of provisions to Widow and Children—5 Geo. IV. c. 87 (Aberdeen Act), secs. 1 and 4—Free yearly rent—Mineral Lease—Royalties—Approaching exhaustion of minerals.

4. *Held* by a majority of seven Judges, that in estimating the provisions which an heir of entail is entitled under sections 1 and 4 of the Aberdeen Act to make for his widow and children, the royalties payable under mineral leases during the year current at the date of the granter's death fall to be taken as part of the "free yearly rent" of the entailed estate, irrespective of the fact that the minerals are nearly exhausted. Lord Belhaven and Stenton, Jan. 23, 1896, p. 423.

ERROR. Sale—Sale of heritage—Sale by auction—Implement in knowledge of ground of challenge—Personal objection—Private knowledge of prior right. Moncrieff v. Lawrie, March 6, 1896, p. 577.

EXECUTOR. *Executor-nominate—Confirmation—Danger to estate—Judicial Factor.*

1. Circumstances in which the Court dismissed a petition for confirmation presented by the widow and executrix-nominate of a person deceased and appointed a judicial factor on the estate, in respect that *prima facie* there was risk of injury to the estate if the administration were left in the hands of the petitioner. Campbell v. Barber, Nov. 7, 1895, p. 90.

Compensation—Retention—Mutuality of debt and credit—Bank—Claim of bank to retain against debt of deceased customer funds lodged by his executors.

2. *Held* that a bank to whom a debt was owing by a deceased customer, whose estate was found to be insolvent, was not entitled to withhold payment of sums lodged with the bank by his executors either on the plea of retention or of compensation. Gray's Trustees v. Royal Bank, Nov. 27, 1895, p. 199.

Liability of executor to creditors of deceased—Where executor has carried on deceased's business—Bankruptcy.

3. The executrix-dative of a deceased wine and spirit merchant, having obtained a transfer of the certificate for the sale of exciseable liquors into her own name, continued the deceased's business. Eighteen months after the death of the deceased his estates were sequestrated, and the trustee in the sequestration called upon the executrix to deliver the certificate and licence to him, to cede possession of the licensed premises, and to account for the profits she had made by carrying on the business. *Held* that the executrix was not a trustee for the creditors of the deceased, and therefore, that she was only liable to account for the value of the estate of the deceased, including the good-will of his business, as at the date of his death. Stewart's Trustee v. Stewart's Executrix, May 21, 1896, p. 739.

Proof—Writ—Writ of Executor.

4. *Held* that an affidavit in support of a claim for return of inventory-duty in which an executor deponed that he had actually paid debts "due and owing from the deceased at the time of his death," including a debt due to A, was not evidence of the constitution of a debt due to A. Dunn's Trustee v. Hardy, March 12, 1896, p. 621.

EXPENSES. *Awarding of expenses—Reduction of Sheriff Court decree which had been extracted within the time allowed for appeal.*

1. The defenders in a Sheriff Court action having obtained decree of absolvitor, with expenses, on 1st December, extracted the decree on 26th December, without waiting for approval of the Auditor's report on their account. The pursuers having brought an action for reduction of the Sheriff's interlocutor, in which they obtained a judgment in their favour in the Inner-House, the defenders submitted that they were entitled to the expenses of the proceedings in the Outer-House, in respect that these had been caused by the pursuers neglecting to appeal against the Sheriff's judgment within fourteen days, before the expiry of which extract could not have been obtained. The Court *found* the pursuers entitled only to expenses in the Sheriff Court and in the Inner-House. Taylor's Trustees v. M'Gavigan, July 3, 1896, p. 945.

Awarding of expenses—Jury Trial.

2. The Court has a discretion in jury trials, as in other cases, to depart from the general rule whereby expenses follow the event. Shepherd v. Elliot, March 20, 1896, p. 695.

Awarding of expenses—Amendment of Record in Inner-House.

3. An amendment of record in the Inner-House which did not involve any radical alteration of the pleadings, or a change of the ground of action, *allowed* on payment of expenses in the Inner-House. Murdison v. Scottish Football Union, Jan. 30, 1896, p. 449.

EXPENSES—*Continued.*

Awarding of expenses—Sale of heritage—Objection to title tendered.

4. Circumstances in which a purchaser of heritable subjects who objected to the title offered him was *held* entitled to expenses incurred in defending an action by the seller, in which the validity of the title tendered was established. Walker v. Galbraith, Dec. 21, 1895, p. 347.

Parties liable—Dominus litis.

5. *Held* (*per* Lord Kyllachy, Ordinary) that in order to make a person liable as *dominus litis* for expenses decerned for in an action to which he was no party, it must be established that he was truly the principal in the action, and that the actual litigant was merely his agent. Fraser v. Malloch, March 12, 1896, p. 619.

Parties liable—Separate defences—Liability of defenders inter se—Trust.

6. A law-agent was appointed sole trustee, and was left a legacy under the will of a client, which the law-agent had himself prepared. An action for the reduction of the will was brought against (first) the law-agent, and (second) the residuary legatee, who was a pupil, and to whom a curator ad litem was appointed, on the ground that the first defender had by fraud or circumvention impetrated the will from the testator, who was weak and facile. Separate defences were lodged. The jury returned a verdict for both the defenders. In dealing with expenses the Court found the pursuer liable to the first defender as trustee, and found the latter personally liable to the second defender, the curator ad litem, on the ground that his action in taking benefit under the will which he had himself prepared had so prejudiced the case that, but for the separate defence, the jury might have disregarded the pupil's interest, and returned a verdict for the pursuer. Rooney v. Cormack, Oct. 18, 1895, p. 11.

Taxation—Separate defences—Objection to Auditor's report.

7. *Observed* by the Lord President that, where successful defenders have appeared separately, the appropriate time for determining whether they are entitled to the expense of separate defences is when the motion for expenses is made. Murray v. Macfarlane's Trustees, Nov. 6, 1895, p. 80.

Taxation—Expenses as between agent and client—Fees to third counsel—Election Petition—Corrupt and Illegal Practices Prevention Act, 1883, *sec.* 68, *subsec.* 17.

8. Section 68, subsection 17, of the Corrupt and Illegal Practices Prevention Act, 1883, enacts that the expenses in an election petition should be taxed as between agent and client. *Held* that in taxing the expenses in an election petition, the Auditor had rightly refused to allow the successful party the fees of a third counsel. Hood v. Gordon, March 18, 1896, p. 675.

Taxation—Expenses between agent and client, or between party and party—Process—Interlocutor—Trust.

9. In an action by a sole testamentary trustee for his discharge, the Court pronounced an interlocutor decerning for the balance due to him on an accounting, finding him entitled to "expenses," appointing him to denude of the trust-estate on receiving payment of said balance and of his expenses, and thereafter discharging him. The Auditor taxed the pursuer's account of expenses as between party and party. The pursuer objected to the Auditor's report, on the ground that the account should have been taxed as between agent and client. The defenders pleaded that the objection came too late. *Held* that the intention of the Court in finding the pursuer entitled to expenses was that he should be kept *indemnis* in respect he was denuding of the whole trust-estate, and therefore that the account fell to be taxed as between agent and client. Davidson's Trustees v. Simmons, July 17, 1896, p. 1117.

See *Justiciary Cases*, 20, 21, and for Caution for Expenses, see *Process*, 6.

FACTOR. See *Agent and Principal.*

FACULTIES AND POWERS. See *Succession*, 15.

FISHINGS. *Right to Salmon-Fishings—Glebe—Designation—Kirk lands—Presumption—Prescription—Crown—Act* 1593, *cap.* 165.

1. *In* 1892 *the proprietor of Ardoe brought an action against the proprietor of Banchory and of the Kirkton of Banchory for declarator that the pursuer had right to the salmon-fishings in the river Dee* ex adverso *of a certain portion of the glebe of Banchory-Devenick, which separated the estates of the pursuer from those of the defender at the river. No right of salmon-fishings attached to the glebe. The Crown was not called as a party to the action. The pursuer's lands of Ardoe were abbot's lands, as also were the lands forming the barony of Banchory: the lands of Kirkton of Banchory were bishop's lands. The glebe of Banchory-Devenick was designated in* 1602, *but the minutes of the presbytery did not shew out of what lands it had been designated. The defender maintained that it had been designated wholly out of Kirkton of Banchory, and consequently that the fishings in dispute belonged to him.* Held, *after a proof* (rev. *judgment of the First Division*), (1) *that in the absence of direct evidence as to the lands from which the glebe had been designated in* 1602, *it was to be inferred that the glebe had been taken from the abbot's lands of Banchory and Ardoe, and not from the bishop's lands of Kirkton, the presumption being that the Presbytery had followed the direction of the Act* 1593, *cap.* 165, *which was then in force;* (2) *that the pursuer's possession was sufficient, and that the possession by both parties shewed the boundary between the salmon-fishings of the barony of Banchory and Ardoe; and* (3) *that the pursuer had right* (*as in a question with the defender*) *to the fishings in dispute.* Ogston v. Stewart, March 26, 1896, H. L., p. 16.

Right to Salmon-Fishings—Prescription—Conveyancing Act, 1874.

2. *A right of salmon-fishing is an estate in land in the sense of the Conveyancing Act*, 1874, *and the possession of salmon-fishings for twenty years is prescriptive possession.* Ogston v. Stewart, March 26, 1896, H. L., p. 16.

Process—Petition for reconstitution of District Fishery Board—Intimation.

3. Petition for the reconstitution of a lapsed district fishery board *ordered* to be intimated on the walls and in the Minute-book, and to the Secretary for Scotland, and to be advertised in certain newspapers. Duke of Argyll, July 9, 1896, p. 991.

Sea-Fishing — Beam-Trawling — Fishery Board — Statute — Bye-law—Ultra vires—Herring Fishery (*Scotland*) *Act*, 1889, *sec.* 7.

4. *Held* that under section 7 of the Herring Fishery (Scotland) Act, 1889, the Fishery Board had merely a discretionary power to prohibit trawling in particular areas within the line specified, and therefore that a bye-law issued by the board prohibiting trawling throughout the whole area within the line was *ultra vires.* Green v. Leith, Feb. 7, 1896, Just. Cases, p. 50.

5. *Held* (by a majority of a Court of seven Judges, over-ruling *Green* v. *Leith*, *supra*, No. 4) that it was within the powers of the Fishery Board under the section to issue a bye-law prohibiting beam-trawling in the entire area within the line specified. Wilson v. Rust; Wilson v. Mackenzie, Feb. 29, 1896, Just. Cases, p. 56.

Sea-Fishing — Fishery Board—Statute—Bye-law—Complaint—Penalty—Herring Fishery (*Scotland*) *Act*, 1889, *sec.* 7—*Sea Fisheries Regulation* (*Scotland*) *Act*, 1895, *sec.* 10.

6. The Herring Fishery (Scotland) Act, 1889, section 7, enacts (subsection 1) that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling or otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire"; and (subsection 2)

FISHINGS—*Continued.*

that any person fishing in contravention of such bye-law should be liable to a fine not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence. In 1892 the Fishery Board issued a bye-law prohibiting beam-trawling or otter-trawling within the limits specified, and setting forth that any person acting in contravention of the bye-law should be liable to a fine not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence. The Sea Fisheries Regulation (Scotland) Act, 1895, sec. 10, repealed sec. 7, subsec. 2, of the Act of 1889, and substituted for the penalties there provided a fine not exceeding £100, and failing payment imprisonment for a period not exceeding sixty days. A person was convicted of a contravention of the bye-law on a complaint which set forth that the accused was liable in a penalty not exceeding £100, and failing payment to imprisonment, and prayed for the imposition of the penalties provided by the Act of 1895. *Held*, in a suspension, that whether the penalty ought to have been specified in the bye-law or not, as it was in fact specified, and as the complaint was founded on the bye-law, the conviction fell to be quashed, as the penalty prayed for was in excess of that specified in the bye-law. Green v. Leith, Feb. 7, 1896, Just. Cases, p. 50.

7. *Held* (over-ruling *Green v. Leith*, *supra*, No. 6) (1) that the portion of the bye-law relating to penalties ought not to have been included in the bye-law, and was to be regarded as nothing more than a superfluous intimation by the Fishery Board of the statutory penalties incurred by a contravention of the bye-law at the date when the bye-law was framed; (2) that the bye-law, in so far as it prohibited beam-trawling or otter-trawling within the line from Duncansby Head to Rattray Point, remained in force notwithstanding the passing of the Act of 1895; and (3) that after the passing of the Act of 1895 the penalties incurred on conviction of a contravention of the bye-law were those specified in that Act, and not those specified in the Act of 1889. Therefore (1) where a complaint set forth that the accused was liable to a penalty not exceeding £100, and, failing payment, to imprisonment for a period not exceeding sixty days, and prayed for the imposition of the penalty provided by the Act of 1895, *held* that the complaint was well laid; but (2) where a complaint set forth that the accused had incurred a penalty not exceeding £5, and prayed for the imposition of the penalty provided by the bye-law and by the Acts of 1889 and 1895, *held* that the complaint was incompetent. Wilson v. Rust; Wilson v. Mackenzie, Feb. 29, 1896, Just. Cases, p. 56.

FOREIGN. See *Agent and Principal*, 1—*Arrestment*, 2—*Deposit-Receipt*, 3.

FORTUNE-TELLING. See *Justiciary Cases*, 2.

FRANCHISE. See *Election Law—Game.*

FRAUD. See *Cautioner*, 1.

FRIENDLY SOCIETY. *Process — Appeal — Competency — Dispute between member and society—Small-Debt Court—Friendly Societies Act*, 1875, *sec.* 22 (*d*) (*e*).

Held that in a small-debt action relative to a dispute between a friendly society and one of its members, an appeal, on a case stated under the Friendly Societies Act, 1875, was competent, although the summons did not refer to the Act. Linton v. City of Glasgow Friendly Society, Oct. 30, 1895, p. 51.

GAME. *Construction of interlocutor declaring a right of fowling over lands belonging to another person—Extent of privilege—Right to let shooting.*

In 1808 Innes, proprietor of Ballogie, was infeft in that estate *cum privilegio et libertate aucupandi* in the Forest of Birse, which belonged

GAME—*Continued.*

to the Earl of Aboyne. By a judgment of the Court of Session in 1812, affirmed by the House of Lords in 1819 in an action by the Earl against Innes, it was found that the liberty and privilege of fowling was "a franchise conferred as a heritable right rendered an appendage to the property of Ballogie," and further, "that the said privilege may lawfully be exercised by the defender personally, or by his gamekeeper duly authorised for that purpose, or by any qualified friends whom he may permit, whether his tenants on Ballogie or not, or whether the defender be personally present or not, but always in such way and manner as not to be abusively exercised or encroach unreasonably on or absorb the general right of fowling as well as hunting belonging to the pursuer over the said forest." In 1896, in an action at the instance of the Marquis of Huntly, a successor of the Earl of Aboyne, to have the right of Ballogie defined, *held* that under the interlocutor of 1812 Ballogie was entitled, *inter alia* (1) to let his right of shooting in the forest to any persons whether they were or were not tenants on Ballogie; and (2) to sell the game killed by him for sport. Marquis of Huntly v. Nicol, March 12, 1896, p. 610.

GLEBE. See *Church*, 2, 3.

GOODWILL. See *Executor*, 3—*Valuation Acts*, 6.

GROUND-ANNUAL. *Bankruptcy—Sequestration—Preference—Poinding of the ground—Bankruptcy (Scotland) Act*, 1856, *sec.* 118.

Held that the creditor under a contract of ground-annual is entitled to the benefit of the proviso in sec. 118 of the Bankruptcy Act, 1856, the annual payments under the contract being truly the interest on a debt of which the principal is the capitalised value of the annual payments. Bell's Trustees v. Copeland & Co., March 13, 1896, p. 650.

GUILD, DEAN OF. See *Burgh*, 3 *to* 7.

HARBOUR. See *Statute*, 7.

HEIR. See *Passive Title.*

HORSE. *Agreement to winter a horse—Injury to horse—Liability of custodier—Proof—Onus.*

1. A farmer undertook to winter a colt belonging to a postmaster. In the course of the winter the colt was found to have sustained a serious injury to its right eye. The postmaster raised an action of damages against the farmer, averring that the injury to the colt's eye was caused by its being struck in the face by the defender, or some person for whom she was responsible; or otherwise, that the injury was caused through the colt's eye having come in contact with some of the sharp edges of the reed fence in which the colt, with culpable negligence, was enclosed, and pleaded that the injury having been caused by the fault or neglect of the defender, she was liable in damages. The Court *assoilzied* the defender, on the ground that the pursuer had failed to prove that the accident to the colt had been caused by the fault of the defender. Sutherland v. Hutton, May 12, 1896, p. 718.

Sale—Warranty—Proof of warranty—Sale of Goods Act, 1893, *sec.* 14.

2. Circumstances in which *held* that an oral statement, by a dealer in horses to a purchaser who said that he wished to buy a horse quiet to ride and drive, that a horse was quiet to ride and drive, did not imply a warranty. Wilson v. Turnbull & Co., May 12, 1896, p. 714.
3. The purchaser of a horse the second day after he received it rejected it on the ground that it had been warranted quiet to ride and drive, and that it was disconform to warranty. It appeared that on the day after

HORSE—*Continued.*
it had been put in the purchaser's stable it had been tried in the saddle by the purchaser and had given satisfaction, that on the following day the purchaser drove it in a dogcart along a road new to it, and that on coming near a bridge over a railway it was scared by the steam of a train which it could not see; that it then reared and turned round and refused to proceed. *Opinion, per cur.*, that even if the warranty were proved the conduct of the horse in the exceptional circumstances in which it was placed did not shew that it was not quiet to drive, and that the purchaser was not entitled to reject it without further trial. Wilson v. Turnbull, May 12, 1896, p. 714.
See *Public Health*, 3.

HOTEL. See *Interdict*, 5—*Trade Name.*

HUSBAND AND WIFE. *Breach of Promise of Marriage—Diligence for recovery of documents disclosing defender's financial position.*
1. In an action of damages for breach of promise of marriage the pursuer moved for a diligence to recover the defender's business books and bank books in order to disclose his financial position. Circumstances in which the Court *refused* the motion. Somerville v. Thomson, March 6, 1896, p. 576.

Divorce for desertion—Separation—Cruelty—Charge of immoral conduct not amounting to adultery, and unknown to spouse founding on it until actions in Court—Relevancy.
2. A husband brought an action of divorce for desertion against his wife, who stated in defence that she had left her husband on account of his continued cruelty. The wife also brought an action for separation on the ground of cruelty against the husband. After the records had been closed the wife craved leave to add in both cases an averment of facts which had come to her knowledge subsequent to the closing of the records, to the effect that, while she was still living with her husband, he had attempted on one occasion to have connection with her niece. The Lord Ordinary (Low) having allowed an amendment in both actions, the Court refused to interfere with his decision, *holding* that proof of the alleged misconduct of the husband might be relevant as shewing his animus towards his wife, although that misconduct, being unknown to the wife, could not constitute a case of cruel maltreatment. A v. B, March 12, 1896, p. 588.

Divorce—Competency of decerning for aliment in pending action of separation and aliment after decree of divorce at instance of wife.
3. A wife, after obtaining an interim award of aliment in an action of separation and aliment against her husband, raised an action of divorce against him, and obtained decree therein. She then, in the action of separation and aliment, moved for decree for a further sum in name of aliment. Except the sum paid under the interim award she had received nothing from her husband in name of aliment pending the actions, and she alleged that she had been alimented by third parties. The Court *refused* the motion as incompetent, in respect that there could be no decerniture for aliment in an action of separation and aliment after the parties had been divorced, an action of separation and aliment proceeding on the assumption that the parties were husband and wife. Shirrefs v. Shirrefs, June 16, 1896, p. 807.

Divorce—Custody and aliment of children—Conjugal Rights (Scotland) Amendment Act, 1861, *sec.* 9.
4. An order pronounced by a Lord Ordinary in an action of divorce, under the power conferred by section 9 of the Conjugal Rights Amendment Act, 1861, to make provision for the custody and aliment of pupil children of the marriage, ceases to be operative in regard to each child when it emerges from pupillarity. Watson v. Watson, Nov. 28, 1895, p. 219.

HUSBAND AND WIFE—*Continued.*

Donation inter virum et uxorem—Implied revocation—Donation of heritage by husband—Subsequent granting of bond over property by him—Liability of wife for expenses connected with property.

5. A husband purchased a house, taking the title to himself and his wife, equally between them, and to their repective heirs and assignees. At the date of the purchase the house was burdened with a bond and disposition in security, and this was taken over in part payment of the price, the husband and the wife becoming liable in the personal obligation. Subsequently a second bond in security of a loan to the husband was granted over the property, the husband alone becoming liable in the personal obligation, and both he and his wife granting the disposition in security with joint consent and assent. The husband predeceased the wife, leaving a trust-disposition and settlement by which he directed his trustees, in the first place, to pay all his just and lawful debts. The house having been sold by the trustees, with consent of the widow, *held*, in a competition between her and the trustees, that one half of the sum in the bonds and of the expense of discharging the same fell to be deducted from the widow's half of the price, as regarded the first bond, on the ground that the gift to the wife was to be taken *cum onere*, and as regarded the second bond, on the ground that the husband, by burdening the property with the bond, had by implication revoked the gift to the extent of one-half of that bond.

Held further that the following liabilities in connection with the property incurred but not discharged, in the husband's lifetime, viz. (1) for a law-agent's account, (2) for compositions due to the superior, (3) for the expense of confirming the title, and (4) for taxes, feu-duties, and incidental expenses, were personal debts of the husband, and were not chargeable against the widow's share of the price. Johnstone's Trustees v. Johnstone, Feb. 27, 1896, p. 538.

Insurance by widower for benefit of children—Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2.

6. *Held* that a widower was a "married man" in the sense of the Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2. Kennedy's Trustees v. Sharpe, Nov. 21, 1895, p. 146.

See *Marriage-Contract.*

IMPLIED GRANT. See *Property*, 6.

INSANITY. *Succession—Testament—Relevancy.*

In a reduction of a will on the ground of the testator's insanity, a general averment that the testator was of unsound mind at the date when he made the will is not sufficient, if the facts stated or admitted by the pursuer raise a strong presumption that the testator was sane, and there is nothing in the will itself to indicate insanity. Hope v. Hope's Trustees, Feb. 19, 1896, p. 513.

See *Judicial Factor*, 1—*Justiciary Cases*, 4.

INSURANCE. *Life Insurance—Insurance by widower for benefit of children—Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2.*

1. *Held* that a widower was a "married man" in the sense of the Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2. Kennedy's Trustees v. Sharpe, Nov. 21, 1895, p. 146.

Accident Insurance—Condition—Warranty—Answers to questions by company—Agent and Principal—Personal Bar.

2. The widow of a person who had been killed by accident raised an action against an accident insurance company upon a policy taken out by the deceased. The defenders pleaded that the policy was void, in respect that it was subject to the condition that the declaration by the insured, upon which it was granted, was true; that in answer to the question in the proposal, "Are there any circumstances which render

INSURANCE—*Continued.*

you peculiarly liable to accident?" the deceased had stated, "Slight lameness from birth," and had signed a declaration in the following terms:—"I hereby declare and warrant that the above statements are true"; and that the answer and declaration in material respects were false. It appeared from a proof that the deceased, while staying in a hotel in England, met an agent of the defenders' company with whom he was not acquainted, and was induced by him to make a proposal for an insurance; that the agent wrote the answers to the questions in the proposal as the deceased dictated them; that the deceased was and had been from childhood extremely lame, and could not have walked across a room without shewing the extent of his lameness. Several witnesses deponed that the deceased had told them that he walked across the room at the hotel before the agent, but the agent deponed that he never saw him rise from his seat. It was proved that some years after the deceased had fallen into a fireplace in his bedroom and had received injuries from which he died next day. The Court *held* (1) that the deceased's statement as to his walking across the room was true; (2) that as the defenders' agent must have seen the extent of his lameness, the defenders were not entitled to take advantage of any misdescription of the lameness in the proposal, as the knowledge of their agent was their knowledge; and (3) that no breach of warranty had been proved. Cruikshank v. Northern Accident Insurance Co., Limited, Nov. 21, 1895, p. 147.

See *Revenue*, 1—*Ship*, 4.

INTERDICT. *Reparation—Wrongous Interdict.*

1. In an action of damages raised by the liquidator of a bleaching company, the pursuer stated that he had advertised a sale by auction of a large number of articles belonging to the bleachwork; that the defender, who had already bought the machinery of the bleachwork and other articles on the day before the sale, wrongfully obtained interim interdict against the sale proceeding; that of 266 articles included in the inventory prepared for the sale nine only were ultimately ascertained to belong to the defender, and that the interdict was unwarrantable *quoad* the articles belonging to the pursuer. The defender pleaded that the action was not relevant, in respect that in the circumstances set forth by the pursuer the defender was entitled to stop the sale until his rights should be ascertained. *Held* that the action was relevant.

Observations per Lord M'Laren on the distinction between actions for wrongous interdict and for the wrongous use of diligence. Fife v. Orr, Oct. 16, 1895, p. 8.

Railway—Compulsory acquisition of lands—Arbitration—Interdict.

2. Note of suspension and interdict to stop proceedings in an arbitration under the Lands Clauses (Scotland) Act, 1845, *refused* on the ground that the complainer had failed to shew that the respondent's claim to compensation was not relevant, or to shew any other cause for staying the proceedings in the arbitration. Glasgow, Yoker, and Clydebank Railway Co. v. Lidgerwood, Nov. 27, 1895, p. 195.

Burgh—Street—Obstruction of street—Nuisance.

3. A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. The town-council, which was the Local Authority, approved of these operations. In a suspension and interdict brought by an inhabitant to have the tramway company interdicted from continuing this practice, *held* that as the Local Authority were entrusted with the duty of seeing that the streets were cleared in such emergencies as a heavy snowstorm, and as they approved of the methods employed by

INTERDICT—*Continued.*

the tramway company, the note of suspension and interdict fell to be refused. Ogston v. Aberdeen Tramways Co., Dec. 20, 1895, p. 340.

Jurisdiction—Sheriff—Patent.

4. A paint manufacturer in Aberdeen brought an action in the Sheriff Court at Aberdeen against a paint merchant there, to have him interdicted from making, using, and selling a paint which the pursuer alleged was an infringement of a patent which he had taken out. After the action was raised a paint manufacturer in Birmingham craved to be sisted as a defender, on the ground that he was the manufacturer of the paint sold by the defender, and thus had the real interest in defending the action. The Birmingham manufacturer was sisted accordingly. Thereafter the original defender withdrew from the action, interdict being pronounced against him, of consent and with the concurrence of the Birmingham manufacturer, and a record was made up between the pursuers and the Birmingham manufacturer, in which the latter raised the question of the validity of the pursuers' patent. After a proof, the Sheriff affirmed the validity of the patent, and granted interdict against the Birmingham manufacturer. In an appeal, *held* that the Sheriff had jurisdiction to pronounce this interlocutor. Gill v. Cutler, Dec. 21, 1895, p. 371.

Railway—Right of railway to exclude from station persons other than travellers—Exclusion of hotel servants wearing hotel badge.

5. The Perth General Station Committee presented a petition to the Sheriff to interdict A B, a hotelkeeper in Perth, "himself, or by his boots, or other servant . . . unlawfully entering or trespassing upon any of the railway stations . . . of the pursuers; and in particular from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises connected therewith, while wearing the uniform or badge of the hotelkeeper, or of his hotel." The petitioners stated that they were proprietors of Perth Station; that on 17th July 1894 they intimated to A B that they had right to prevent, and would not permit, hotel servants wearing hotel badges to appear upon their platforms; that on various occasions in July 1895 A B had sent the boots of his hotel, wearing the hotel uniform and badge, to wait the arrival of certain trains, and that the latter on each occasion had been asked by the petitioners' servants to leave the station, but that he had refused to do so. The defender admitted that in July 1895 he had sent his hotel boots to meet customers arriving by train. The Sheriff refused the petition, and on appeal the Court affirmed the Sheriff's judgment, *holding* (1) that an interdict against the defender or his servants "unlawfully entering" the station could not be granted, as such an interdict would not specify the act forbidden; and (2) that *quoad ultra* the interdict sought was merely to prevent hotel servants entering the station in a certain dress to meet customers, and that that was not a case for interdict. Perth General Station Committee v. Ross, June 26, 1896, p. 885.

See *Trade Name.*

INTEREST. *Rate of Interest—Parent and Child—Legitim.*

Where a son raised an action for payment of legitim thirteen years after his father's death, and election could not, owing to the son's minority, have been made at an earlier date, the Court *held* that the father's executrix was only liable in interest on the son's legitim at the rate which the money would have earned under prudent administration, and found her liable in interest at the rate of 4 per cent, that being the rate which the estate was admitted to have earned.

Opinion reserved by Lord M'Laren as to the rate of interest chargeable where the right of legitim can be immediately determined, but where the claim is allowed to lie over without fault on either side.

INTEREST—*Continued.*

Observed by Lord M'Laren,—"There is at present no statutory rate of legal interest; 5 per cent was only a maximum rate, and there is no statutory rule obliging the Court to award 5 per cent in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country." Ross v. Ross, June 16, 1896, p. 802.

ISSUE. See *Process*, 21—*Reparation*, 11, 13, 14, 15.

JUDICIAL FACTOR. *Appointment—Curator Bonis—Insanity—Opposition of alleged incapax—Necessity for inquiry.*

1. A petition was presented, along with two certificates by medical men, for the appointment of a curator bonis to a person, on the ground that he was of unsound mind. The alleged *incapax* lodged answers, in which he denied that he was insane. He further averred that he was a domiciled Englishman, and not subject to the jurisdiction of the Scots Courts. The Lord Ordinary granted the petition without inquiry. On a reclaiming note, *held* that, having regard to the statements in the answers, the petition should not have been granted without inquiry as to the question of domicile and as to the respondent's insanity. Alston v. Alston, Oct. 19, 1895, p. 16.

Appointment—Executor—Executor-nominate—Confirmation—Danger to estate.

2. Circumstances in which the Court dismissed a petition for confirmation presented by the widow and executrix-nominate of a person deceased and appointed a judicial factor on the estate, in respect that *prima facie* there was risk of injury to the estate if the administration were left in the hands of the petitioner. Campbell v. Barber, Nov. 7, 1895, p. 90.

Appointment—Lease—Desertion of farm—Appointment of manager—Sheriff—Jurisdiction.

3. Where a tenant has deserted a farm without making proper provision for its management, it is competent for the Sheriff, on the petition of the landlord, to appoint an interim manager. Gibson v. Clark, Dec. 13, 1895, p. 294.

Powers—Opening lockfast place—Reparation—Wrongous use of diligence.

4. The wife of a bankrupt brought an action of damages against a person who had been appointed judicial factor upon the sequestrated estate of her husband under section 16 of the Bankruptcy Act, averring that the defender, while taking an inventory of the effects in the house tenanted by her husband, had wrongfully and without warrant forced open the door of a room which was locked and examined the effects therein, although informed that the effects in that room belonged entirely to the pursuer. *Held* that the action was irrelevant. M'Lachlan v. Bell, Nov. 20, 1895, p. 126.

Powers—Trust—Power to make advances out of capital—Discretionary power of trustees.

5. A testator conveyed to certain persons named and to such other persons as should be assumed in terms of law to act in the trust, as trustees for executing the trust, his heritable and moveable estates. He directed his trustees, *inter alia*, to retain and invest £4000 for behoof of his son D in liferent allenarly and of his issue in fee, and on the death of D without issue to pay the sum to the testator's other sons, subject to the condition that "in case at any time my trustees may in the exercise of their judgment and discretion think it prudent and advisable to pay over" to D "the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted full power, authority, and liberty to

JUDICIAL FACTOR—*Continued.*

do so, . . . it being my intention to give to my trustees the same full powers and discretion in giving the said principal sum" to D, "which I myself now possess." A judicial factor who had been appointed in room of the trustees, who had resigned, presented a petition, bearing to be at D's request, for power to invest a portion of the £4000 in the purchase of an annuity in favour of D and his wife, and the survivor of them. The Lord Ordinary refused the petition, on the ground that the trust-deed did not authorise any payment for behoof of D's wife. The judicial factor having reclaimed, and lodged a minute stating that in his opinion the proposed application of the portion of the trust-estate was prudent and advisable, the Court, holding that the proposed investment, being at D's request, was virtually a payment to D himself, *granted* the prayer of the petition.

Observations by Lord M'Laren as to the limits of the power of a judicial factor who has come in place of trustees vested with discretionary powers. Howden v. Simson, Nov. 16, 1895, p. 113.

JURISDICTION. See *Arbitration*, 1—*Arrestment*, 2—*Burgh*, 6, 7—*University*.

JUS QUÆSITUM TERTIO. See *Superior and Vassal*, 7, 10—*Trust*, 12.

JUSTICIARY CASES. *Crimes and Offences—Breach of the Peace—Relevancy—Proof—Salvation Army Procession.*

1. A member of the Salvation Army was charged under a summary complaint, which set forth that on Sunday afternoon he "did behave in a disorderly manner, and did march along the said street playing on a concertina or other similar instrument, and refuse to desist, and annoy and disturb the lieges, and commit a breach of the peace." The accused was convicted. In an appeal the case stated that the following facts were proved:—The appellant marched at the head of a procession playing on a concertina, there being singing and shouting by members of the procession; the playing of the concertina attracted a crowd of thirty or forty persons, thereby making it difficult for people to pass; this was the cause of annoyance to several persons who were examined as witnesses; the complainer on being asked to desist refused to do so. *Held* that the complaint was relevant, and that the Magistrates, on the facts proved, were entitled to convict. Whitchurch v. Millar, Oct. 25, 1894, Just. Cases, p. 1.

Crimes and Offences—Fortune-telling—Complaint—Relevancy—Intent to deceive—Act 5 Geo. IV. cap. 83, sec. 4—Prevention of Crimes Act, 1871, sec. 15.

2. A woman was charged in a Police Court with a contravention of the Act 5 Geo. IV. cap. 83, sec. 4, in so far as she did, at a time and place specified, "pretend to tell the fortunes of" a person named, "who was thereby induced to pay to the said accused" the "sum of sixpence." The accused was convicted of the contravention "as libelled," and brought a suspension. The Court *quashed* the conviction, holding that the complaint was irrelevant, in respect that it did not set forth that the accused had pretended to tell fortunes with intent to deceive and impose on anyone. Smith v. Neilson, March 18, 1896, Just. Cases, p. 77.

Crimes and Offences—Indecent Exposure—Specification—Relevancy.

3. A person was charged upon a complaint which set forth that "he did . . . on a boat in the River Clyde . . . wilfully, indecently, and in a shameless manner expose his person" to a person designed. The accused was convicted of the "crime charged." In a suspension the Court set aside the conviction on the ground that neither the complaint nor the conviction shewed the facts upon which the charge was rested. Carlin v. Malloch, Feb. 7, 1896, Just. Cases, p. 43.

JUSTICIARY CASES—*Continued.*

Crimes and offences—Murder—Child Murder—Culpable Homicide—Mental derangement short of insanity—Child-birth.

4. At the trial of a woman upon a charge of murdering her child by choking it immediately after its birth, the presiding Judge (Lord M'Laren) directed the jury that they were entitled to find the panel guilty of culpable homicide, if they were of opinion upon the evidence that her mental state at the time when the injury was inflicted, though not warranting an acquittal on the ground of insanity, was such as to make her only partially accountable for her acts. H. M. Advocate v. Abercrombie, May 7, 1896, Just. Cases, p. 80.

Crimes and offences—Pharmacy Act, 1868, *secs.* 1 *and* 15—*Keeping open shop for retailing poisons by unregistered person—Chemist—Photographic Chemist.*

5. A dealer in photographic materials was charged with an offence under the Pharmacy Act, 1868, sec. 1, in so far as he, not being a duly registered pharmaceutical chemist, or a chemist and druggist, did at his shop unlawfully "keep open shop for the retailing, dispensing, or compounding of poisons." The following facts were proved:—That the accused had not the statutory qualification; that he had a shop open to the public for the sale of photographic materials, including some of the scheduled poisons; that his assistants were instructed to sell poisons only to persons engaged in photography or to chemists; that his trade catalogue bore that the scheduled poisons were only to be sold in wholesale quantities, but specified prices per ounce and per lb.; that an assistant in the shop on one occasion sold one ounce of one of the scheduled poisons. In an appeal upon a case stated *held* that the facts stated amounted to the offence of keeping open shop for the retailing of poisons. Bremridge v. Turnbull, Nov. 2, 1895, Just. Cases, p. 12.

Crimes and offences—Pharmacy Act, 1868, *secs.* 1 *and* 15—*Chemist—"Scientific instrument maker and technical chemist" assumed as designation by person not on the register.*

6. *Held* that the use of the title "scientific instrument maker and technical chemist" by a person who had not the statutory qualification was a contravention of the Pharmacy Act, 1868, sec. 1. Bremridge v. Hume, Nov. 2, 1895, Just. Cases, p. 9.

Crimes and offences—Theft—Reset—Conviction of reset on a charge of theft—Specification—Criminal Procedure (Scotland) Act, 1887, *sec.* 59.

7. A person was tried before a Sheriff and a jury on an indictment which set forth that the accused did, "between 6th and 12th October 1895, from a field or fields on the farm of Marchhill, in the parish and county of Dumfries, belonging to John Blackley, cattle-dealer, residing there, steal" three sheep. The jury returned this verdict,—"Find the accused guilty of reset of theft." In a suspension, *held* that the conviction was not bad for want of specification. Kennedy v. H. M. Advocate, Jan. 8, 1896, Just. Cases, p. 28.

Complaint—Statute—Bye-law—Penalty—Herring Fishery (Scotland) Act, 1889, *sec.* 7—*Sea-Fisheries Regulation (Scotland) Act*, 1895, *sec.* 10.

8. Section 7 enacts (subsection 1) that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling or otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness-shire, to Rattray Point, in Aberdeenshire"; and (subsection 2) that any person fishing in contravention of such bye-law should be liable to a fine not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence. In 1892 the Fishery Board issued a bye-law prohibiting beam-trawling or otter-trawling within the limits specified, and setting forth that any person acting in contravention of the bye-law should be liable to a fine

JUSTICIARY CASES—*Continued.*

not exceeding £5 for a first offence, and not exceeding £20 for a second or any subsequent offence. The Sea Fisheries Regulation (Scotland) Act, 1895, sec. 10, repealed sec. 7, subsec. 2, of the Act of 1889, and substituted for the penalties there provided a fine not exceeding £100, and failing payment imprisonment for a period not exceeding sixty days. A person was convicted of a contravention of the bye-law on a complaint which set forth that the accused was liable in a penalty not exceeding £100, and failing payment to imprisonment, and prayed for the imposition of the penalties provided by the Act of 1895. *Held*, in a suspension, that whether the penalty ought to have been specified in the bye-law or not, as it was in fact specified, and as the complaint was founded on the bye-law, the conviction fell to be quashed, as the penalty prayed for was in excess of that specified in the bye-law. Green v. Leith, Feb. 7, 1896, Just. Cases, p. 50.

9. *Held* (over-ruling *Green v. Leith*, *supra*, No. 8) (1) that the portion of the bye-law relating to penalties ought not to have been included in the bye-law, and was to be regarded as nothing more than a superfluous intimation by the Fishery Board of the statutory penalties incurred by a contravention of the bye-law at the date when the bye-law was framed; (2) that the bye-law, in so far as it prohibited beam-trawling or otter-trawling within the line from Duncansby Head to Rattray Point, remained in force notwithstanding the passing of the Act of 1895; and (3) that after the passing of the Act of 1895 the penalties incurred on conviction of a contravention of the bye-law were those specified in that Act, and not those specified in the Act of 1889. Therefore (1) where a complaint set forth that the accused was liable to a penalty not exceeding £100, and, failing payment, to imprisonment for a period not exceeding sixty days, and prayed for the imposition of the penalty provided by the Act of 1895, *held* that the complaint was well laid; but (2) where a complaint set forth that the accused had incurred a penalty not exceeding £5, and prayed for the imposition of the penalty provided by the bye-law and by the Acts of 1889 and 1895, *held* that the complaint was incompetent. Wilson v. Rust; Wilson v. Mackenzie, Feb. 29, 1896, Just. Cases, p. 56.

Complaint—Specification—Statutory offence—Reference to section of statute.

10. A complaint charging a statutory offence must specify the section or sections of the statute constituting the offence, except in cases where the statute is so brief as to render such specification unnecessary.

A complaint charged the accused with an offence "contrary to the Public-Houses (Scotland) Act, 1862, and the Acts 9 Geo. IV. c. 58, and 16 and 17 Vict. c. 67, therein referred to." *Held* that the complaint was irrelevant for want of specification. Buchanan v. Wilson, July 16, 1896, Just. Cases, p. 86.

Procedure—Inducie—Home Drummond Act, 1828, *sec.* 23—*Summary Procedure (Scotland) Act*, 1864, *sec.* 6—*Burgh Police (Scotland) Act*, 1892, *sec.* 515.

11. *Held* that a complaint of breach of a publican's certificate brought under the Summary Procedure Act and the Burgh Police Act, 1892, must be served upon an *inducie* of six days in terms of the Home Drummond Act, 1828. Laird v. Anderson, Nov. 2, 1895, Just. Cases, p. 14.

Procedure—Illegal Citation—Burgh Police Act, 1892, *sec.* 477.

12. Where a person cited under the Burgh Police Act, 1892, upon an *inducie* of three days to answer to a complaint which required an *inducie* of six days, appeared and pleaded that she had not been duly cited, and was afterwards convicted, *held* that the citation being invalid the subsequent proceedings were inept. Laird v. Anderson, Nov. 2, 1895, Just. Cases, p. 14.

JUSTICIARY CASES—*Continued.*

Procedure—Verbal Citation—Person with known address—Oppression.

13. *Observed per cur.* that when a person charged with a police offence has a known place of residence, it is oppressive to bring him before a magistrate without serving upon him a copy of the complaint (unless he is apprehended *in flagrante delicto*). Carlin v. Malloch, Feb. 7, 1896, Just. Cases, p. 43.

Procedure—Irregularity—Interlocutor adjourning diet unsigned—Exclusion of review—Burgh Police Act, 1892, *sec.* 495.

14. The record of the proceedings under a complaint charging an offence under the Burgh Police Act, shewed that the magistrates made several adjournments of the diet, and the magistrates omitted to sign the interlocutor making the final adjournment until after the trial and conviction of the accused. *Held* that this omission rendered the trial and the conviction irregular and illegal, and that the conviction fell to be quashed, notwithstanding the provision of sec. 495 of the Burgh Police Act. MacArthur v. Campbell, March 18, 1896, Just. Cases, p. 81.

Oppressive Prosecution—Burgh Police Act, 1892, *sec.* 180.

15. A person erected a house in a burgh, and let it to a tenant on the condition that he should not enter into occupation until it was finished. During the absence of the landlord the tenant occupied the house without any notice having been given under section 180 of the Burgh Police Act. On the landlord's return he at once gave notice to the town-clerk that the house was ready for inspection. A prosecution was instituted against him for failure to give notice before the house was occupied, and he was convicted and sentenced to a fine of 10s. *Opinion per* Lord Young, that the prosecution was nimious and oppressive in the circumstances, and that the conviction should be set aside. MacArthur v. Campbell, March 18, 1896, Just. Cases, p. 81.

Proof.

16. At the trial of a butcher before a Sheriff and a jury for reset of theft of sheep, the agent for the accused proposed to prove that the man who had stolen the sheep libelled had sold other stolen sheep to other butchers who had bought *in bona fide* ignorance that the sheep had been stolen. In a suspension *held* that the Sheriff had rightly disallowed this line of evidence. Kennedy v. H. M. Advocate, Jan. 8, 1896, Just. Cases, p. 28.

17. The record of the proceedings in a Police Court prosecution set forth that Bridget Macdonald had appeared and given evidence for the prosecution. In a suspension it appeared that the witness examined was not Bridget Macdonald; that she knew nothing at first hand of the facts to which she had spoken; and that she had been told what to say. *Held* that the conviction fell to be quashed in respect that the record set forth the name of a witness who had not been examined, and failed to set forth the name of a witness who had been examined. Gachie v. Auld, July 16, 1896, Just. Cases, p. 87.

Conviction—Verdict—Alternative charge and general conviction—Post-Office offence—Stealing or secreting letters—Post-Office Offences Acts Consolidation Act, 1837, *sec.* 26.

18. *Held* that the alternative statements in the Post-Office Offences Act, 1837, were not statements of proper alternative offences, but were only specifications of different modes in which the statutory offence might be committed, and therefore that a general verdict of guilty as libelled on an indictment setting forth that the accused did "steal or secrete a post letter," contrary to the Act, was a good verdict. Teesdale v. H. M. Advocate, March 17, 1896, Just. Cases, p. 73.

Conviction—Several charge and general conviction—Prevention of Cruelty to Animals Act, 1850, *sec.* 1.

19. A complaint set forth that A, a carriage-hirer, and B his servant, did

JUSTICIARY CASES—*Continued.*

"cruelly beat, illtreat, overdrive, . . . or procure to be cruelly beaten, illtreated, overdriven," two horses belonging to A, then under charge of B, and did cause the said animals to draw a brake laden with passengers, and the said B did unmercifully and unnecessarily lash them with the shaft of a whip, said animals being in a poor, weak, and emaciated condition, and completely exhausted, whereby said animals were subjected to pain and suffering, contrary to the Act 13 and 14 Victoria, caput 92, section 1." The Justices found A and B "guilty of the contravention charged," and convicted them. In a suspension by the master *held* that the conviction against him was bad, on the ground that as one of the acts charged as together constituting the contravention was attributed to the servant alone, the general conviction against the master was not valid. Galbraith v. Disselduff, Oct. 25, 1895, Just. Cases, p. 4.

Sentence—Separation of competent portion of sentence from incompetent—Warrant to recover penalty by poinding—Vaccination (Scotland) Act, 1863, secs. 18 *and* 25.

20. A conviction and sentence of a contravention of the Vaccination Act, 1863, sentenced the accused to payment of a fine and expenses, and continued,—"And in default of immediate payment thereof, grants warrant for recovery of the said sums by poinding of his goods and effects, and summary sale thereof on the expiration of not less than forty-eight hours after such poinding, without further notice or warrant, and appoints a return or execution of such poinding and sale to be made within eight days from this date, under certification of imprisonment for the period of ten days in default of payment or recovery of the said sums, with the expenses of diligence, before the time allowed for such report." In a suspension the prosecutor admitted that the warrant for poinding was *ultra vires*, but maintained that, *quoad ultra*, the sentence was valid and ought to be upheld. The Court *suspended* the conviction *simpliciter*, holding that it was impossible to separate the warrant to poind from the remainder of the sentence so as to leave a sentence which was valid in terms of the Act. Moffat v. Shaw, Jan. 8, 1896, Just. Cases, p. 18.

Sentence—Conviction—Expenses—Summary Procedure (Scotland) Act, 1864, Schedule K, Form 3.

21. A conviction and sentence in the form of Schedule K, No. 3, of the Summary Procedure (Scotland) Act, 1864, *suspended*, on the ground that it adjudged the accused, in default of immediate payment of the penalty imposed, to be imprisoned for fourteen days, "unless the said penalty and expenses shall be sooner paid," while no award of expenses had been pronounced against the accused. Dingwall v. Davidson, Jan. 9, 1896, Just. Cases, p. 31.

Appeal—Case stated—Competency—Time—Summary Prosecutions Appeals (Scotland) Act, 1875, sec. 3.

22. Applications under section 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, to the inferior Judge to state a case for appeal, must be made within the three days provided by that section, even where the last of the three days is a Sunday. M'Vean v. Jameson, Jan. 8, 1896, Just. Cases, p. 25.

See *Fishing*, 4, 5.

LEASE. *Constitution—Lease by bona fide possessor without title—Assignation.*

1. The title of a *bona fide* possessor of land, who had granted a lease of minerals for twelve years, was reduced when 3½ years of the lease had still to run. He then granted an assignation of the lease in favour of the true owner, who undertook to implement the granter's obligations.

LEASE—*Continued.*

In an action by the lessee against the granter and the assignee for declarator that the pursuer was not bound by the lease, *held* that the lease was not binding on the true owner when he established his right to the lands, and therefore that it was not binding on the tenant, and that the assignation had no effect, as the granter had nothing to assign, *diss.* Lord Young, who was of opinion (1) that, as the lease had been granted by a *bona fide* possessor in the course of ordinary administration, it was binding upon the true owner, and (2) that if the lease was not binding upon him originally he was entitled to validate it by homologation, and had done so. Reid's Trustee v. Watson's Trustees, March 13, 1896, p. 636.

Construction—River—Lease of water in ponds and "streams leading thereto"—Whether water percolating to pond from spring a "stream."

2. Under the lease of a distillery the tenant had right to the water in two ponds, "and in the streams leading thereto." A stream from the hills entered the upper pond, which was connected with the lower pond by another stream. A few yards from the lower pond was a spring, water from which percolated through marshy ground into that pond. After the date of the lease the landlord collected the water from the spring into a tank, and by means of a pipe carried part of this water to the house of another of his tenants, the remainder of the water collected in the tank passing through an overflow pipe into the pond. The tenant of the distillery having brought an action to have the landlord interdicted from interfering with the water from the spring, *held* after a proof that the tenant was not entitled to interdict, *per* the Lord Justice-Clerk and Lord Trayner, on the ground that water percolating from a spring to a pond did not constitute a stream in the sense of the lease, and *per* Lord Young on the ground that in the circumstances as disclosed by the evidence the tenant had not suffered any prejudice from the landlord's operations. M'Nab v. Campbell's Trustees, July 17, 1896, p. 1098.

Passive Title—Heir—Lease excluding assignees.

3. A nineteen years' lease of an urban subject was granted to a tenant and his heirs, but excluding assignees and subtenants without the consent of the lessor. On the death of the tenant, his heir took up the lease. *Held* that the heir did not incur passive representation for the debts of his predecessor, in respect that he took the lease, not as representing his ancestor, but in his own right under the lease. Bain v. Mackenzie, Feb. 25, 1896, p. 528.

Long Lease—Fee and Liferent—Husband and Wife—Assignation of lease—Destination to spouses in conjunct fee and to the survivor in fee.

4. A lease for ninety-nine years was assigned to spouses "in conjunct fee and to the survivor of them in fee." *Held* that the fee vested in the spouses jointly, with the benefit of survivorship. Walker v. Galbraith, Dec. 21, 1895, p. 347.

Long Lease—Destination—Vesting—Succession—Conditio si institutus sine liberis decesserit.

5. Certain subjects were leased for 950 years to A. P., "and his heirs as after mentioned," and failing him "then the whole subjects to and in liferent only to the present wife of the said A. P. . . . and after the death of the said spouses . . . then to the children of their marriage equally between them, share and share alike, in fee." A. P. was survived by his wife. Three children of their marriage were alive at the date of the lease, of whom two survived their father. *Held* in a competition as to the right to the lease on the death of the widow, that the right to the lease, subject to the widow's liferent, had vested on the death of the father in the two children then alive to the extent of one half each, and that a daughter of the third child who had prede-

ceased that date had no right, as the *conditio si sine liberis* did not apply, the lease having been granted by a stranger to the family, and not as a parental provision. Marquis v. Prentice, March 12, 1896, p. 595.

Long Lease—Right in Security—Poinding of the ground—Registered bond and assignation in security of long lease—Registration of Leases (Scotland) Act, 1857, sec. 4.

6. *Held* that the creditor under a bond and assignation of a ninety-nine years' lease duly recorded in terms of the Registration of Leases (Scotland) Act, 1857, sec. 4, was not entitled to warrant for poinding of the ground. Luke v. Wallace, March 13, 1896, p. 634.

Compulsory Sale—Compensation to tenant—Lease with break.

7. A tenant of a farm under a lease to Whitsunday 1911, which gave power to the landlord or tenant to terminate it at Whitsunday 1898, being deprived of land by a Local Authority under compulsory powers, claimed, in an arbitration under the Lands Clauses Act, 1845, compensation for loss of profits on the basis of the lease extending to Whitsunday 1911. The Local Authority contended that the lease should be taken as ending at Whitsunday 1898. *Held* that the tenant was entitled to compensation on the footing that the lease endured to Whitsunday 1911, subject to such deduction as the arbiter might consider due to the contingency of its being brought to an end at an earlier date. Fleming v. District Committee of Middle Ward of Lanarkshire, Nov. 15, 1895, p. 98.

Compulsory Sale—Railway—Construction of railway—Compensation—Yearly tenant—Procedure—Arbitration—Sheriff—Railway Clauses Consolidation (Scotland) Act, 1845, sec. 6—Lands Clauses Consolidation (Scotland) Act, 1845, sec. 114.

8. A claim by a yearly tenant against a railway company for compensation under sec. 6 of the Railway Clauses Consolidation (Scotland) Act, 1845, falls to be determined by the Sheriff under sec. 114 of the Lands Clauses Consolidation (Scotland) Act, 1845—and not by arbitration—whether the claim is on account of lands injuriously affected or is on account of lands taken. Glasgow District Subway Co. v. Albin & Sons, Nov. 6, 1895, p. 81.

Outgoing and Incoming—Compensation—Tenant's claim for arbiter's valuation—Counter claim by landlord under the lease—Liquid and illiquid.

9. In an action by an outgoing tenant against his landlord for sums ascertained to be due to the pursuer under his lease by arbiters mutually chosen, the defender pleaded that he was entitled to set off against the pursuer's claim a counter claim for interest on improvement expenditure, &c. under the lease. *Held* that as the pursuer's right depended on his having implemented his obligations under the lease he was not entitled to decree *de plano*, and a proof allowed. Lovie v. Baird's Trustees, Oct. 16, 1895, p. 1.

Outgoing and Incoming—Compensation—Claim by tenant under a separate contract—Counter claim by landlord under the lease—Liquid and illiquid.

10. In an action by an outgoing tenant against his landlord for the price of the waygoing crop, which had been ascertained, as provided for by the lease, in a submission entered into between the parties at its termination, the defender, who had taken over the crop and admitted that the price was due, pleaded that he was entitled to set off against the pursuer's claim an illiquid counter claim under the lease for damages against the tenant for miscropping and for failing to upkeep buildings. *Held* that the landlord's illiquid counter claim under the lease was not a relevant defence to the tenant's claim for the sum found due to him by the decreet-arbitral. Sutherland v. Urquhart, Dec. 13, 1895, p. 284.

LEASE—*Continued.*

Compensation for improvements—Notice—Determination of tenancy—Agricultural Holdings (Scotland) Act, 1883, *sec.* 7.

11. A farm was let for a term of years "with entry at Martinmas 1885," subject to the condition that the tenant should only get possession of the threshing-mill "after the landlord shall have done with using the same in threshing out last year's crop." The conditions of lease provided that no turnips growing on the farm should be sold, but that the whole should be consumed and made down into dung and regularly applied to the lands. It was further provided that the tenant should have right to the barn, threshing-mill, and barnyard, till the "term of Whitsunday, after the termination of the lease, for the purpose of stacking and threshing his waygoing crop. *Held* that "the determination of the tenancy" was at Martinmas, although the tenant was entitled under the lease to remain in occupation of the land under turnips, and to a limited use of the barnyard and threshing-mill after that date, and that notice of a claim for compensation fell to be given by the tenant four months before Martinmas. Waldie v. Mungall, June 16, 1896, p. 792.

Desertion of farm—Appointment of manager—Sheriff—Jurisdiction—Judicial Factor—Reduction.

12. Where a tenant has deserted a farm without making proper provision for its management, it is competent for the Sheriff, on the petition of the landlord, to appoint an interim manager.

A landlord, on 31st August 1894, presented a petition in the Sheriff Court for the appointment of a manager upon a farm, alleging that the tenant had almost entirely displenished the farm, had left it without appointing any manager, and was believed to have gone to America without the intention of returning. No appearance was entered for the tenant, who had left for America on 24th August, and the Sheriff, without inquiry, made the appointment craved, and by an interlocutor dated 10th October, pronounced a fortnight after the tenant had returned to his farm, approved the manager's report of his management, and granted him a discharge. Thereafter the tenant raised an action against the landlord concluding for reduction of the decree appointing the manager, and of the subsequent interlocutors, on the ground that the application to the Sheriff was incompetent, and that, in any view, the Sheriff was not entitled to grant the petition without making inquiry. He averred that he had not deserted the farm, but had been merely temporarily absent from it. He made no claim for damages in the action, and did not aver that he had suffered pecuniary loss by the defender's proceedings. He stated, however, that he reserved his claim for damages in respect thereof. After a proof the Court *assoilzied* the defender, *holding* that in the absence of any claim for damages the only ground of action which fell to be considered was the competency of the proceedings in the Sheriff Court, and that as it had been proved that the landlord had reasonable grounds for believing that the tenant had deserted his farm without making any proper provision for its management, these proceedings were competent. Gibson v. Clark, Dec. 13, 1895, p. 294.

See *Crofter—Mines and Minerals*, 1, 2, 3.

LEGITIM. See *Succession*, 7, 8, 9.

LIEN. *Minute-book of Company.*

Held that a person who had been secretary of a company prior to its liquidation had no right of retention or lien over its minute-book for a debt due to him by the company. Gladstone v. M'Callum, June 16, 1896, p. 783.

See *Ship*, 4.

LIFERENT. See *Succession*, 12.

LIQUID AND ILLIQUID. See *Lease*, 9, 10.

LOAN. *Right in Security—Agreement for repayments out of profits—Specific appropriation—Breach of trust.*

1. A offered to advance to a shipping company £15,000 on a mortgage over a steam vessel, "on condition that all profits earned by the steamer to be paid to us towards reducing the loan till the loan shall have been reduced to £10,000." The managing committee of the company agreed to accept the offer, subject to the modification "that instead of all the profits being paid to A till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then." A agreed to the modification, and the arrangement was approved by the company. Subsequently the advance was made, and the mortgage granted. The company went into liquidation. *Held* that the agreement imported merely a personal obligation by the company to pay to A £2000 per annum from profits, and that A had no preference over the profits. Graham & Co. v. Raeburn & Verel, Nov. 7, 1895, p. 84.

Proof—Bank Cheque.

2. In support of a claim against the estate of a deceased person for repayment of an alleged loan, the creditor produced a cheque drawn by her payable to the deceased or bearer, and marked paid by the bank, but not indorsed by any payee. *Held* that the cheque did not of itself instruct a loan, and afforded no ground for allowing parole proof. Dunn's Trustee v. Hardy, March 12, 1896, p. 621.

Proof—Writ—Writ of executor and trustee—Writ of beneficiaries—Res inter alios.

3. In an action of multiplepoinding brought by a testamentary trustee, a claim was lodged by A, who averred that "from time to time she made loans of money" to the truster amounting in all to £390. In support of her claim A referred to a minute of agreement entered into between the truster's widow, since deceased, who was at the time his executrix and sole trustee, and his eldest son, under which the son took over at a valuation the crop and stocking on certain farms of which the truster had been tenant. There was appended to the minute, which was tested, a state of the trust funds, and among the "outstanding debts" was entered "sum on debt due to" A "£390." The state was signed by the widow and eldest son, and appended to it was a docquet signed by the truster's other children, who, with the widow and eldest son, were the beneficiaries under his will, approving of the minute of agreement, and also "approving of and holding as correct, and duly vouched" the state of trust funds. A, to whom the document had not been delivered or exhibited at any time, maintained that the debt of £390 was proved by it, or alternatively that it raised a *prima facie* case of loan which she was entitled to supplement by parole proof. *Held* (1) that the docquet was not a writ binding on the beneficiaries as in a question with A, but was merely an admission or discharge by them in favour of the truster's widow; (2) that the entry of the sum of £390 was ineffectual to prove a debt due by the trust-estate, in respect (*a*) that the writ in which it occurred was not delivered to A as an acknowledgment by the trustee that the debt was due, and (*b*) that such an acknowledgment, if delivered to A, would not have been binding on the trust-estate; and (3) that the writs being themselves insufficient to prove the constitution of a loan there was no room for parole proof to any effect. Dunn's Trustee v. Hardy, March 12, 1896, p. 621.

Proof—Writ—Writ of executor.

4. *Held* that an affidavit in support of a claim for return of inventory-duty in which an executor deponed that he had actually paid debts "due and owing from the deceased at the time of his death," including

LOAN—*Continued.*
a debt due to A, was not evidence of the constitution of a debt due to A. Dunn's Trustee v. Hardy, March 12, 1896, p. 621.

LOCAL GOVERNMENT BOARD. See *Public Health*, 1, 2.

LUNATIC. See *Insanity.*

MAILLS AND DUTIES. *Superior and Vassal—Right in Security.*
Held that the creditor in a bond and disposition in security of a superiority, with an assignation to feu-duties and casualties, has no title to sue an action of maills and duties against the vassal of his debtor for recovery of the feu-duties. Nelson's Trustees v. Tod, July 9, 1896, p. 1000.

MANDATE. See *Process*, 14.

MARKET. See *Burgh*, 1, 2.

MARRIAGE-CONTRACT. *Vesting—Entail—Provision by heir of entail for younger children.*
1. C, an heir of entail in possession, by his marriage-contract, in the exercise of a power under the deed of entail, bound the succeeding heirs to pay to the trustees a sum equal to three years' rent of the entailed estate, in trust for behoof of the children of the marriage not succeeding to the entailed estate, in such shares as C should appoint, and failing appointment, to be held by the trustees for the younger children alive at C's death equally, or their issue. As a further provision for his younger children, he assigned to his trustees certain policies of assurance on his life under similar conditions as to apportionment. In contemplation of the marriage of R, his third son, C executed a deed appointing to R or his lawful issue or assigns £1500 as his share of the total trust funds. This deed was declared to be delivered on execution, and to be irrevocable, and R was taken bound to assign his rights under it to his marriage-contract trustees. R predeceased his father. *Held* that R's right to the £1500 was not contingent on his surviving his father, and that it vested at the date of the appointment in his favour. Chancellor's Trustees v. Sharples' Trustees, Jan. 24, 1896, p. 435.

Vesting—Clause of survivorship—Power of appointment.
2. By antenuptial marriage-contract A bound himself "to make payment to the child or children that may happen to be procreate of this marriage of" £8000 "to be payable at the first term of Whitsunday or Martinmas after the death of the longest liver of him" and his intended spouse, "which sum in the event of there being more children than one shall be divisible in such proportions as A shall appoint, by a writing under his hand at any time of his life, and failing such appointment, to be divided equally amongst the survivors of them and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life." Thirty years after his marriage A executed a deed apportioning the fund among his children then alive (there being no issue of predeceasers) as follows,—to his son B, "whom failing, by his predeceasing the term of payment, his issue," a certain sum and the remainder equally among his other children C, D, and E, and the survivors and survivor of them, and the issue of such as may have predeceased the term of payment leaving issue." A was survived by his widow and by these children. In a special case presented during the lifetime of A's widow by the representative of one of the children who had survived A and had died without issue, and by the surviving children, *held* (1) that under the marriage-contract the right to the sum payable by A's executors at the first term of Whitsunday or Martinmas after the death of the surviving spouse did not vest in the children prior to that date; and (2) that the apportionment was valid. Blackburn's Trustees v. Blackburn, March 20, 1896, p. 698.

MARRIAGE-CONTRACT—*Continued.*

Fee and Liferent—Assignation of lease—Destination to spouses in conjunct fee and to the survivor in fee.

3. A lease for ninety-nine years was assigned to spouses "in conjunct fee and to the survivor of them in fee." *Held* that the fee vested in the spouses jointly, with the benefit of survivorship. Walker v. Galbraith, Dec. 21, 1895, p. 347.

Special Destination—General Settlement.

4. A long lease of heritage was assigned to D. D. and M. D., his wife, "in conjunct fee, and to the survivor of them in fee, and at the death of the survivor to the heirs of the said D. D. and M. D., equally between them." The spouses subsequently executed a mutual settlement, by which they conveyed to the survivor of them in liferent for his or her liferent use only, and at the death of the survivor to two sons of the wife by a former marriage, their whole heritable and moveable estate. At the date of the mutual settlement the spouses had no other property than the lease carried by the assignation. *Held* that the destination in the assignation to the heirs of the spouses was evacuated by the mutual settlement. Walker v. Galbraith, Dec. 21, 1895, p. 347.

Power to revoke—Conjugal Rights Amendment Act, 1861, *sec.* 16—*Reasonable provision for wife.*

5. Spouses who had invested a legacy of £1000, received by the wife from a relative, in their joint names, executed the following deed,—"We . . . in order to regulate the succession to our heritable and moveable estates after our deaths, have resolved to grant these presents . . . We . . . do hereby leave and bequeath, assign and dispone to the last survivor of us in liferent for his or her liferent use allenarly, whom failing, to our son in fee," certain of the investments, declaring that in the event of the son dying before the surviving spouse without leaving issue and intestate, the shares and moneys should be divided equally, one share to be divided among the children of the husband's brother, and the other share to be paid to the wife's brother. The residue of the estates of the two spouses was bequeathed to the surviving spouse, and "in so far as these presents relate to the shares . . . and moneys to be liferented by the survivor of us are concerned, we hereby mutually declare the same to be irrevocable unless with our joint consent." The husband survived, and the son died during his survivance without issue and intestate. In an action brought by the wife's brother against the husband for declarator that he had an indefeasible right under the mutual deed, and that the husband was not entitled to revoke it to the pursuer's prejudice, *held* that the deed was contractual, and, in the sense of section 16 of the Conjugal Rights Amendment Act of 1861, a reasonable provision by the husband for the support of the wife, and was not revocable by the husband. Mudie v. Clough, July 17, 1896, p. 1074.

Satisfaction.

6. *Legacy which was* held *not to be in satisfaction of marriage-contract provision.* Johnstone v. Haviland, Feb. 17, 1896, H. L., p. 6.

Denuding—Annuity to wife—Power to discharge stante matrimonio—Purchase of annuity in lieu of that provided in marriage-contract.

7. By antenuptial contract dated in 1866, the father of the intended husband bound himself to pay £40,000 to the marriage-contract trustees for the purpose, *inter alia*, of payment to the wife, in the event of her surviving her husband, of a free yearly annuity of £800 during her lifetime. This annuity was not declared to be alimentary. In 1895 the spouses and the children of the marriage (who were *sui juris*) called on the trustees to denude of the £40,000, alleging that the whole fund had vested in the children absolutely, subject to the annuity contingently provided to the wife, and that she had agreed to

MARRIAGE-CONTRACT—*Continued.*
discharge that annuity. *Held* that the trustees were not entitled to denude of the £40,000, in respect that the annuity was a marriage-contract provision which the wife was not entitled *stante matrimonio* either to alienate or to discharge.

Held, further, that the trustees were not entitled to purchase with the trust funds an annuity in their names, payable to the wife contingently on her surviving her husband, and, *quoad ultra*, to denude of the trust funds, in respect (1) that the security of the trust funds was greater than that of a purchased annuity, and (2) that a purchased annuity, not being protected by the marriage-contract trust, could be alienated by the wife. Ker's Trustees v. Ker, Dec. 13, 1895, p. 317.
See *Entail*, 4.

MASTER AND SERVANT. See *Reparation*, 1 *to* 7.

MINES AND MINERALS. *Entail—Restriction of provisions to Widow and Children—5 Geo. IV. c. 87 (Aberdeen Act), secs. 1 and 4—Free yearly rent—Mineral Lease—Royalties—Approaching exhaustion of minerals.*
1. *Held* by a majority of seven Judges that in estimating the provisions which an heir of entail is entitled under sections 1 and 4 of the Aberdeen Act to make for his widow and children, the royalties payable under mineral leases during the year current at the date of the granter's death fall to be taken as part of the "free yearly rent" of the entailed estate, irrespective of the fact that the minerals are nearly exhausted. Lord Belhaven and Stenton, Jan. 23, 1896, p. 423.

Lease—Construction.
2. A proprietor let to a tenant the coal under certain lands described, with the sole right of working and winning "the whole or any part of said coal" for the period of 171 years, but with power to the tenant to renounce the lease in certain events, and, *inter alia*, so soon as that part of the coal was worked out which lay above what was known as the day level. On his part the tenant bound himself to pay to the landlord, "as long as the workings are confined to that part of the coal which is above" the day level, a fixed rent of £200, or in the option of the landlord one-seventh of the gross produce of the coal. He also bound himself to proportion the working of the splint seam "as nearly as possible" to the other seams in the same manner as was observed in other well-regulated collieries. It was further agreed that in case the tenant, his heirs and successors, "shall not avail themselves of the break stipulated for in this lease when that part of the coal is worked out which lies above" the day level, "but shall declare their intention of proceeding to work out the remainder of the coal, . . . then and in that event, and so soon as the said coal lying above the said level shall be completely worked out . . . the rent and proportion hereinbefore specified . . . shall thencefurth cease and determine," and the tenant and his foresaids "shall in lieu thereof" be bound to pay a fixed rent of £150, or in the option of the landlord one-tenth of the gross produce of the coal, "the said restricted rent to commence either upon the day in which the sale of the coal under the foresaid level commences, or at the expiry of two years from the day upon which the former rent ceases, whichever of these events shall first happen." In an action raised by the landlord for declarator that the tenant was not entitled to work the coal below the day level until the coal above that level was exhausted, the tenant maintained that, as no restriction was expressed in the lease, no restriction was to be implied. *Held* that the tenant was not entitled to work coal below the day level until the coal above that level was exhausted. Carron Company v. Henderson's Trustees, July 15, 1896, p. 1042.

MINES AND MINERALS—*Continued.*

Lease—Agreement to alter—Proof—Acquiescence in contravention of lease—Personal Bar.

3. By the provisions of the lease of a coal-field granted in 1798 for a period of 171 years, the tenant and his successors were not entitled to work the coal below what was known as the "day level" until the coal above that level was exhausted. In 1828 it was found that the most valuable seam in the field was practically worked out above the day level, and the tenant, with the approval of the landlord, began to work below that level. After that date, with occasional intervals, the tenant and his successors continued, with the knowledge and tacit consent of the landlord, to work coal below the day level, although the upper seams of coal were unexhausted, and with the view to such working they drove mines to the lower seams. In an action raised by the landlord in 1895, for declarator that the tenant was not entitled to work coal below the day level until the coal above that level was exhausted, and for interdict, *held* that the landlord's consent to the tenant's deviation from the lease in the past did not imply an agreement to alter the terms of the lease, and that the landlord had done nothing to bar himself from demanding their observance in the future. Carron Company v. Henderson's Trustees, July 15, 1896, p. 1042.

Railway—Compulsory Powers—Misappropriation of freestone—Reparation—Measure of damages.

4. A railway company having wrongously excavated certain freestone reserved to their superiors, *held* that the superiors were entitled to recover from the company the market value of the freestone used or removed by them, less the cost of working, although it appeared that the superiors could not themselves have worked or let the freestone to a profit. Davidson's Trustees v. Caledonian Railway Co., Oct. 29, 1895, p. 45.

Superior and Vassal—Feuar's right to freestone for building on feu—Whether railway bridges and other works within right.

5. A feu-charter, which reserved the freestone to the superior, gave power to the feuar, notwithstanding the reservation, to dig or work the freestone for erecting "houses and offices, or walls or other buildings" upon the feu, or for making or repairing the roads thereon. A railway company having taken over the feu by compulsory purchase, *held* that it was within the powers of the feuar to dig freestone for the construction of bridges and other railway works on the feu. Davidson's Trustees v. Caledonian Railway Co., Oct. 29, 1895, p. 45.

Superior and Vassal—Feu with minerals reserved to granter—Lease of minerals—Damage caused to feu by working of minerals—Action by feuar against granter—Process—"All parties not called."

6. A granted a feu of certain subjects, reserving the minerals, and afterwards leased the minerals. Injury having subsequently been occasioned to the surface of the feu by the workings of the mineral tenants, the feuar raised an action of damages against A. The defender, averring that the injury was due solely to the fault of the mineral tenants, pleaded, "All parties not called." *Held* that the pursuer was entitled to proceed with his action without calling the mineral tenants. Highgate & Co. v. Magistrates of Paisley, July 9, 1896, p. 992.

Superior and Vassal—Reservation in feu-charter—Power to "search for and work out" coal—"Shank or open the ground"—"Close or garden."

7. A feu-charter, dated in 1728, contained a reservation in the granter's favour of the coal under the subjects feued, with power "to search for, work out, and dispose of the said coal, . . . and provided that, in searching for or working said coal, we doe not shank or open the ground within the house, office-houses, closs, or gardens to be built or made upon the said landa." In 1895 a successor of the granter

MINES AND MINERALS—*Continued.*

commenced boring operations at a spot which was within thirteen yards of one of the main entrances of the mansion-house built upon the feu, and which was situated in an artificially made and enclosed piece of ground laid out partly in grass and partly in flower beds. The bore was sunk in the part laid out in grass. In a note of suspension and interdict presented by the feuar to have the boring operations interdicted, *held* (1) that "boring" was covered by the expression "opening the ground"; and (2) that the place where the operations were being carried on was a "close or garden" in the sense of the charter, and was therefore within the prohibited area. Macdonald v. Welsh, July 9, 1896, p. 995.

Valuation Acts—Subjects—Erections by lessee—Clayfield—"Minerals"—Lands Valuation (Scotland) Amendment Act, 1895, *sec.* 4, *Exemption* 2.

8. A tenant who under his lease had right to dig and take clay to a considerable depth below the surface made certain erections upon the ground let to him, which he used exclusively for the purpose of working the clay. *Held* that "clay" was a "mineral" within the meaning of exemption 2 of section 4 of the Lands Valuation Amendment Act, 1895. Assessor for Portobello v. Mitchell & Sons, March 20, 1896, p. 686.

See *Reparation*, 2, 4, 5.

MINOR AND PUPIL. *Allowance for heir's maintenance and education.*

1. *Circumstances in which a mother, who had for ten years as her son's tutor and curator managed large entailed estates and kept up the family residence for her own and his behoof at a cost of* £3000 *per annum, and expended upwards of* £1000 *per annum in his maintenance and education and his travelling and other expenses, was* held (varying *judgment of the First Division*) *entitled in a question with her son to take credit for an annual charge at the rate of* £3000 *for his maintenance and education, in the sense of fitting him for his future position in life.* Ross v. Ross, July 27, 1896, H. L., p. 67.

Removal of Tutor and Curator.

2. A petition at the instance of one of two testamentary trustees and executors, who were also tutors to the truster's pupil children, for the removal of the other trustee from these offices on the ground that his estates had been sequestrated, and that the trust had a claim against his estate, *granted.* Whittle v. Carruthers, June 2, 1896, p. 774.

Custody and religious education of pupil orphans—Guardian—Mora—Guardianship of Infants Act, 1886, *secs.* 2 *and* 3.

3. In April 1893, the mother of three pupil children, a year after her husband's death, and a month before her own, sent them to the manager of a Protestant Home in this country, with a view to their being sent to Canada, or kept in this country, as the manager should consider best. Two of the children were sent to a similar Home in Canada in March 1894, and all were well cared for and brought up as Protestants. In October 1895 the grandfather and an uncle of the children, who were their nearest male agnates, presented a petition craving the Court to deliver the children to them, or otherwise to ordain the manager of the Homes to bring up and educate the children as Roman Catholics. They averred that the parents of the children were Roman Catholics, and that they had both expressed the desire that their children should be brought up in that religion. The Court *refused* the petition in respect that the children had been sent to the Homes by their mother, who was their legal guardian, and that it would not be for the benefit of the children to disturb the arrangements made for their upbringing and religion, seeing that these had endured for three years. Kincaid v. Quarrier, March 19, 1896, p. 676.

MINOR AND PUPIL—*Continued.*

Custody and aliment of children—Husband and Wife—Divorce—Conjugal Rights (Scotland) Amendment Act, 1861, *sec.* 9.

4. An order pronounced by a Lord Ordinary in an action of divorce, under the power conferred by section 9 of the Conjugal Rights Amendment Act, 1861, to make provision for the custody and aliment of pupil children of the marriage, ceases to be operative in regard to each child when it emerges from pupillarity. Watson v. Watson, Nov. 28, 1895, p. 219.

Illegitimate Child—Aliment—Custody—Father's offer to receive and support male child of seven years—Religion of Child.

5. The rule that the father of an illegitimate male child seven years of age is entitled to be relieved of the burden of alimenting it in its mother's custody if he offer to support it in his own home will not be applied when it appears that it would be detrimental to the welfare of the child to remove it from the mother's custody.

Question whether such an offer by a Roman Catholic father, who declares his intention to bring up the child in his own faith, will relieve him of the obligation to aliment the child if the Protestant mother chooses to retain the custody of the child, and states that she wishes the child to be brought up as a Protestant. Brown v. Halbert, May 19, 1896, p. 733.

NOBILE OFFICIUM. See *Charitable and Educational Bequests and Trusts*, 2, 3—*Process*, 12.

NOTICE. See *Lease*, 11.

NUISANCE. *Obstruction of Street—Nuisance—Interdict.*

A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. The town-council, which was the Local Authority, approved of these operations. In a suspension and interdict brought by an inhabitant to have the tramway company interdicted from continuing this practice, *held* that as the Local Authority were entrusted with the duty of seeing that the streets were cleared in such emergencies as a heavy snowstorm, and as they approved of the methods employed by the tramway company, the note of suspension and interdict fell to be refused. Ogston v. Aberdeen Tramways Co., Dec. 20, 1895, p. 340.

ONUS. See *Burgh*, 5—*Election Law*, 1—*Horse*, 1—*Ship*, 2.

PARENT AND CHILD. *Filiation—General averment in defence that pursuer had intercourse with other men—Allowance of proof of averments generally—Competency of specific questions as to such intercourse.*

1. In defence to an action of filiation and aliment relating to an illegitimate child born in December 1895, the defender denied the paternity, and averred "that about 1894 and 1895 the pursuer was indulging in sexual intercourse with several young men living in her own neighbourhood, among them being 'three men named,' and that one of them is the father of the child." The parties were allowed a proof "of their respective averments on record." *Held* that, whether the averment quoted was irrelevant for want of specification or not, as the defender had been allowed a proof of his averments, he was entitled at the proof to ask the men named in his averment whether they had had intercourse with the pursuer on particular occasions in the period specified. Barr v. Bain, July 17, 1896, p. 1090.

PARENT AND CHILD—*Continued.*

Illegitimate Child—Filiation—Proof—Effect of defender's false denial of material circumstances.

2. Evidence in an action of filiation which was *held* sufficient to establish that the defender was the father of the pursuer's child.

Observed that the denial by the defender in an action of filiation of material facts and circumstances (although not believed) does not corroborate the pursuer's statement, but that if the pursuer is corroborated as to material statements made by her, and as to which she is contradicted by the defender, the defender's denial, if proved false or not credited, may give a complexion to the whole evidence adverse to him. Macpherson v. Largue, June 16, 1896, p. 785.

For questions as to Custody, see *Minor and Pupil*, 3, 4, 5.

PARISH COUNCIL. *Chairman of Parochial Board ex officio trustee—Parish Council succeeding to Parochial Board—Local Government (Scotland) Act*, 1894, *secs.* 21 *and* 22.

A truster in 1885 nominated among her trustees "the chairman of the Parochial Board of the parish of K. and his successor in office for the time being, so long as such board shall exist." *Held* that the chairman of the Parish Council of K. was not entitled *ex officio* to act as a trustee under the deed. Parish Council of Kilmarnock v. Ossington's Trustees, June 20, 1896, p. 833.

See *Poor*, 2.

PAROCHIAL BOARD. See *Poor*, 1, 2.

PAROLE EVIDENCE. See *Bill of Exchange*, 2.

PARTNERSHIP. *Constitution—Contract—Advance to firm—Partnership Act*, 1890, *sec.* 2, *subsec.* 3.

1. A advanced money to a firm on an agreement entitling him to a share of the profits of the firm. *Held*, on a construction of the agreement, that A was not a partner of the firm. Laing Brothers & Co.'s Trustee v. Low, July 17, 1896, p. 1105.

Bankruptcy—Title to Sue—Sequestration of firm—Title of trustee to sue solvent partner for payment of debts due to firm's creditors.

2. *Question* whether the trustee on the estate of a firm which has been sequestrated has a title to sue a solvent partner for payment of the debts due by him as a partner to the creditors of the firm. Laing Brothers & Co.'s Trustee v. Low, July 17, 1896, p. 1105.

Stamp—Conveyance on sale—Transfer of assets of private partnership to public company—Identity of partners and shareholders—Consideration—Company—Stamp Act, 1891, *secs.* 54 *and* 55—*First Schedule.*

3. Where a private partnership conveyed its whole assets to a joint stock company limited by shares, consisting exclusively of the same partners, in consideration of each partner getting shares in the new company equal in value to his holding in the old partnership, *held* that the conveyance was a conveyance on sale within the meaning of the Stamp Act, 1891, and that the disposition was chargeable with *ad valorem* stamp-duty on the value of the stock transferred. John Wilson & Son, Limited, v. Inland Revenue, Oct. 22, 1895, p. 18.

PASSIVE TITLE. *Lease excluding assignees.*

A nineteen years' lease of an urban subject was granted to a tenant and his heirs, but excluding assignees and subtenants without the consent of the lessor. On the death of the tenant, his heir took up the lease. *Held* that the heir did not incur passive representation for the debts of his predecessor, in respect that he took the lease, not as representing his ancestor, but in his own right under the lease. Bain v. Mackenzie, Feb. 25, 1896, p. 528.

PATENT. *Validity—Prior Use.*

1. A paint manufacturer took out a patent for a gold paint made by mixing dissolved liquid pyroxylin with metallic substances in a powdered state. In an action for infringement against a person who was proved to have sold a gold paint of the same chemical composition, the defender pleaded that the patent was invalid by reason of prior use, and proved that prior to the date of the patent he had publicly used and sold his gold paint, which he had made by mixing a compound known as "Hartley's kristaline," of the composition of which he was ignorant, with metallic substances in a powdered state. It was proved that "Hartley's kristaline" was dissolved liquid pyroxylin. *Held* that the patent was invalid by reason of prior use. Gill v. Cutler, Dec. 21, 1895, p. 371.

Jurisdiction—Sheriff—Interdict.

2. A paint manufacturer in Aberdeen brought an action in the Sheriff Court at Aberdeen against a paint merchant there, to have him interdicted from making, using, and selling a paint which the pursuer alleged was an infringement of a patent which he had taken out. After the action was raised a paint manufacturer in Birmingham craved to be sisted as a defender, on the ground that he was the manufacturer of the paint sold by the defender, and thus had the real interest in defending the action. The Birmingham manufacturer was sisted accordingly. Thereafter the original defender withdrew from the action, interdict being pronounced against him, of consent and with the concurrence of the Birmingham manufacturer, and a record was made up between the pursuers and the Birmingham manufacturer, in which the latter raised the question of the validity of the pursuers' patent. After a proof, the Sheriff affirmed the validity of the patent, and granted interdict against the Birmingham manufacturer. In an appeal, *held* that the Sheriff had jurisdiction to pronounce this interlocutor. Gill v. Cutler, Dec. 21, 1895, p. 371.

PENALTY. See *Justiciary Cases*, 8, 9, 20.

PERSONAL OBJECTION. See *Insurance*, 2—*Sale*, 2—*Superior and Vassal*, 7.

PERSONAL OR REAL. See *Superior and Vassal*, 7, 9, 10.

PETITION. See *Process*, 23 *to* 27.

PLAN. See *Property*, 4—*Superior and Vassal*, 9.

POINDING. *Delay in selling poinded effects—Supervening cessio of debtor—Right of poinding creditor to a preference.*

1. A creditor executed a poinding of his debtor's effects on 25th July 1893, but took no further steps in the poinding, the debtor having from time to time made payments to account. Sixteen months thereafter the debtor took out cessio, and the poinding creditor lodged a claim to a preferable ranking in the cessio. *Held* that there had been undue delay on the creditor's part in following out his diligence by a sale of the poinded effects, and that the poinding was in consequence inept to found a preference. Henderson v. Grant, March 17, 1896, p. 659.

Warrant to recover penalty by poinding—Vaccination (Scotland) Act, 1863, secs. 18 and 25.

2. Conviction of a contravention of the Vaccination Act *suspended* in respect that it contained a warrant for poinding which was *ultra vires*, and that it was impossible to separate the warrant to poind from the remainder of the sentence so as to leave a sentence which was valid in terms of the Act. Moffat v. Shaw, Jan. 8, 1896, Just. Cases, p. 18.

POINDING OF THE GROUND.

Right in Security—Registered bond and assignation in security of long lease—Registration of Leases (Scotland) Act, 1857, sec. 4.

1. *Held* that the creditor under a bond and assignation of a ninety-nine years' lease duly recorded in terms of the Registration of Leases (Scotland) Act, 1857, sec. 4, was not entitled to warrant for poinding of the ground. Luke v. Wallace, March 13, 1896, p. 634.

Bankruptcy—Sequestration—Preference—Ground-annual—Bankruptcy (Scotland) Act, 1856, sec. 118.

2. *Held* that the creditor under a contract of ground-annual is entitled to the benefit of the proviso of the Bankruptcy Act, 1856, sec. 118, the annual payments under the contract being truly the interest on a debt of which the principal is the capitalised value of the annual payments. Bell's Trustees v. Copeland & Co., March 13, 1896, p. 650.

POLICE. *Police Commissioners—Power to delegate to a committee—Imposition of Assessment—Burgh Police Act, 1892, sec. 54.*

1. *Held* that under section 54 of the Burgh Police (Scotland) Act, 1892, Commissioners are entitled to delegate to a committee the power of hearing and deciding appeals under section 368 against assessments. Brown v. Magistrates of Leith, March 17, 1896, p. 654.

Assessment—Private Improvement Expenses—Police Commissioners—Finality Clause—Review—Burgh Police (Scotland) Act, 1892, secs. 339 and 368.

2. The owner of property abutting on a private street appealed to the Commissioners under sec. 368 of the Burgh Police (Scotland) Act, 1892, against an assessment imposed upon him for private improvement expenses. The Commissioners dismissed the appeal. He then appealed to the Court of Session under sec. 339. *Held* that the appellant having submitted the question of his liability to pay the assessment to the Commissioners their decision was under sec. 368 final, and that the appeal was *incompetent*. Brown v. Magistrates of Leith, March 17, 1896, p. 654.

Assessment—County General Assessment—Statute—Construction—County Council—Local Government (Scotland) Act, 1889, secs. 11, 26, and 27.

3. In an action brought by a parliamentary burgh against a county council for declarator that the defenders were not entitled to assess the pursuers' lands within the burgh for county general assessment under the County General Assessment Act, 1868, *held* (1) that by secs. 26 and 27 of the Local Government Act, 1889, the whole assessing powers derived by a county council from prior Acts were merged in the power given to assess for consolidated rates, and that a county council had no other power to assess; and (2) that a county council's power to assess being limited to lands and heritages within the county as defined by the Act, they were not entitled to assess lands or heritages within a royal or parliamentary burgh. Corporation of Galashiels v. County Council of Selkirk, June 18, 1896, p. 818.

Assessment—Water Supply—Whole parish supplied by one system of water-works—Burgh formed within parish after 1889, and created a special water supply district—Residue of parish formed into a separate water supply district—County Council—Burgh Police Commissioners—Local Government (Scotland) Act, 1889, sec. 99.

4. In 1876 the Parochial Board of Wemyss, as the Local Authority under the Public Health Act, 1867, introduced a water supply for the whole parish from a source outside the parish, the only works within the parish being the distributing mains. On the passing of the Local Government (Scotland) Act, 1889, the Kirkcaldy District Committee of the County Council of Fife came in place of the Parochial Board as

POLICE—*Continued.*

Local Authority, and the water-works were vested in them. The requisite expenditure was levied upon the whole property in the parish. In 1891 a district of the parish was created a police burgh, and subsequently formed into a special water supply district. In 1892 the remaining part of the parish was formed into a special water supply district. The existing system of water-works for the supply of the whole parish was continued. In a question between the District Committee of the County Council and the Police Commissioners of the burgh, *held* (1) that the water supply and water-works fell to be managed by the subcommittee of the District Committee appointed under sec. 81 of the Local Government Act, 1889, and the Police Commissioners (or so many of the Police Commissioners as the Sheriff should fix as a committee) jointly; and (2) that the Police Commissioners were alone entitled to impose and levy the necessary assessments within the burgh. Kirkcaldy District Committee v. Police Commissioners of Buckhaven, &c., Nov. 16, 1895, p. 107.

Assessment—Special water supply—Agreement between Local Authorities—Ultra vires.

5. A Parochial Board, as the Local Authority for the parish under the Public Health Act, 1867, having formed a Special Water Supply District, entered into an agreement with the Police Commissioners of a neighbouring burgh, whereby, in consideration of obtaining a supply of water for the Special Water District, the Parochial Board agreed to assess the inhabitants of the Special Water District at the same rate as the inhabitants of the burgh were assessed, and to pay over the proceeds to the Commissioners. *Held* that the agreement prescribed a mode of assessment for the Special Water District which was not in accordance with the statutory powers of the Local Authority imposing the assessment, and that, in so far as it did so, it was invalid. Wordie's Trustees v. County Council of Lanarkshire, Nov. 22, 1895, p. 168.

Assessment—Drainage—Glasgow Police Act, 1866, *secs.* 332-5—*Glasgow Police Amendment Act*, 1890, *sec.* 16.

6. The Glasgow Police Commissioners having found the drains of a block of houses to be defective, issued an order in terms of section 16 of the Glasgow Police Amendment Act. The owner having failed to obey the order, the Police Commissioners proceeded to execute certain work, on the advice of their sanitary engineer, discarding as useless the materials of the old drain, and constructing at a safer distance from the property a new drain in a different site, and with a different outflow. In an action by the Police Commissioners against the owner for the expenses of the work, the Court *assoilzied* the defender on the ground that the proceedings of the pursuers were not warranted by section 16 of the Act of 1890, in respect that it only contemplated repairs to existing structures, and not the formation of a new system of drainage. Glasgow Police Commissioners v. M'Omish & Arthur, June 26, 1896, p. 896.

Regulation of streets and buildings—Free space for air—Statute—Implied repeal—Glasgow Police Act, 1866, *secs.* 370 *and* 372—*Glasgow Building Regulations Act*, 1892, *sec.* 33.

7. *Held* that the exemption, in section 372 of the Glasgow Police Act of 1866, of corner buildings from the provisions requiring a certain amount of free space for air, was not repealed by section 33 of the Glasgow Building Regulations Act of 1892, the purpose of the latter section being merely to define the character of the requisite free space in the case of buildings which under the principal Act were required to have free space, but not to enact that buildings which had previously been exempt should for the future comply with

POLICE—*Continued.*

the provisions regarding free space. Raeside v. White, July 17, 1896, p. 1119.

Regulation of streets and buildings—Open space attached to dwelling-house—Burgh Police (Scotland) Act, 1892, *sec.* 170.

8. The proprietor of ground within a burgh proposed to build thereon two rows of dwelling-houses parallel to each other, both facing public streets and with unbuilt-on ground separating them behind. This back ground was less than one and a-half times the extent of the combined areas to be occupied by the two rows of houses, but was greater than three-fourths of the area to be occupied by each row taken separately. *Held* that the whole of the back ground was open space directly attached to each of the rows of houses in the sense of section 170 of the Burgh Police Act, 1892, and consequently that the statutory requirements with respect to ventilation behind the house would be satisfied. Hoy v. Magistrates of Portobello, July 15, 1896, p. 1039.

Regulation of streets and buildings—Obstruction of street—Nuisance—Interdict.

9. A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the street by the use of a snow-plough, and of afterwards scattering salt upon the lines. The town-council, which was the Local Authority, approved of these operations. In a suspension and interdict brought by an inhabitant to have the tramway company interdicted from continuing this practice, *held* that as the Local Authority were entrusted with the duty of seeing that the streets were cleared in such emergencies as a heavy snowstorm, and as they approved of the methods employed by the tramway company, the note of suspension and interdict fell to be refused. Ogston v. Aberdeen Tramways Co., Dec. 20, 1895, p. 340.

See *Justiciary Cases*, 15.

Police Offences—Assembling on street for purpose of betting—Burgh Police (Scotland) Act, 1892, *sec.* 393.

10. A person convicted of a contravention of section 393 of the Burgh Police Act, 1892, appealed on a case which stated—that the appellant was a bookmaker; that on the occasion specified in the complaint he was walking up and down one of the streets of the burgh; that a young man, whose name was not disclosed, "joined the appellant and handed him a piece of white paper. The appellant looked at it and put it" into his pocket. "The young man then handed him two or three pieces of money, apparently silver, which the appellant also put in his pocket"; that the appellant was apprehended and the young man disappeared; that on being searched there was found on the appellant's person fifty-four "betting lines," telegrams, a sporting paper, a note-book containing the names of horses, and about £28 in money; and that what took place between the appellant and the young man "was in accordance with the mode in which street betting is carried on." The Court *quashed* the conviction, holding that the facts proved did not amount to assembling on the street for the purpose of betting. Bonnar v. Walker, Jan. 9, 1896, Just. Cases, p. 39.

Police Offences—Bye-law regulating omnibus traffic—Loitering—Relevancy.

11. A bye-law framed by the magistrates of a burgh for the regulation of omnibus traffic provided as follows:—"The driver of an omnibus shall not loiter therewith on the public streets, either when on the way to its stance, before starting, or at any other time." A driver was charged with a contravention of the bye-law in so far as he did on a certain date, with an omnibus of which he was driver, loiter on a certain public street. It was proved that the accused drove his omnibus at a slow

POLICE—*Continued.*

walking pace four times along a street, stopping to take up passengers, before starting for his destination. The street was not crowded, and the omnibus caused no danger, obstruction, or inconvenience. *Held* that the facts proved did not justify the conviction, even if the charge were relevant. Fairfoul v. Somerville, Oct. 25, 1895, Just. Cases, p. 6.

POOR. *Officials—Inspector of Poor—Union of parishes—Transfer of existing officers—Right of new Parish Council to refuse to employ one of two inspectors of former parishes—Order by Secretary for Scotland—Local Government (Scotland) Act*, 1889, *sec.* 51—*Local Government (Scotland) Act*, 1894, *secs.* 46 *and* 51.

1. By an order the Secretary for Scotland united the parishes of A and V, and declared that the former parish councils should cease, and their whole powers, rights, duties, property, liabilities, debts, officers, and servants should be transferred to the parish council of the new parish. The new Parish Council thereafter appointed Stuart, the former inspector of poor for V, to be inspector for the united parish, and refused to regard Seaton, the former inspector of A, as in their employment. In an action against them at the instance of Seaton for payment of his salary as an inspector, they maintained (1) that the old parishes having been abolished, their officers had also ceased to exist; and (2) that the clause in the order transferring existing officers to the new Parish Council was invalid, in respect it did not provide for the adjustment and distribution of their duties. *Held* that the order was valid, and that the inspectors of the pre-existing parishes continued to hold office as servants of the new Parish Council. Seaton v. Parish Council of Arbroath and St Vigeans, May 28, 1896, p. 763.

Officials—Trust—Chairman of Parochial Board ex officio trustee—Parish Council succeeding to Parochial Board—Local Government (Scotland) Act, 1894, *secs.* 21 *and* 22.

2. A truster in 1885 nominated among her trustees "the chairman of the Parochial Board of the parish of K. and his successor in office for the time being, so long as such board shall exist." *Held* that the chairman of the Parish Council of K. was not entitled *ex officio* to act as a trustee under the deed. Parish Council of Kilmarnock v. Ossington's Trustees, June 20, 1896, p. 833.

Relief—Recourse against other parishes—Admission of liability—Proof of residential settlement.

3. In 1892 Barony Parish gave parochial relief for seven days to three illegitimate children of a married woman who had been deserted by her husband in 1879. Barony having claimed repayment from Rutherglen, the husband's birth parish, Rutherglen resisted the claim on the ground that the woman had acquired a settlement in Barony by continuous residence therein for five years from August 1883. The two parishes then entered into a joint investigation, in the course of which a signed statement was taken from the woman setting forth her successive places of residence during the five years in question. All these places of residence were in Barony. Thereafter Barony withdrew its claim. In 1895 the question again arose as to the liability of Rutherglen or Barony for the maintenance of the children, the question still depending on whether the mother had by 1888 acquired a settlement in Barony. The mother had died, and the only evidence, in addition to her statement above mentioned, was the children's birth certificates, which corroborated the mother's statement. *Held* (1) that the mere fact that Barony withdrew its claim in 1892 did not import an admission of liability; but (2) that the evidence as a whole shewed that the mother had acquired a residential settlement in Barony Parish. Parish Council of Rutherglen v. Parish Council of Barony, July 11, 1896, p. 1018.

POOR—*Continued.*

Relief—Residential Settlement—Interruption of acquisition by receipt of parochial relief.

4. *Held* that the acquisition of a residential settlement had not been interrupted by the pauper having received small sums from a parochial board for the purchase of medicine, the pauper not having been a proper object of relief at the time she received these sums. Parish Council of Rutherglen v. Parish Council of Barony, July 11, 1896, p. 1018.

POOR'S ROLL. Appeal to the House of Lords—Interim execution pending appeal—Application for leave to appeal in *forma pauperis*. Gibson v. Clark, Jan. 14, 1896, p. 389.

POSSESSION. See *Property*, 1, 2.

POST-OFFICE. See *Justiciary Cases*, 18.

POWER. See *Succession*, 15.

PRESCRIPTION.

Question, whether a feu-charter granted by trustees in 1867, and bearing to be granted in the exercise of powers conferred by a private Act of Parliament (which was mentioned), and only in so far as consistent with the Act, could be validated by prescriptive possession, so as to exclude the plea that it was *ultra vires* of the trustees in respect that the conditions of the Act had not been complied with. Tayport Land Co., Limited, v. Dougall's Trustees, Dec. 13, 1895, p. 287.

See *Fishings*, 1, 2—*Property*, 1, 4.

PRESUMPTION. See *Burgh*, 5—*Election Law*, 1—*Fishing*, 1—*Ship*, 2.

PRINCIPAL AND AGENT. See *Agent and Principal.*

PRIVILEGE. See *Reparation*, 10, 11, 12.

PRIVY COUNCIL. See *University.*

PROCESS. *Citation—Edictal Citation—Sheriff Court Act*, 1876, *sec.* 9.

1. A landlord presented a petition in the Sheriff Court for the appointment of a manager upon a farm, alleging that the tenant had deserted the farm and gone to America. The warrant of citation contained no warrant to cite the respondent edictally, and the petition was served by leaving a copy at the farmhouse, where his family continued to reside. No appearance having been entered for the tenant, the petition was granted. The tenant, who returned to this country within a month, brought an action of reduction of the appointment of the manager on the ground, *inter alia*, that there had been no edictal citation. In the action he averred that he had been only temporarily absent from the farm. The Court *repelled* the plea, on the ground that if the defender's absence was temporary edictal citation was not necessary. Gibson v. Clark, Dec. 13, 1895, p. 294.

Citation—Execution of Citation.

2. In a Sheriff Court petition the service copy of the petition bore a citation dated 1st September, requiring the defender to lodge a notice of appearance "within forty-eight hours after the date of this my citation"; the execution returned upon the petition bore that it was served upon the 31st August; and the Sheriff pronounced decree in absence on 3d September. In a reduction of the execution, *held* that in the absence of other contradictory evidence than the service copy of the petition, with the citation thereon, the date of the execution fell to be taken as the date of service, and that the *inducice* fell to be reckoned therefrom. Gibson v. Clark, Dec. 13, 1895, p. 294.

PROCESS—*Continued.*

Summons—Amendment—Court of Session Act, 1868, *sec.* 29.

3. A firm of iron-merchants raised an action against a rivet manufacturer, concluding for payment of (1) £175; (2) £172, 18s. 11d; (3) £23, 9s. 6d.; (4) £232, 8s. 10d. In the condescendence the pursuers averred that the defender had entered into a contract to supply the pursuers with 100 tons of rivets, and that in consequence of the defender failing to implement his contract the pursuers had been unable to execute a contract they had made with a shipbuilding company to supply the same quantity of rivets, and had been found liable in an action to pay them the above sums (1) and (2) as damages and costs, and that the pursuers had also lost (3) £23, 9s. 6d., the profits they would have made on the two contracts, and (4) the amount of their solicitor's account in defending the action. The Lord Ordinary having assoilzied the defender, the pursuers reclaimed, and craved leave to amend the summons by adding an alternative conclusion for payment of £300, and a statement that this sum was the difference between the market price of the rivets undelivered at the date when they should have been delivered, and the contract price. *Held* that the amendment was incompetent. Russell, Hope, & Co. v. Pillans, Dec. 7, 1895, p. 256.

Amendment—Summons—Arrestment on the dependence—Court of Session Act, 1868, *sec.* 29.

4. An action was raised at the instance of five pursuers, on separate grounds of action, concluding for payment to each of separate sums, and arrestments were used on the dependence of the action. Subsequently, on the motion of the pursuers, the names of four of the pursuers were deleted from the summons, together with the conclusions applicable to them respectively. The remaining pursuer afterwards obtained a decree. *Held* (1) that the original summons was incompetent; and (2) that the alteration on the summons was an amendment in the sense of the Court of Session Act, 1868, sec. 29, and did not validate the arrestments so as to confer a preference on the remaining pursuer in competition with other creditors of the defender at the date of the arrestment. Fischer & Co. v. Andersen, Jan. 15, 1896, p. 395.

Amendment of Record in Inner-House—Expenses.

5. An amendment of record in the Inner-House which did not involve any radical alteration of the pleadings, or a change of the ground of action, *allowed* on payment of expenses in the Inner-House. Murdison v. Scottish Football Union, Jan. 30, 1896, p. 449.

Caution for Expenses—Action of damages for slander—Bankrupt pursuer.

6. Circumstances in which, after issues had been adjusted in an action of damages for slander, the Court ordained the pursuer, who was an undischarged bankrupt, to find caution. Powell v. Long, July 3, 1896, p. 955.

"All parties not called"—Feu with minerals reserved to granter—Lease of minerals—Damage caused to feu by working of minerals—Action by feuar against granter.

7. A granted a feu of certain subjects, reserving the minerals, and afterwards leased the minerals. Injury having subsequently been occasioned to the surface of the feu by the workings of the mineral tenants, the feuar raised an action of damages against A. The defender, averring that the injury was due solely to the fault of the mineral tenants, pleaded, "All parties not called." *Held* that the pursuer was entitled to proceed with his action without calling the mineral tenants. Highgate & Co. v. Magistrates of Paisley, July 9, 1896, p. 992.

PROCESS—*Continued.*

Consignation—Statute—Construction—Consignation by bondholder of surplus price—Court of Session Consignations (Scotland) Act, 1895, secs. 2, 3, and 5—Titles to Land Consolidation Act, 1868, sec. 122.

8. *Held* that the Court of Session Consignations Act, 1895, did not apply to surplus moneys deposited by a bondholder under sec. 122 of the Titles to Land Act, 1868.

Opinions as to the effect of any Act of Parliament directing money to be consigned subject to the orders of the Court *reserved*. Antrobus, July 15, 1896, p. 1032.

Remit—Company—Remit to Taxing-Master of the House of Commons to tax promoter's account—Finality of report.

9. In an action of accounting brought by a public company against one of its promoters, the defender lodged certain counter claims. The account of these lodged by the defender was remitted to the Taxing-Master of the House of Commons, who taxed the account. The pursuer lodged objections to the report, mainly on the ground that the Taxing-Master did not state in detail the method adopted by him in dealing with disputed items. The Lord Ordinary pronounced an interlocutor remitting these objections to the Taxing-Master. The Court *recalled* his interlocutor, in respect that it did not appear that the reporter had mistaken the duty entrusted to him, or come to a wrong conclusion on any matter of principle. Edinburgh Northern Tramways Co. v. Mann, July 15, 1896, p. 1056.

Sist—Action to negative alleged right of way—Sist to give County Council opportunity to intervene—Local Government (Scotland) Act, 1894, sec. 42.

10. The proprietor of an estate brought an action against R., concluding for declarator that he held the estate free of any public right of way over a certain part of it, and for interdict against the defender entering upon it. R., who had used a path over the part of the estate in question for sixteen years, lodged defences. The Lord Ordinary allowed a proof. Shortly before the diet fixed for proof the defender moved the Lord Ordinary to sist the action, upon the ground that, his funds being exhausted, he was unable to make the necessary preparations for the proof, and that the case was being considered by the County Council, who were entitled under the Local Government Act, 1894, to take steps to vindicate rights of way. The Lord Ordinary refused the motion, and the defender having failed to appear at the proof the Lord Ordinary granted decree as against R. as concluded for. On a reclaiming note the Court *recalled* the interlocutor of the Lord Ordinary, and *sisted* the action *hoc statu* upon an undertaking by the defender not to use the path during the sist. Alston v. Ross, Dec. 12, 1895, p. 273.

Abandonment of action—Trustee in sequestration—Judicature Act, 1825, sec. 10.

11. The trustee in a sequestration, who had sisted himself as pursuer, and carried on an action raised by the bankrupt prior to sequestration, lodged a minute craving leave to abandon the action. The minuter did not found on the Judicature Act, 1825, sec. 10, and did not propose to pay the defenders' expenses. The Court *refused* the minute. Scott v. Thurso River Harbour Trustees, Dec. 11, 1895, p. 268.

Decree—Correction by Clerk of Court before extract—Diligence—Suspension—Nobile officium.

12. In writing the interlocutor in a cause in which the Court had pronounced judgment for £41 in favour of the pursuer, the Clerk of Court, by a clerical error, wrote £14 for £41, and the interlocutor was signed by the presiding Judge. The Clerk corrected the error before

PROCESS—*Continued.*

extract, but failed to have the alteration authenticated by the Judge. The interlocutor having been extracted, the defender was charged to make payment, and the days of charge having expired without payment being made, the defender's goods were poinded. The defender thereupon presented in the Bill-Chamber a note of suspension of the decree and the proceedings thereon. The agents-disbursers of the pursuer, in whose name decree had been extracted and the charge given, presented a petition praying the Court to confirm and authenticate the Clerk of Court's amendment. The Lord Ordinary on the Bills reported the suspension. The Court informed the Lord Ordinary on the Bills that the interlocutor as amended correctly expressed the judgment of the Court, and held it to be unnecessary to pronounce any order on the petition. Clark & Macdonald v. Bain, Nov. 16, 1895, p. 102.

Decree—Denial that interlocutor bearing to proceed upon consent of party had been consented to—Power of Court to order inquiry.

13. A decree by a Sheriff-substitute appointing a petitioner executor-dative proceeded on the statement that the respondent had withdrawn her opposition. In an appeal by the respondent, the appellant stated that the Sheriff-substitute was mistaken in supposing that she had withdrawn her opposition, and asked for a proof on that point. The Court proposed in the first instance to remit to the Sheriff-substitute for a report, and the appellant having objected to this course, *refused* the appeal. Whyte v. Whyte, Dec. 17, 1895, p. 320.

Decree—Decree in absence—Mandate to lodge defences.

14. In an action by A against a Danish company defences were lodged on the instructions of a person resident in Scotland. The pursuer on the case appearing in the Adjustment Roll objected that the defences had been lodged without the authority of the defender, and moved for decree in absence. The Lord Ordinary, after adjourning the adjustment of the record on three occasions in order to allow a mandate to be produced, but without pronouncing an order for the production of a mandate, refused a minute craving further delay alleged to be necessary to allow a meeting of the company to be called for the purpose of granting a mandate, and granted decree in absence. In a competition between A and another creditor of the company, *held* that the decree in absence was irregular, and could not receive effect. Fischer & Co. v. Andersen, Jan. 15, 1896, p. 395.

Decree—Competency of decerning for aliment in pending action of separation and aliment after decree of divorce at instance of wife.

15. A wife, after obtaining an interim award of aliment in an action of separation and aliment against her husband, raised an action of divorce against him, and obtained decree therein. She then, in the action of separation and aliment, moved for decree for a further sum in name of aliment. Except the sum paid under the interim award she had received nothing from her husband in name of aliment pending the actions, and she alleged that she had been alimented by third parties. The Court *refused* the motion as incompetent, in respect that there could be no decerniture for aliment in an action of separation and aliment after the parties had been divorced, an action of separation and aliment proceeding on the assumption that the parties were husband and wife. Shirrefs v. Shirrefs, June 16, 1896, p. 807.

Reclaiming Note—Competency—Court of Session Act, 1850, *sec.* 11—*Court of Session Act*, 1868, *sec.* 53.

16. A Lord Ordinary, who had previously assoilzied the defenders in an action and found them entitled to expenses, reserving as to modification, pronounced an interlocutor approving of the Auditor's report on the defenders' account, modifying the taxed amount, and decerning for

PROCESS—*Continued.*

the amount as modified. *Held* that it was competent to reclaim against this interlocutor within twenty-one days. Taylor's Trustees v. M'Gavigan, May 21, 1896, p. 738.

Proof—Diligence for recovery of documents—Public Government Board—Inland Revenue—Instructions issued to officers of Inland Revenue—Reparation—Personal injury.

17. In an action at the instance of an excise officer against a firm of brewers for damages for injuries sustained by the pursuer, while engaged in the performance of his duty in sampling liquors in the defenders' premises, the defenders moved for a diligence to recover the instructions issued by the Inland Revenue to their officers as to their duties in drawing samples. The Board of Inland Revenue objected on the ground that the recovery sought would be prejudicial to the public service. The Court *refused* the diligence. Tierney v. Ballingall & Son, Feb. 19, 1896, p. 512.

Proof—Diligence for recovery of documents—Breach of Promise of Marriage.

18. In an action of damages for breach of promise of marriage the pursuer moved for a diligence to recover the defender's business books and bank books in order to disclose his financial position. Circumstances in which the Court *refused* the motion. Somerville v. Thomson, March 6, 1896, p. 576.

Proof—Diligence for recovery of documents—Reports by railway servants to railway company regarding accident—Reparation—Injury to passenger.

19. In an action against a railway company for damages on account of the death of a passenger, the pursuers moved for a diligence to recover reports by the company's servants to the company regarding the accident. Diligence *refused*, on the ground that such reports were confidential. Stuart v. Great North of Scotland Railway Co., July 9, 1896, p. 1005.

Proof—Parent and Child—Filiation—General averment in defence that pursuer had intercourse with other men—Allowance of proof of averments generally—Competency of specific questions as to such intercourse.

20. In defence to an action of filiation and aliment relating to an illegitimate child born in December 1895, the defender denied the paternity, and averred "that about 1894 and 1895 the pursuer was indulging in sexual intercourse with several young men living in her own neighbourhood, among them being" three men named, "and that one of them is the father of the child." The parties were allowed a proof "of their respective averments on record." *Held* that, whether the averment quoted was irrelevant for want of specification or not, as the defender had been allowed a proof of his averments, he was entitled at the proof to ask the men named in his averment whether they had had intercourse with the pursuer on particular occasions in the period specified. Barr v. Bain, July 17, 1896, p. 1090.

Proof—Jury Trial—Issue—Motion to vary—Substitution of new issue—Dismissal of action—Court of Session Act, 1868, *sec.* 28—*A. S.*, 14*th October* 1868, *sec.* 6.

21. Upon a motion to vary the terms of an issue, it is incompetent either (1) for a party to propose a new issue resting upon an entirely separate ground of action, or (2) for the Court to disallow altogether the issue whose terms are sought to be varied, and dismiss the action as irrelevant.

Observed, per Lord M'Laren, that when it is desired to substitute one issue for another, a reclaiming note, and not a motion to vary, is the proper mode of bringing the case into the Inner-House. Burns v. Diamond, Feb. 18, 1896, p. 507.

See also *infra*, Nos. 39, 40.

PROCESS—*Continued.*

Particular actions—Declarator—Relevancy—Trust—Powers—Object of power—Church.

22. A church in Manchester was held by trustees under a trust-deed which entitled them to sell the church, it being declared that in the event of a sale the proceeds should be held by the trustees for such purposes as the majority of the Presbytery of Edinburgh should direct. The church was sold, and in consequence the congregation was dissolved. The minister raised an action against the Presbytery of Edinburgh and the trustees for declarator that a majority of the Presbytery might competently direct the trustees to make payment to the pursuer of such sums as the majority of the Presbytery might appoint by way of compensation to the pursuer for loss of stipend or otherwise. The pursuer averred that a majority of the members of the Presbytery were willing to direct an allowance to be made to him if they were satisfied of the competency of doing so. *Held* that the action was not relevant, as the pursuer's statement did not shew that he was an object of the power given to the majority of the Presbytery of Edinburgh. Mackie v. Presbytery of Edinburgh, March 17, 1896, p. 668.

Particular actions—Petition—Petition for amendment of scheme for administration of educational endowment—Consent of Scotch Education Department—Educational Endowments (Scotland) Act, 1882, sec. 20.

23. A petition for the amendment of a scheme framed for the administration of an educational endowment by the Educational Endowments Commissioners, bore to be presented with the consent of the Scotch Education Department, as required by section 20 of the Educational Endowments Act, 1882, but in point of fact the consent of the Department was not given until after the date of an interlocutor appointing intimation and service. *Held* that although the presentation of the petition was a reprehensible irregularity, the consent given *pendente processu* entitled the Court to entertain the application. Governors of Bell's Trust, June 9, 1896, p. 780.

Particular actions—Petition—Petition to Dean of Guild—Answers lodged for first time on appeal—Competency—Procedure.

24. In a petition to the Dean of Guild for warrant to alter a building the Burgh Engineer appeared on behalf of the Lord Provost and Magistrates, who were called as respondents, and objected verbally to the petition being granted. The Dean of Guild having refused the petition, the petitioners appealed, and thereafter answers were tendered for the Lord Provost and Magistrates, embodying the verbal objections previously stated on their behalf. The petitioners objected to the answers being received. The Court *allowed* the answers to be received, and remitted the case to the Dean of Guild to proceed. Lord Saltoun v. Magistrates of Edinburgh, July 3, 1896, p. 956.

Particular actions—Petition—Petition for reconstitution of District Fishery Board—Intimation.

25. Petition for the reconstitution of a lapsed district fishery board *ordered* to be intimated on the walls and in the Minute-book, and to the Secretary for Scotland, and to be advertised in certain newspapers. Duke of Argyll, July 9, 1896, p. 991.

Particular actions—Petition—Company—Petition for confirmation of resolution altering memorandum of association so as to extend business of company—Intimation.

26. A company formed for the purpose of carrying on the business of employers' liability and accident insurance presented a petition craving the Court to confirm a special resolution altering the company's memorandum of association so as to make the objects of the company include sickness and guarantee insurance. *Held* that intimation of the proposed extension of the company's business must be made by advertise-

PROCESS—*Continued.*

ment. Scottish Employers' Liability, &c., Assurance Co., Limited, July 11, 1896, p. 1016.

Particular actions—Petition—Intimation.

27. *Observations* by the Lord President to the effect that in preparing petitions more attention should be paid to the question of what intimation should be craved. Scottish Employers' Liability, &c., Assurance Co., Limited, July 11, 1896, p. 1016.

Particular actions—Reduction—Church—Voluntary Church—Suspension of Minister—Restoration to status.

28. A minister of the United Presbyterian Church was served with a libel for an alleged offence, and was suspended from the ministry till the decision of the case. After a proof, the Presbytery found the charge proved. The minister appealed to the Synod, who remitted the case to a commission. The commission found certain counts in the libel proved, and suspended the minister *sine die*. The minister brought an action (1) for declarator that he had been libelled and suspended contrary to the rules of the Church; (2) "in case it may be necessary," for reduction of the decree of suspension pronounced by the commission; and (3) for interdict against the defenders proceeding to fill his charge, or deprive him of the status or emoluments of his office. He reserved his right to claim damages. The pursuer having intimated that he did not insist in the conclusions for declarator and interdict, but only in that for reduction of the sentence of the commission, the Court *dismissed* the conclusion for reduction, on the grounds (1) that that conclusion was merely ancillary to the conclusions for declarator and interdict; and (2) that reduction of the sentence by the commission would leave the pursuer under the original suspension, and would not restore his status as a minister, or lead to the establishment of any patrimonial right. Skerret v. Oliver, Jan. 30, 1896, p. 468.

Particular actions—Reduction—Church—Voluntary Church—Contract—Suspension of Minister—Specific implement—Restoration to office.

29. In an action by a minister of a congregation of the United Presbyterian Church against the Synod concluding (1) for reduction of a sentence of suspension pronounced against him by a committee of the Synod to whom the Synod had remitted the trial of a libel against him, on the allegation that it was *ultra vires* of the Synod to make the remit, and (2) for interdict against the defenders filling up his charge, *held* by Lord Kincairney (1) that the pursuer had relevantly averred a breach of contract, causing an injury which was of a patrimonial character, or of a character equivalent to patrimonial; (2) that the suspension by the committee being alleged to be *ultra vires*, appeal to the Court was not excluded by a provision in the contract that members should not have recourse to the civil Courts against judgments of the Courts of the Church; but (3) that reduction of the sentence of suspension, to the effect of restoring the pursuer to office, was not a remedy which the Court ought to grant, or was in use to grant, in similar cases, and that the action fell to be dismissed. Skerret v. Oliver, Jan. 30, 1896, p. 468.

Particular actions—Reduction—Church—Voluntary Church—Action to reduce decree of suspension—Who must be called as defenders—Citation of Synod and Presbytery.

30. In an action by a minister of the United Presbyterian Church, for reduction of a decree suspending him from his office, and for restoration to his office, with its emoluments, *held* by Lord Kincairney (Ordinary), and acquiesced in, (1) that it was sufficient to call as defenders the prosecuting members of the Presbytery, the Synod, and a commission of the Synod by whom the sentence complained of had been pronounced; (2) that the Synod was validly cited by its office-bearers being called; and (3) that the Presbytery was not a proper defender,

PROCESS—*Continued.*

but was validly cited for its interest, by its office-bearers being called. Skerret v. Oliver, Jan. 30, 1896, p. 468.

Particular actions—Reduction—Reduction of Sheriff Court Decree—Competency—Court of Session Act, 1868, *secs.* 64-67—*Act of Sederunt, March* 10, 1870, *sec.* 3, *subsec.* 5.

31. *Held* (by Lord Kincairney and *acquiesced* in) (1) that the provisions of the Court of Session Act, 1868, had not rendered an action for reduction of an extracted Sheriff Court decree incompetent; and (2) that it was not incompetent to include in such action of reduction conclusions additional to those contained in the Sheriff Court process for the purpose of more clearly elucidating the rights of parties. Taylor's Trustees v. M'Gavigan, July 3, 1896, p. 945.

Particular actions—Reduction—Reduction of Sheriff Court Decree.

32. Reduction of Sheriff Court decree appointing a manager of a firm on its alleged desertion by its tenant. Gibson v. Clark, Dec. 13, 1895, p. 294.

Particular actions—Special Case—Competency—Failure to set out contentions of parties.

33. *Held* that a special case in which the contentions of parties were not set forth was not in competent form. Stewart's Trustees v. Stewart, Nov. 14, 1895, p. 93.

Particular actions—Special Case—Competency—Absence of Lis.

34. *Held* that a special case which was brought for the purpose of ascertaining the true construction of an Act of Parliament, but which disclosed no controversy between the parties, was incompetent. County Council of Renfrew v. Trustees for Orphan Homes of Scotland, Nov. 22, 1895, p. 166.

Appeal—Competency—Sheriff—Value of cause—Debts Recovery (Scotland) Act, 1867, *secs.* 12 *and* 13.

35. *Held* that when a Sheriff's judgment in an action for payment of a sum under £25 involves the determination of a question as to the defender's liability for further payments, an appeal to the Court of Session will not be competent unless it appears from the process that the amount involved in the determination is over £25. Standard Shipowners' Mutual Association v. Taylor, June 24, 1896, p. 870.

Appeal—Competency—Value of cause—Cessio—Affidavit and Claim—Sheriff Court Act, 1853, *sec.* 22—*Sheriff Courts Act*, 1876, *sec.* 26 (4).

36. A creditor who had poinded some of his debtor's effects thereafter lodged an affidavit and claim in the latter's cessio in which he stated the amount of the debt due to him to be £42, and claimed a preferable ranking to the effect of receiving full payment of his debt out of the poinded effects. The trustee admitted his claim to an ordinary ranking only, and his deliverance was sustained by the Sheriff. The value of the poinded effects was £18. The creditor appealed to the Court of Session. The trustee objected to the competency of the appeal on the ground that the only question was the creditor's right to a preferable ranking, and that the actual sum in dispute was therefore below £25. *Held* that the appeal was competent, the value of the cause falling to be ascertained as in an ordinary Sheriff Court action, viz., by the amount of the claim made in the conclusions of the summons, or other initial writ, which here was the affidavit and claim.

Observations by Lord M'Laren on the right of appeal in cessios by reclaiming note under 6 and 7 Will. IV. c. 56. Henderson v. Grant, March 17, 1896, p. 659.

Appeal—Competency—Finality Clause—Burgh Police (Scotland) Act, 1892, *secs.* 339 *and* 368.

37. The owner of property abutting on a private street appealed to the Commissioners under sec. 368 of the Burgh Police (Scotland) Act, 1892, against an assessment imposed upon him for private improvement

PROCESS—*Continued.*

expenses. The Commissioners dismissed the appeal. He then appealed to the Court of Session under sec. 339. *Held* that the appellant having submitted the question of his liability to pay the assessment to the Commissioners their decision was under sec. 368 final, and that the appeal was *incompetent*. Brown v. Magistrates of Leith, March 17, 1896, p. 654.

Appeal—Competency—Friendly Society—Dispute between member and society—Small-Debt Court—Friendly Societies Act, 1875, *sec.* 22 (*d*) (*e*).

38. *Held* that in a small-debt action relative to a dispute between a friendly society and one of its members, an appeal, on a case stated under the Friendly Societies Act, 1875, was competent, although the summons did not refer to the Act. Linton v. City of Glasgow Friendly Society, Oct. 30, 1895, p. 51.

Appeal for jury trial—Competency—Consent to proof before answer precluding appeal for jury trial.

39. The defenders in an action of damages having pleaded that the pursuer's averments were irrelevant, the Sheriff, "before answer, of consent" allowed a proof. *Held* that an appeal for jury trial was incompetent, in respect that the interlocutor set forth a contract between the parties as to the procedure to be followed. Paterson v. Kidd's Trustees, May 21, 1896, p. 737.

Appeal for jury trial—Proof or Jury Trial—Judicature Act, 1825, *sec.* 40.

40. In an appeal for jury trial in an action of damages for wrongous interdict, the action having been held to be relevant, the Court, in respect that neither party asked for jury trial, refused the appeal and *remitted* the case to the Sheriff. Fife v. Orr, Oct. 16, 1895, p. 8.

See *Appeal—Decree—Election Law*, 1, 9 *to* 12.

PROOF. See *Bill of Exchange*, 2—*Justiciary Cases*, 16, 17—*Process*, 20, 21; for questions as to Burden of Proof, *Burgh*, 5—*Election Law*, 1—*Horse*, 1—*Ship*, 2; and for diligence for recovery of documents, *Election Law*, 11—*Process*, 17, 18, 19.

PROPERTY. *Title—Disposition a non domino—Mill-lade—Prescription.*

1. A mill-lade from the River Jed supplied two mills belonging to one proprietor, of which the Abbey Mill was the upper and the Waulk Mill the lower. The mills were sold in 1845 to separate persons, A and B, in a process of ranking and sale. By the decree the Lords sold and adjudged to B the Waulk Mill and the mill lands, "and particularly the mill-lade," and they found and declared that A and B, the "purchasers of the two mills, have a joint *pro indiviso* right of property in the mill-lade thereof." B obtained from the superior of the mills and mill lands a charter in terms of the decree, and was infeft thereon in 1846, and the mill-lade was subsequently possessed along with the mills. Part of the mill-lade had been made on half of the bed of the river, belonging to C, a riparian proprietor. C did not object to this, and he and his successors continued to use the water of the river by drawing it from the lade. In a suspension and interdict brought in 1894 by the proprietor of the Waulk Mill against C's successor to prevent him from discharging sewage into the lade, the above facts were proved. *Held* (1) that the conveyance of the mill-lade in the decree of sale and in the subsequent charter imported a conveyance *quoad* C's land, not of a right of servitude, but of the lade itself and of the ground necessary for its support; (2) that the possession which had followed upon this title for the prescriptive period was sufficient to give B an exclusive right of property in the lade and in the ground supporting it as against C's successor, and that B was entitled to interdict. Hilson v. Scott, Dec. 7, 1895, p. 241.

PROPERTY—*Continued.*

Competing Titles—Superior and Vassal—School Board possessing transferred school on personal title—Education (Scotland) Act, 1872, *sec.* 38.

2. In 1833 A granted a feu-disposition of a portion of the lands of Craigrothie, upon which a schoolhouse had been built, to B, who entered into possession but did not take infeftment. In 1873 B transferred the schoolhouse and ground to the school board of the parish, who got possession, but no formal conveyance in favour of the school board was executed. In 1883 D bought the lands of Craigrothie, and duly completed his titles by infeftment upon a disposition, which contained a clause of warrandice excepting all feu-rights granted by the disponer or his predecessors. In an action brought by the school board against D for declarator of their right to the ground possessed by them, the pursuers founded upon the unfeudalised feu-disposition and on section 38 of the Education (Scotland) Act, 1872, which enacts that when a school has been transferred to a school board, the school and the site shall vest in the school board. The pursuers did not allege that D knew of their right at the date of his purchase. *Held* (1) that D's right to the lands was not affected by the unfeudalised feu-disposition; and (2) that section 38 of the Act did not give the school board a better title than that of their author, and therefore that their title was not valid in competition with the title of D. Ceres School Board v. M'Farlane, Dec. 12, 1895, p. 279.

Disposition—Warrandice—Exception of existing feu-rights—Unrecorded feu-disposition.

3. *Opinions* that an exception in a clause of warrandice "of all feu-rights granted by the disponer or his predecessors" fell to be construed as meaning all feu-rights completed by infeftment. Ceres School Board v. M'Farlane, Dec. 12, 1895, p. 279.

Bounding Title—Measurement—Plan—Prescription.

4. A purchaser obtained a conveyance to four acres of ground excepting "those parts and portions thereof sold and disponed by me to A and B, all as specified and described in the disposition thereof by me in their favour, dated 11th July 1864." The disposition of 11th July referred to an annexed plan as delineating the ground conveyed, and also described that ground by measurement. *Held* that the purchaser's title was a bounding title, and that he could not acquire by prescription any of the subjects excepted from the grant. North British Railway Co. v. Hutton, Feb. 19, 1896, p. 522.

Common Interest—Servitude.

5. A was the proprietor of the ground floor of a tenement, of which B and C owned the upper flats. The titles of all were derived from a common author, and conferred upon each "the following servitude":—"That no buildings shall be erected on the area behind the said tenement nearer the back side wall thereof than nineteen feet, and that the said space of nineteen feet all along the length of the said tenement shall be kept open and unbuilt upon in all time coming, in order to preserve the back lights of the foresaid shops hereby disponed." In an action raised by A in 1893 to have B and C ordained to remove certain wooden posts which they had fixed in the court, the Court *held* (1) that the parties had a right of common interest in the back court entitling each to prevent the others from erecting any structure upon it; and therefore (2) that it was not material to inquire to what extent the light of the pursuer's flat was interfered with. Taylor's Trustees v. M'Gavigan, July 3, 1896, p. 945.

Servitude—Implied grant—Right of access where disponee owns adjoining ground.

6. A co-operative society were proprietors of a piece of ground with build-

PROPERTY—*Continued.*

ings which faced upon the west a street known as Store Brae. In 1872 they acquired a piece of ground adjoining their property on the east under a feu-charter which bound them to erect on the ground a dwelling-house "to be used in the meantime as a bakehouse," and to erect a fence on the east side of the feu. The feu-charter contained no provision as to access. There was an access from Store Brae through the Society's property by a pend four feet wide, but the only practicable access for carts was over a ploughed field belonging to the superior, which bounded the bakehouse feu on the east. In building the bakehouse the society brought carts over this field, and after it was built they continued to use the track as an access for carts. In 1895 the proprietor of the field brought an action against the society for declarator that they had no right of access over it. The defenders pleaded that the grant of the feu for the purpose of building a bakehouse implied a grant of a suitable access, and that the use which had followed the grant shewed its meaning. From a proof it appeared that it was practicable for the bakehouse business to be carried on without an access for carts by the use of hand-barrows from the pend. There was evidence to shew that before commencing the building of the bakehouse the society applied for the superior's permission to bring carts over his field. *Held* that there was no implied grant of access over the field. Cullens v. Cambusbarron Co-operative Society, Limited, Nov. 27, 1895, p. 209.

Game—Construction of interlocutor declaring a right of fowling over lands belonging to another person—Extent of privilege.

7. In 1808 Innes, proprietor of Ballogie, was infeft in that estate *cum privilegio et libertate aucupandi* in the Forest of Birse, which belonged to the Earl of Aboyne. By a judgment of the Court of Session in 1812, affirmed by the House of Lords in 1819, in an action by the Earl against Innes, it was found that the liberty and privilege of fowling was "a franchise conferred as a heritable right rendered an appendage to the property of Ballogie," and further, "that the said privilege may lawfully be exercised by the defender personally, or by his gamekeeper duly authorised for that purpose, or by any qualified friends whom he may permit, whether his tenants on Ballogie or not, or whether the defender be personally present or not, but always in such way and manner as not to be abusively exercised or encroach unreasonably on or absorb the general right of fowling as well as hunting belonging to the pursuer over the said forest." In 1896, in an action at the instance of the Marquis of Huntly, a successor of the Earl of Aboyne, to have the right of Ballogie defined, *held* that under the interlocutor of 1812 Ballogie was entitled, *inter alia*, (1) to let his right of shooting in the forest to any persons whether they were or were not tenants of Ballogie; and (2) to sell the game killed by him for sport. Marquis of Huntly v. Nicol, March 12, 1896, p. 610.

Right of majority of members of voluntary association to alienate property of club as a donation.

8. In 1869 a silver cup was presented to the curling clubs of Dumfriesshire for competition as a trophy, and these clubs (which were not incorporated societies) framed rules, under which the cup was to become the property of the club which won the cup twice in succession. In 1893 the cup was so won by the Upper Annandale Club. Thereafter, at a meeting of that club, it was resolved, by a majority of the members present, to present the cup to M. J., who had been skip of the rink which obtained the highest score on the two successive occasions on which the club had won the cup. In an action brought against M. J. by certain members of the club, who had objected to the presentation, *held* that the club not being an incorporated society the cup

PROPERTY—*Continued.*

was the joint property of all the individual members of the club; that it was *ultra vires* of a majority of the members thus to give away the joint property against the wishes of the minority; and therefore that the presentation to M. J. was ineffectual. Murray v. Johnstone, July 8, 1896, p. 981.

See *Superior and Vassal.*

PUBLIC HEALTH. *Burgh—Erection of hospital—Antecedent Approval of Local Government Board—Conditional Approval—Public Health (Scotland) Act*, 1867, *sec.* 39—*Local Government (Scotland) Act*, 1894, *sec.* 3.

1. The Public Health (Scotland) Act, 1867, sec. 39, empowers Local Authorities to build hospitals, "provided" the Local Government Board "approve of the situation and construction thereof." In an application by a burgh Local Authority to the Local Government Board for the approval of the site and plans of a temporary cholera hospital the Board gave its approval thus,—"The Board approve of the site subject to the following conditions . . . 4. That all infected matter (other than clothing, which, if to be used again, must be duly disinfected) is to be disposed of by means of an incinerator . . . The Board approve of the plans, subject to provision being made for the proper disinfection of clothing." *Held* that this was a valid approval by the Board, under section 39. Magistrates of Edinburgh v. Magistrates of Leith, Jan. 11, 1896, p. 383.

Burgh—Erection of hospital by Local Authority "within a convenient distance" from its own district—Right to erect within neighbouring burgh—Public Health (Scotland) Act, 1867, *sec.* 39—*Public Health Amendment (Scotland) Act*, 1890, *sec.* 1.

2. Under the Public Health Acts a burgh Local Authority may with the approval of the Local Government Board erect a hospital within its own district, "or within a convenient distance of such district." *Held* that the Local Authority of a burgh, with the approval of the Local Government Board, might erect a hospital within the district of a neighbouring burgh. Magistrates of Edinburgh v. Magistrates of Leith, Jan. 11, 1896, p. 383.

Slaughter-houses—Place of deposit for carcases of horses—Licence—Burgh Police (Scotland) Act, 1892, *sec.* 285.

3. The proprietor of premises within a burgh, which were not licensed in terms of section 285 of the Burgh Police (Scotland) Act, 1892, appealed against a conviction of having used the premises as a place of deposit for the carcase of a horse, in contravention of the section. The Court *sustained* the appeal, holding that the facts stated as proved did not in law justify a conviction. Simpson v. Proctor, Jan. 8, 1896, Just. Cases, p. 22.

PUBLIC-HOUSE. *Certificate—Sequestration of Publican—Right of trustee to delivery of certificate.*

1. *Held* that the trustee upon the sequestrated estate of a publican was *prima facie* entitled to get delivery from the bankrupt of his permit-book and certificate. Fraser's Trustee v. Fraser, July 8, 1896, p. 978.

Breach of Certificate—Complaint—Inducie—Home Drummond Act, 1828, *sec.* 23—*Summary Procedure (Scotland) Act*, 1864, *sec.* 6—*Burgh Police (Scotland) Act*, 1892, *sec.* 515.

2. *Held* that a complaint of breach of a publican's certificate brought under the Summary Procedure Act and the Burgh Police Act, 1892, must be served upon an *inducie* of six days in terms of the Home Drummond Act, 1828. Laird v. Anderson, Nov. 2, 1895, p. 14.

Breach of Certificate—Complaint—Relevancy—Specification of statute.

3. A complaint charged the accused with an offence "contrary to the Public-Houses (Scotland) Act, 1862, and the Acts 9 Geo. IV. c. 58,

PUBLIC-HOUSE—*Continued.*

and 16 and 17 Vict. c. 67, therein referred to." A conviction was obtained. *Held* that the complaint was irrelevant for want of specification, and conviction therefore quashed. Buchanan v. Wilson, July 16, 1896, Just. Cases, p. 86.

Breach of Certificate—Hotel Certificate—Contravention— Guest of bona fide traveller—Public-Houses Acts Amendment (Scotland) Act, 1862.

4. A hotelkeeper supplied two glasses of liquor on a Sunday to a *bona fide* traveller for the refreshment of two friends of the *bona fide* traveller, who were themselves neither *bona fide* travellers nor lodgers in the hotel. The hotelkeeper knew that the liquor was to be consumed by the friends. It was paid for by the *bona fide* traveller. *Held* that the hotelkeeper had not committed a contravention of his certificate. Oliver v. Loudon, Jan. 9, 1896, Just. Cases, p. 34.

Breach of Certificate—Hotel Certificate—Sale of victuals outside of licensed premises — Public-Houses (Scotland) Acts Amendment Act, 1862, Schedule A.

5. A hotel licence, which authorises the sale in the hotel, "but not elsewhere, of victuals and of spirits," does not preclude the holder from selling victuals elsewhere than in the hotel. Mackenzie v. M'Dougall, Oct. 25, 1895, Just. Cases, p. 3.

"Hawking spirits" — Relevancy of complaint — Specification — Public-Houses Acts Amendment (Scotland) Act, 1862, secs. 16 and 37.

6. A complaint charged the accused with an offence against the Public-Houses Acts Amendment (Scotland) Act, 1862, and particularly section 16 thereof, in so far as upon a date and at a place specified "he did hawk one pint of spirits to" A B. *Held* that the complaint was irrelevant, in respect it did not state whether the offence was committed by selling spirits, or by offering spirits for sale. Cameron v. Buchan, Feb. 7, 1896, Just. Cases, p. 46.

"Hawking spirits" — Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 16.

7. A hotelkeeper was charged with a contravention of section 16 of the Public-Houses Acts Amendment (Scotland) Act, 1862, in so far as he did, on 23d November 1895, hawk one pint of spirits to A B. It was proved that the accused, on 22d November, called at A B's house and solicited an order for spirits; that A B gave him an order for one pint of rum, and that this was delivered to him next day, 23d November, by the accused upon the public road. *Held* that the facts proved did not support the charge of hawking. Cameron v. Buchan, Feb. 7, 1896, Just. Cases, p. 46.

RAILWAY (AND COMPULSORY POWERS GENERALLY). *Compulsory acquisition of lands—Arbitration—Interdict.*

1. Note of suspension and interdict to stop proceedings in an arbitration under the Lands Clauses (Scotland) Act, 1845, *refused* on the ground that the complainer had failed to shew that the respondent's claim to compensation was not relevant, or to shew any other cause for staying the proceedings in the arbitration. Glasgow, Yoker, and Clydebank Railway Co. v. Lidgerwood, Nov. 27, 1895, p. 195.

Compulsory acquisition of lands—Lease—Compensation to tenant—Lease with break.

2. A tenant of a farm under a lease to Whitsunday 1911, which gave power to the landlord or tenant to terminate it at Whitsunday 1898, being deprived of land by a Local Authority under compulsory powers, claimed, in an arbitration under the Lands Clauses Act, 1845, compensation for loss of profits on the basis of the lease extending to Whitsunday 1911. The Local Authority contended that the lease should be taken as ending at Whitsunday 1898. *Held* that the tenant

was entitled to compensation on the footing that the lease endured to Whitsunday 1911, subject to such deduction as the arbiter might consider due to the contingency of its being brought to an end at an earlier date. Fleming v. District Committee of Middle Ward of Lanarkshire, Nov. 15, 1895, p. 98.

Compulsory powers—Compensation—Yearly tenant—Procedure—Arbitration—Sheriff—Railway Clauses Consolidation (Scotland) Act, 1845, *sec.* 6—*Lands Clauses Consolidation (Scotland) Act*, 1845, *sec.* 114.

3. A claim by a yearly tenant against a railway company for compensation under sec. 6 of the Railway Clauses Consolidation (Scotland) Act, 1845, falls to be determined by the Sheriff under sec. 114 of the Lands Clauses Consolidation (Scotland) Act, 1845—and not by arbitration—whether the claim is on account of lands injuriously affected or is on account of lands taken. Glasgow District Subway Co. v. Albin & Son, Nov. 6, 1895, p. 81.

Compulsory powers—Mines and Minerals—Misappropriation of freestone—Reparation—Measure of damages.

4. A railway company having wrongously excavated certain freestone reserved to their superiors, *held* that the superiors were entitled to recover from the company the market value of the freestone used or removed by them, less the cost of working, although it appeared that the superiors could not themselves have worked or let the freestone to a profit. Davidson's Trustees v. Caledonian Railway Co., Oct. 29, 1895, p. 45.

Compulsory powers—Superior and Vassal—Feuar's right to freestone for building on feu—Whether railway bridges and other works within right.

5. A feu-charter, which reserved the freestone to the superior, gave power to the feuar, notwithstanding the reservation, to dig or work the freestone for erecting "houses and offices, or walls or other buildings" upon the feu, or for making or repairing the roads thereon. A railway company having taken over the feu by compulsory purchase, *held* that it was within the powers of the feuar to dig freestone for the construction of bridges and other railway works on the feu. Davidson's Trustees v. Caledonian Railway Co., Oct. 29, 1895, p. 45.

Compulsory powers—Land acquired by voluntary purchase—Conditional incorporation of Lands Clauses Consolidation (Scotland) Act, 1845, *sec.* 127.

6. Where a school board acquired land for the site of a school by voluntary purchase, and without adopting the procedure prescribed by section 31 of the Education Act, 1878, and obtaining a confirming Act, *held* that the school board were not liable under section 127 of the Lands Clauses Act, 1845, to make good the deficiency in the poor-rates caused by their having acquired the land. Barony Parish Council v. Glasgow School Board, Nov. 28, 1895, p. 221.

Lapse of powers—Level Crossing—Ultra vires—Statute—Incorporation of special Act with general Act—Railway Clauses Consolidation Act, 1845, *sec.* 16.

7. A special Act obtained by a railway company in 1853 incorporated the Railway Clauses Consolidation (Scotland) Act, 1845, "so far as not hereby altered or varied," and by its 37th section enacted,—"The railway hereby authorised shall be completed within five years from the passing of this Act, and on the expiration of such period the powers by this Act, or the Acts incorporated, granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised except as to so much of the railway as shall then be completed." The special Act gave compulsory powers to take land for a double line of railway, and to carry the railway over a public road

RAILWAY—*Continued.*

near B. station on the level. The company acquired sufficient land for a double line, but within the five years they only formed a single line. In 1890 the Board of Trade, under the powers of the Regulation of Railways Act, 1889, required the railway company to interlock the signals at the stations on their line. After the new interlocking arrangements at B. station had been inspected by the Board of Trade inspector, he intimated that they would not be passed unless a loop-line at the station was extended. To effect this alteration it was necessary that a second line of rails should be laid across the road. The District Committee of the County Council thereupon brought an action against the railway company to have it declared that the defenders were not entitled to encroach on the road beyond the line of the existing gates and fences at each side of the level crossing in order to lay the new rails, and for interdict. The pursuers did not dispute that the defenders in constructing the line would have been entitled to lay double rails across the road, but maintained that under sec. 37 of the special Act the defenders' power to do so lapsed at the end of five years. *Held* that sec. 37 of the special Act did not, after the lapse of the five years, deprive the company of the power given by sec. 16 of the Railway Clauses Consolidation (Scotland) Act, 1845, to do all acts necessary for using the railway, and that the defenders were entitled to lay a double line of rails across the road, as this had become necessary for using the railway. Western District Committee of the County Council of Stirling v. North British Railway Co., July 2, 1896, p. 929.

Disputes between companies—Arbitration—Competency of construing award —"Traffic."

8. *The Great North of Scotland Railway Company and the Highland Railway referred to A B as arbiter the following question:—"Whether the proviso of section* 82 *of the Highland Railway Act,* 1865, *applies to traffic exchanged under the Great North of Scotland Act,* 1884, *between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rules of the Clearing House?" The arbiter in his award found "that the proviso of section* 82 *of the Highland Railway Act,* 1865 . . . *does not apply to traffic exchanged under the Great North of Scotland Act,* 1884, *between the two companies at Elgin," and further, "that the receipts of such traffic are to be divided between the two companies respectively, in accordance with their respective mileage, and under the rules of the Clearing House." In an action raised by the Great North of Scotland Railway Company for implement of the award, the defenders made and asked to be allowed a proof of the following averment:—"The terms 'traffic exchanged under the Act of* 1884 *between the two companies at Elgin,' occurring in the question submitted to A B do not include, and were not intended to include, passenger traffic. This was explained to A B, and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."* Held (aff. *judgment of Second Division*) *that the award was unambiguous, and must receive effect.* Highland Railway Co. v. Great North of Scotland Railway Co., July 16, 1896, p. 80.

Disputes between Companies—Arbitration—Reference of differences with respect to matters referred to in a section of private Act—Jurisdiction—Lanarkshire and Dumbartonshire Railway Act, 1891, *sec.* 6.

9. By the Lanarkshire and Dumbartonshire Railway Act, 1891, sec. 6, subsec. (4), it was enacted that a railway company should carry their line under certain ground belonging to the North British Railway Com-

pany in tunnel, and that in the construction of the tunnel the company should not "without the previous consent of" the North British Company break open the surface of the ground. By subsec. (7) it was enacted that bridges and works passing over or under lands belonging to the North British Company should be according to plans approved of by the engineer of that company. By subsec. (10) it is enacted that "if any difference shall at any time arise between the company and the North British Company or their respective engineers, with respect to any of the matters above referred to in this section, such difference shall be determined by an engineer to be appointed by the Board of Trade. . . ." The tunnel having been completed, the North British Company raised an action against the company to have them ordained to remove a ventilating shaft which they had constructed from the roof of the tunnel to the surface of the ground belonging to the North British Company. The questions raised in the action were whether certain plans which had been submitted by the company to and approved of by the engineer of the North British Company disclosed the ventilating shaft, and if they did, whether the engineer's approval was equivalent to the consent required by subsec. (4), or otherwise barred the North British Company from challenging the shaft. The defenders pleaded the reference clause. The pursuers maintained that the questions did not constitute a difference in the sense of subsec. (10), in respect (1) that the erection of the shaft was altogether outwith the statutory powers of the defenders; and (2) that the questions were essentially questions of law. *Held* that a difference had arisen which fell to be referred in terms of subsec. (10). North British Railway Co. v. Lanarkshire and Dumbartonshire Railway Co., Nov. 5, 1895, p. 76.

Responsibility of railway company for defective equipment of their line.

10. A railway company or other employer is not relieved, by the appointment of competent engineers and managers, from responsibility for injury arising to a servant from a defect in the construction of the works. M'Killop v. North British Railway Co., May 29, 1896, p. 768.

Reparation—Carriage—Passengers—Getting out of train not at platform—Invitation to alight.

11. In an action of damages for personal injury against a railway company, the pursuer averred that between five and six o'clock on a January morning he was travelling as a passenger to a station on the defenders' line; that "about 300 yards before entering the station platform, and in a line with, up to, and abutting the coping of the platform, is a parapet wall, which reaches to the footboard of the carriage and resembles the station platform, although it is narrow"; that on the morning in question the train stopped at this parapet wall, and the pursuer in the darkness stepped out on to the wall "thinking it to be the station platform owing to the darkness, and the fact that the defenders systematically were in the habit of leaving" the station "unlit"; and that on discovering where he was, he was about to re-enter the train when it suddenly started again, with the result that the pursuer was precipitated over the wall and injured. The defenders pleaded that the action was irrelevant. The Court *sustained* the defenders' plea, and *dismissed* the action. M'Aulay v. Glasgow and South-Western Railway Co., June 23, 1896, p. 845.

Right of railway to exclude from station persons other than travellers—Exclusion of hotel servants wearing hotel badge—Interdict.

12. The Perth General Station Committee presented a petition to the Sheriff to interdict A B, a hotelkeeper in Perth, "himself, or by his boots, or other servant . . . unlawfully entering or trespassing upon any of the railway stations . . . of the pursuers; and in particular

RAILWAY—*Continued.*

from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises connected therewith, while wearing the uniform or badge of the hotelkeeper, or of his hotel." The petitioners stated that they were proprietors of Perth Station; that on 17th July 1894 they intimated to A B that they had right to prevent, and would not permit, hotel servants wearing hotel badges to appear upon their platforms; that on various occasions in July 1895 A B had sent the boots of his hotel, wearing the hotel uniform and badge, to wait the arrival of certain trains, and that the latter on each occasion had been asked by the petitioners' servants to leave the station, but that he had refused to do so. The defender admitted that in July 1895 he had sent his hotel boots to meet customers arriving by train. The Sheriff refused the petition, and on appeal the Court affirmed the Sheriff's judgment, *holding* (1) that an interdict against the defender or his servants "unlawfully entering" the station could not be granted, as such an interdict would not specify the act forbidden; and (2) that *quoad ultra* the interdict sought was merely to prevent hotel servants entering the station in a certain dress to meet customers, and that that was not a case for interdict.

Question, whether the petitioners' right of property in the station was of such a character as to entitle them to exclude from the station all persons other than travellers. Perth General Station Committee v. Ross, June 26, 1896, p. 885.

See *Process*, 19.

REAL BURDEN. See *Superior and Vassal*, 7, 10.

REDUCTION. See *Process*, 28 *to* 32.

REI INTERVENTUS. See *Sale*, 1.

RELIEF. *Ship—Charter-party—Agreement by owner to insure—Risk—Owner and charterer—Collision.*

A steam-trawler was hired out by her owner under a time charter, whereby the charterer was to find crew, stores, &c., and the owner was "to pay insurance only." The owner, *inter alia*, insured against loss from having to pay damages for injury which might be caused by the trawler to other vessels with the exception of one-fifth of three-fourths of such loss. The trawler, through the fault of the charterer's crew, caused damage to another vessel, and the owner of the trawler, without notice to the charterer, settled the claim, and was reimbursed by the insurance company to the extent of his insurance. In an action raised by the owner against the charterer for the balance of loss, *held* that as the pursuer had settled the claim without notice to the defender, he had no right of relief against him on the ground that it had been caused by his fault. Clarke v. Scott, Jan. 30, 1896, p. 442.

REPARATION. *Master and Servant—Negligence—Employers Liability Act*, 1880, *sec.* 1, *subsec.* 3.

1. A workman was injured by the fall of a printers' guillotine which he was assisting to lift into an upright position on a lorry in compliance with the orders of A, one of the men engaged in the operation, who directed the operation to be performed. In an action by the injured workman against his employers for damages under the Employers Liability Act, 1880, *held* that even if A was, in the sense of section 1, subsection 3, of the Act, a person to whose orders the pursuer was bound to conform, the defenders were not liable, no negligence having been proved. Brown v. Furnival & Co., Feb. 5, 1896, p. 492.

Master and Servant—Coalmaster—Responsibility of coal mining company for defective system of working.

2. A miner brought an action of damages against his employers, a coal

pany in tunnel, and that in the construction of the tunnel the company should not "without the previous consent of" the North British Company break open the surface of the ground. By subsec. (7) it was enacted that bridges and works passing over or under lands belonging to the North British Company should be according to plans approved of by the engineer of that company. By subsec. (10) it is enacted that "if any difference shall at any time arise between the company and the North British Company or their respective engineers, with respect to any of the matters above referred to in this section, such difference shall be determined by an engineer to be appointed by the Board of Trade. . . ." The tunnel having been completed, the North British Company raised an action against the company to have them ordained to remove a ventilating shaft which they had constructed from the roof of the tunnel to the surface of the ground belonging to the North British Company. The questions raised in the action were whether certain plans which had been submitted by the company to and approved of by the engineer of the North British Company disclosed the ventilating shaft, and if they did, whether the engineer's approval was equivalent to the consent required by subsec. (4), or otherwise barred the North British Company from challenging the shaft. The defenders pleaded the reference clause. The pursuers maintained that the questions did not constitute a difference in the sense of subsec. (10), in respect (1) that the erection of the shaft was altogether outwith the statutory powers of the defenders; and (2) that the questions were essentially questions of law. *Held* that a difference had arisen which fell to be referred in terms of subsec. (10). North British Railway Co. v. Lanarkshire and Dumbartonshire Railway Co., Nov. 5, 1895, p. 76.

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REI INTERVENTUS. See *Sale*, 1.

RELIEF. *Ship—Charter-party—Agreement by owner to insure—Risk—Owner and charterer—Collision.*

A steam-trawler was hired out by her owner under a time charter, whereby the charterer was to find crew, stores, &c., and the owner was "to pay insurance only." The owner, *inter alia*, insured against loss from having to pay damages for injury which might be caused by the trawler to other vessels with the exception of one-fifth of three-fourths of such loss. The trawler, through the fault of the charterer's crew, caused damage to another vessel, and the owner of the trawler, without notice to the charterer, settled the claim, and was reimbursed by the insurance company to the extent of his insurance. In an action raised by the owner against the charterer for the balance of loss, *held* that as the pursuer had settled the claim without notice to the defender, he had no right of relief against him on the ground that it had been caused by his fault. Clarke v. Scott, Jan. 30, 1896, p. 442.

REPARATION. *Master and Servant—Negligence—Employers Liability Act*, 1880, *sec.* 1, *subsec.* 3.

1. A workman was injured by the fall of a printers' guillotine which he was assisting to lift into an upright position on a lorry in compliance with the orders of A, one of the men engaged in the operation, who directed the operation to be performed. In an action by the injured workman against his employers for damages under the Employers Liability Act, 1880, *held* that even if A was, in the sense of section 1, subsection 3, of the Act, a person to whose orders the pursuer was bound to conform, the defenders were not liable, no negligence having been proved. Brown v. Furnival & Co., Feb. 5, 1896, p. 492.

Master and Servant—Coalmaster—Responsibility of coal mining company for defective system of working.

2. A miner brought an action of damages against his employers, a coal

mining company, alleging that he had been injured in consequence of the defenders failing to properly secure the roof of the mine. The action was laid both at common law and under the Employers Liability Act. The defenders pleaded that the action was irrelevant at common law, on the ground that they had placed the management of the mine in the hands of a certificated manager, in accordance with the provisions of the Coal Mines Regulation Act, and that it was not said that they had failed to supply the manager with every appliance for which he asked. *Held* that the case could not be dismissed as irrelevant at common law, in respect that the record imputed fault to the defenders, as distinguished from their servants, in regard to their system of working, and that it was not impossible that a mining company might be guilty of such fault. Macdonald v. Udston Coal Co., Limited, Feb. 8, 1896, p. 504.

Master and Servant—Railway—Responsibility of railway company for defective equipment of their line.

3. A railway company or other employer is not relieved, by the appointment of competent engineers and managers, from responsibility for injury arising to a servant from a defect in the construction of the works.

In an action for damages at common law and under the Employers Liability Act at the instance of the father of a railway servant, the pursuer averred that his son had been run over and killed by a train while acting as a flag-boy at a level crossing; that the train in question was being pushed by an engine behind on a line which formed a curve, close to the place of the accident, round a water-tank, and that the water-tank had been erected by the defenders in such a position as to make it impossible for those in charge of the engine to see whether the line was clear, or to receive signals. The defenders pleaded that there was no relevant case at common law, in respect that there was no averment that the engineers employed to lay out the station and to fix the site of the water-tank were not competent. *Held* that the pursuer was entitled to an issue at common law. M'Killop v. North British Railway Co., May 29, 1896, p. 768.

Master and Servant—Coal Mine—Person in superintendence—Engineman—Employers Liability Act, 1880, *section* 1, *subsection* 2—*Fault in failing to light pit.*

4. A brought an action of damages against a coal company on account of the death of her son, who had been employed in one of the defenders' pits, and had met his death by falling down the shaft. She claimed damages (1) under the Employers Liability Act, 1880, on the ground that the accident was due to the fault of the engineman in hoisting the cage from the midworking, where the pursuer's son was employed, before the indicator shewed that the gate at the entrance to the shaft was closed; and (2) at common law on the ground that the accident had been caused by the defenders' failure properly to light the pit-bottom. *Held* (1) that the engineman was not a person having superintendence entrusted to him in the sense of subsection 2 of section 1 of the Employers Liability Act, and that the action was therefore irrelevant under the statute; but (2) that there was a case for trial at common law in regard to the alleged failure of the defenders properly to light the pit-bottom. Farnham v. New Bank Coal Co., Limited, May 12, 1896, p. 722.

Master and Servant—Coal Mine—Defect in road in mine—Knowledge of mine-owner—Liability at common law—Employers Liability Act, 1880, *sec.* 1, *subsec.* (1), *sec.* 2, *subsec.* (1), *and sec.* 8.

5. A miner was injured by the fall of two large stones from the roof of a roadway in the coal mine in which he was employed. In an action by

REPARATION—*Continued.*

him against his employers for damages, laid both at common law and under the Employers Liability Act, 1880, he averred that "the accident was caused through the fault and gross negligence of the defenders, their manager, oversman, and roadsman, in allowing said roof of said road to remain in such an exceedingly dangerous condition"; that "the road had not been properly inspected"; that "the wood supporting the roof and sides where the accident occurred was in a rotten state, and had been in this state for a considerable time before the accident, and contributed to the accident"; and that "this was well known to the defenders, their oversman and roadsman, but no steps were taken to have it remedied." *Held* that these averments were relevant to infer liability under the Act, and further that the pursuer was entitled to an issue both at common law and under the Act. M'Mullen v. Newhouse Coal Co., May 27, 1896, p. 759.

Master and Servant—Ship—Responsibility of stevedore for defect in ship.

6. *Held* that a stevedore was not liable for injuries sustained by one of his servants in consequence of defects in the ship upon which the stevedore was employed, there being no particular circumstances to lay the duty of inspection upon him. Simpson v. Paton, March 12, 1896, p. 590.

Master and Servant—Ship—Liability of shipowner to servant of stevedore for defect in ship's gear—Liability of stevedore to his servant for defect in ship's gear.

7. A labourer in the employment of stevedores brought actions for damages on account of personal injuries sustained by him through the fall of a stanchion when engaged in discharging the cargo of a ship (1) against the shipowners, and (2) against his own employers. Averments on a consideration of which it was *held* (1) that the action against the shipowners was relevant; but (2) that the action against the stevedores fell to be dismissed as irrelevant, in respect that the stevedores were under no duty of inspecting the vessel to see to its safety for their servants. M'Lachlan v. s.s. "Peveril" Co., Limited, May 27, 1896, p. 753.

Precautions for safety of public—Defective condition of shop floor—Liability of tenant of shop for injuries to customers—Latent defect.

8. In an action of damages against the tenant of a shop by a woman who, after making some purchases, had fallen through the floor of the shop into a cellar, the following facts were proved:—The shop was an old building. The portion of the floor which gave way underneath the pursuer had been patched many years before, the patching having been effected by sawing off the flooring flush with the two adjacent joists, and nailing pieces of wood termed "fillets" along the joists, upon which was supported the new flooring. The flooring probably gave way owing to the nails fixing the fillets to the joists having become insufficient for that purpose. Previous to the accident, the surface of the floor was to all appearance safe. Anyone going below into the cellar might have seen that the portion in question of the floor rested on fillets and not on the joists; but there was evidence to the effect that such a person merely by looking upwards would not have noticed anything wrong. The defender, who was a yearly tenant, and had been in possession for about three years, had never made any inspection of the floor, and had never been in the cellar (which, though within his tenancy, he did not use), and did not suspect that anything was wrong with the floor. *Held* that although the defender had no reason to suspect that the floor was insecure, he was in fault in not having it inspected and kept in a safe condition for customers, and that he was liable in damages. Dolan v. Burnet, March 4, 1896, p. 550.

REPARATION—*Continued.*

Negligence—Precautions for safety of the public—Lorry standing in street unattended to—Child—Proximate cause of injuries—Glasgow Police Act, 1866, *sec.* 149.

9. A carter in charge of a horse and lorry left his lorry standing unattended on a crowded street in Glasgow and went into a public-house to have a drink. After an absence of a few minutes he returned, and without looking underneath the lorry drove off, seriously injuring a child of six, who had during his absence gone underneath the lorry. In an action of damages by the father of the child against the carter's employer, *held* that the defender was liable in damages, in respect that the child's injuries were due to the fault of the carter in driving away after he left the public-house without looking underneath the lorry to see that all was safe.

Opinion (*per* Lord Trayner) that—assuming the driver to have been guilty of a contravention of the Glasgow Police Act, 1866, sec. 149, which subjects to a penalty any person who, on any public street, suffers a cart to "stand longer than is necessary for loading or unloading goods"—such contravention did not render the defender liable in damages for the injuries to the child, in respect that the driver's absence from his lorry was not the proximate cause of the injuries. *Opinion* (*per* Lord Young) *contra*. Morrison v. M'Ara, March 6, 1896, p. 564.

Slander—Letter—Complaint to committee of association for sport—Privilege.

10. In an action of damages for slander the pursuer averred that the defender had acted as referee at a football match between members of two clubs belonging to a football union at which the pursuer was one of the players, that the defender had complained by letter to the committee of the union that the pursuer had during the match made offensive remarks about the defender, that the defender had at a meeting of the committee held to investigate the matter, given evidence in support of his complaint, and stated that the pursuer had called him "a bloody little brute,"—and that the pursuer had not used the language complained of. The pursuer set forth several innuendoes as to the import of the same words. The pursuer averred generally that the statements were made by the defender calumniously and maliciously. The Court *dismissed* the action as irrelevant, *holding* (1) that the statements complained of were not *per se* defamatory, and that the pursuer had not set forth a proper innuendo of a different and libellous meaning; and (2) that even if the words were defamatory, the defender, in the circumstances disclosed in the pursuer's statements on record, was privileged in making the complaint, and in supporting it before the committee, and that the pursuer had made no relevant averment of facts from which malice could be inferred. Murdison v. Scottish Football Union, Jan. 30, 1896, p. 449.

Slander—Association for sport—Resolution of committee—Publication in newspapers—Privilege—Issue.

11. The pursuer of an action of damages for slander called as defenders (1) "The Scottish Football Union and the members of the Committee of the Union" as such committee and as representing the said Union, and (2) certain members of the committee as individuals. The pursuer averred that the committee in consequence of a complaint by a referee as to pursuer's conduct at a football match between members of two clubs belonging to the Union, in which the pursuer was a player, arranged for a meeting of committee to inquire into the complaint, that it was *ultra vires* of the committee to hold such an inquiry, that the meeting was attended by the members of committee called as defenders individually, that the committee so composed adopted a finding that

REPARATION—*Continued.*

the pursuer had used offensive language to the referee, and passed a resolution that he should be severely censured and ordered to apologise to the referee, and that the finding and resolution were published in certain newspapers containing football intelligence throughout Scotland upon the instruction of the members of committee who attended the meeting. The pursuer also made averments to the effect that the inquiry had been conducted in an unfair and irregular manner. *Held* (1) that the pursuer was not entitled to an issue against the Union and its committee as representing it, the ground of his complaint being that the committee had acted outwith the authority of the Union; and (2) that the pursuer was entitled to an issue of slander against the members of the committee individually, and that having regard to the averments as to the publication in newspapers, and to the conduct of the inquiry, the pursuer's record did not necessarily imply privilege, and that it must be left to the presiding Judge, after hearing the evidence, to direct the jury whether the defenders were privileged. Form of issue approved. Murdison v. Scottish Football Union, Jan. 30, 1896, p. 449.

Slander—Privilege—Report of railway inspector to superiors—Motion for new trial—Credibility—Evidence to support verdict.

12. A railway inspector lodged a report with the traffic superintendent stating that he had detected, in a goods shed, a railway clerk using a gimlet in the side of a cask, and a railway porter sitting on the cask with a water can in his hands, that he had said to them that they were in a very awkward position, and that the clerk said they were, while the porter followed him and asked if he intended to report the matter. The clerk and the porter raised an action of damages for slander against the inspector, and obtained an issue which contained malice. At the trial the pursuers, who had also been for some time in the employment of the company, deponed that the whole report was an invention, but they offered no explanation of the defender's motive in making the charge against them. The jury having returned a verdict for the pursuers, and awarded £100 to each as damages, the Court refused to grant a new trial, on the ground that the question was one of credibility, and that if the jury believed the evidence for the pursuers the false report by the defender was sufficient evidence of malice to warrant the verdict returned. Martin and Stark v. Cruickshanks, June 26, 1896, p. 874.

Slander—Innuendo—Issue—Counter Issue—Veritas—Evidence competent to defender without counter issue.

13. In an action of damages for slander the pursuer obtained an issue whether the defender falsely and calumniously stated that a clause in an agreement between a client of the pursuer and the Police Commissioners of a burgh had been added by the pursuer to the agreement after its execution by the Commissioners, meaning thereby that the clause had been fraudulently interpolated in the agreement by the pursuer after execution. The defender admitted that he had made the statement, and stated that it was true, but denied the innuendo. At the trial the defender proposed to adduce evidence to shew that the clause was added after execution by the Commissioners, but the evidence was disallowed by the presiding Judge, on the ground that it was an attempt to prove *veritas* without a counter issue. In a bill of exceptions, *held* that the evidence was competent as tendered to prove a fact relevant to the defence. Henderson v. Russell, Oct. 22, 1895, p. 25.

Slander—Issue—Counter Issue.

14. In an action of damages for alleged slander contained in two leaflets issued by the defender, the pursuer averred that the leaflets falsely and

REPARATION—*Continued*

calumniously represented him to be a dishonest and disreputable person, but only proposed to put in issue certain specific charges of dishonesty out of various charges which the leaflets contained. The defender pleaded *veritas*, averred a number of instances, in which he alleged the pursuer to have acted dishonestly, and proposed issues in justification. *Held* (1) that the pursuer was entitled to limit his issues to certain of the specific charges of dishonesty contained in the leaflets, although these were only given in illustration of the general attack on his character; and (2) that the counter issues must be limited to these specific charges. Powell v. Long, Feb. 25, 1896, p. 534.

Sporting Association—Suspended from playing football—Patrimonial loss.

15. *Held* that a resolution of a football union suspending a member of a club belonging to the union from playing did not entitle the member to an issue that the resolution had been "wrongfully, incompetently, and unwarrantably passed and caused to be published by the committee to his loss, injury, and damage," in respect that the alleged resolution was not one which affected any question of property or patrimonial interest, the appropriate issue, so far as the resolution affected reputation, being an issue of slander. Murdison v. Scottish Football Union, Jan. 30, 1896, p. 449.

Wrongous Interdict.

16. In an action of damages raised by the liquidator of a bleaching company, the pursuer stated that he had advertised a sale by auction of a large number of articles belonging to the bleachwork; that the defender, who had already bought the machinery of the bleachwork and other articles on the day before the sale, wrongfully obtained interim interdict against the sale proceeding; that of 266 articles included in the inventory prepared for the sale nine only were ultimately ascertained to belong to the defender, and that the interdict was unwarrantable *quoad* the articles belonging to the pursuer. The defender pleaded that the action was not relevant, in respect that in the circumstances set forth by the pursuer the defender was entitled to stop the sale until his rights should be ascertained. *Held* that the action was relevant. Fife v. Orr, Oct. 16, 1895, p. 8.

Wrongous appointment of judicial manager of farm.

17. Appointment of judicial manager of farm on *ex parte* statements by landlord as to farm having been deserted by tenant. *Question* whether in event of statements being erroneous, *bona fides* of landlord a relevant defence to action of damages by tenant against him. Gibson v. Clark, Dec. 13, 1895, p. 294.

Wrongous use of diligence—Sequestration—Judicial Factor—Opening lockfast place.

18. The wife of a bankrupt brought an action of damages against a person who had been appointed judicial factor upon the sequestrated estate of her husband under section 16 of the Bankruptcy Act, averring that the defender, while taking an inventory of the effects in the house tenanted by her husband, had wrongfully and without warrant forced open the door of a room which was locked and examined the effects therein, although informed that the effects in that room belonged entirely to the pursuer. *Held* that the action was irrelevant. M'Lachlan v. Bell, Nov. 20, 1895, p. 126.

Compulsory powers—Mines and Minerals—Misappropriation of freestone—Measure of damages.

19. A railway company having wrongously excavated certain freestone reserved to their superiors, *held* that the superiors were entitled to recover from the company the market value of the freestone used or removed by them, less the cost of working, although it appeared that

REPARATION—*Continued.*
the superiors could not themselves have worked or let the freestone to a profit. Davidson's Trustees v. Caledonian Railway Co., Oct. 29, 1895, p. 45.
See *Discharge—Railway*, 11—*Relief.*

REPRESENTATION (BY HEIR). See *Passive Title.*

RES INTER ALIOS. See *Loan*, 3—*Relief.*

RES JUDICATA. *Construction of interlocutor—Opinions of Judges.*
1. *Question* (*per* Lord M'Laren) whether it is permissible to refer to the opinion of the Court for the purpose of controlling or limiting the effect of its decree. Marquis of Huntly v. Nicol, March 12, 1896, p. 610.
Opinion of Court on point not debated or determined by interlocutor.
2. The opinion of the Court, expressed at advising, on a question not argued by the parties, and not referred to in the interlocutor of the Court, *held* not to foreclose the parties from subsequently raising the question for judgment. Moubray's Trustees v. Moubray, June 16, 1896, p. 809.

RETENTION. *Executor—Compensation—Mutuality of debt and credit—Bank—Claim of bank to retain against debt of deceased customer funds lodged by his executors.*
1. *Held* that a bank to whom a debt was owing by a deceased customer, whose estate was found to be insolvent, was not entitled to withhold payment of sums lodged with the bank by his executors either on the plea of retention or of compensation. Gray's Trustees v. Royal Bank, Nov. 27, 1895, p. 199.
Factor's right of retention—Right in security—Effect of assignation to rents in bond and disposition in security where bondholder has not raised an action of maills and duties.
2. *Held* that factors who had been authorised by their principal to collect and retain rents in repayment of advances made by them to him were entitled to retain the rents in competition with creditors who held bonds over the property duly recorded, and containing assignations to rents in ordinary form, but who had not brought an action of maills and duties against the tenants. Stevenson, Lauder, & Gilchrist v. Dawson, Feb. 5, 1896, p. 496.
Factor's right of retention—Bankruptcy—Retrocession of bankrupt.
3. A, the proprietor of heritage, appointed a firm of house factors to be factors of his property, and authorised them to retain the rents which they collected in repayment of an advance which they had made to him on his acceptance. Subsequently a petition for sequestration of A's estates was presented three days before the term of Martinmas, and the first deliverance was pronounced on the same day. At Martinmas the factors uplifted the rents and retained them in repayment of their advance. The trustee who was appointed on A's sequestrated estates made no objection to the retention of the rents by the factors, and they lodged no claim in the sequestration. A having thereafter been discharged on a composition, and retrocessed in his estates, claimed the rents retained by the factors on the ground that it was property falling under the sequestration which belonged to him in virtue of his retrocession. *Held* that the factors were entitled to retain the rents claimed. Stevenson, Lauder, & Gilchrist v. Dawson, Feb. 5, 1896, p. 496.
Company—Minute-book of Company.
4. *Held* that a person who had been secretary of a company prior to its liquidation had no right of retention or lien over its minute-book for a debt due to him by the company. Gladstone v. M'Callum, June 16, 1896, p. 783.

REVENUE. *Income-tax—Interest on colonial investments—Income-Tax Act, 1842—Schedule D, Case 4, sec. 102—Customs and Inland Revenue Act, 1893, sec. 5.*

1. The Customs and Inland Revenue Act, 1893, imposed income-tax for the year 1893-4 upon income chargeable under Schedules A, B, C, D, and E of the Income-Tax Act, 1853, and enacted that provisions in any Income-Tax Act in force in the previous year should have full force and effect "with respect to the duties of income-tax hereby granted." An insurance society was assessed for income-tax for the year 1893-94 on the interest of colonial investments not received in Great Britain, but received and re-invested in the colonies, on the ground that it was subject to assessment under sec. 102 of the Income-Tax Act, 1842. *Held* (1) that if and in so far as sec. 102 of the Act of 1842 subjected to assessment income not covered by the lettered schedules, it was not in force for the year 1893-94; and (2) that sec. 102 did not impose duties, but merely contained provisions as to the duties granted in the schedules. Inland Revenue v. Scottish Provident Institution, Dec. 17, 1895, p. 322.

Income-tax—Interest on colonial investments—Constructive remittance—Income-Tax Act, 1842, Schedule D, Case 4.

2. Where interest derived from the colonial investments of a society for mutual insurance was not remitted home, but was re-invested abroad, *held* that it was not constructively remitted to this country by being entered in the society's accounts so as to be chargeable with duty under Case 4 of Schedule D of the Income-Tax Act, 1842. Inland Revenue v. Scottish Provident Institution, Dec. 17, 1895, p. 322.

Income-Tax—Profits arising from Trade—Trade carried on by Religious Society—Deductions—Losses not connected with Trade—Income-Tax Act, 1853, sec. 2, Schedule D—Income-Tax Act, 1842, sec. 100, Schedule D, Case 1, Rule 3.

3. A society whose object was to promote religion by the circulation of tracts and books, carried on the business of booksellers in a shop, and earned profits therefrom. The Society also sold books by colporteurs, but the colportage work could not by itself be carried on at a profit as a commercial undertaking, and the society was able to continue it only by means of the profits earned in the shop and of voluntary subscriptions. *Held* that the profits earned in carrying on the business of booksellers were trade profits and fell to be assessed for income-tax, and that the losses arising from the colportage agencies did not fall to be deducted therefrom, the colportage being essentially distinct from the bookselling business, and not being of the nature of trade. Religious Tract and Book Society v. Inland Revenue, Jan. 14, 1896, p. 390.

Excise—Licence to carry armorial bearings—Customs and Inland Revenue Duties Act, 1869, sec. 19, subsec. 13.

4. *Held* that a device upon a ring consisting of a shield charged with a crowned lion rampant was an armorial bearing in the sense of subsec. 13 of sec. 19 of the Customs and Inland Revenue Duties Act, 1869. Milligan v. Cowan, May 16, 1896, p. 731.

See *Process*, 17—*Stamp*.

REVOCATION. See *Trust*, 2, 3.

RIGHT IN SECURITY. *Catholic Security—Contribution of separate estates to common burden—Annuity.*

1. Where two heritable estates, which were both subject to the common burden of an annuity, passed into the possession of separate proprietors, *held*, in a question between these proprietors, that each estate was bound to contribute to the annuity from year to year, in proportion to the amount of its free rental after deduction of the interest on prior burdens. Ferrier v. Cowan, March 20, 1896, p. 703.

RIGHT IN SECURITY—*Continued.*

Bond and Disposition in Security—Retention—Factor's right of retention—Effect of assignation to rents in bond and disposition in security where bondholder has not raised an action of maills and duties.

2. *Held* that factors who had been authorised by their principal to collect and retain rents in repayment of advances made by them to him were entitled to retain the rents in competition with creditors who held bonds over the property duly recorded, and containing assignations to rents in ordinary form, but who had not brought an action of maills and duties against the tenants. Stevenson, Lauder, & Gilchrist v. Dawson, Feb. 5, 1896, p. 496.

Bond and Disposition in Security—Registered Bond and Assignation in Security of long lease—Poinding of the ground—Registration of Leases (Scotland) Act, 1857, sec. 4.

3. *Held* that the creditor under a bond and assignation of a ninety-nine years' lease duly recorded in terms of the Registration of Leases (Scotland) Act, 1857, was not entitled to warrant for poinding of the ground. Luke v. Wallace, March 13, 1896, p. 634.

Bond and Disposition in Security of Superiority—Right of bondholder to sue action of Maills and Duties.

4. *Held* that the creditor in a bond and disposition in security of a superiority, with an assignation to feu-duties and casualties, has no title to sue an action of maills and duties against the vassal of his debtor for recovery of the feu-duties. Nelson's Trustees v. Tod, July 9, 1896, p. 1000.

Bond and Disposition in Security—Sale by owner of burdened house—Right of bondholder to enforce sale.

5. *Opinion* (*per* Lord Young) that a bondholder cannot enforce implement of a sale made by the owner of the burdened subjects. Smith v. Soeder, Nov. 1, 1895, p. 60.

Bond and disposition in security reserving power to feu security subjects—Feu of part of subjects under building restrictions and disburdening subjects feued of bond—Whether disponee from bondholder, who had sold unfeued subjects under powers of sale, bound by restrictions.

6. In 1871 Harper, the proprietor of an area of unbuilt-on ground in Glasgow granted a bond and disposition in security over the ground, reserving power to feu the same, it being declared that the superiority of the lands feued should be subject to the security. Thereafter Harper feued out part of the ground under building restrictions, and bound himself to take the feuars in the unfeued plots bound to conform to these restrictions, which were declared to be essential qualifications of the feu-contract and real liens and burdens upon the plots thereby disponed, and in so far as declared in favour of the vassal, a real lien and burden on the remainder of the ground. Buildings were erected on the plots feued in conformity with the feu-contracts. Subsequently the superiorities of the plots feued were sold with the consent of the bondholder, and the security was restricted to the unfeued ground. In 1894 the bondholder, under the powers in his bond, sold the unfeued ground and the purchasers having proposed to erect on the ground houses which were disconform to the restrictions, the proprietors of the feus granted by Harper brought an action against the purchasers of the unfeued ground to have it declared that the ground was subject to the building restrictions and conditions contained in Harper's feu-contracts. The pursuers averred that the defenders were at the time they purchased the unfeued ground aware of these conditions and restrictions. The Court *assoilzied* the defenders, holding (1) that as the defenders had not acquired the superiorities of the feus granted by Harper they were not liable in the personal obligations undertaken by him to the feuars; (2) that the personal obligations undertaken by Harper to the feuars

RIGHT IN SECURITY—*Continued.*

after he had granted the bond with power of sale could not affect the right of the bondholder or of his successors in the unfeued ground; (3) that the restrictions had not validly been made real burdens on the unfeued ground, as they did not enter the titles thereof; (4) that the feu-contracts granted by Harper could not create a servitude *altius non tollendi* over the unfeued ground, in respect that there was no separate and distinct condition as to height, although a limitation as to height might be inferred from the conditions of the feu-contracts as a whole; (5) that assuming the defenders to have been in the knowledge of the conditions in Harper's feu-contracts, they were not thereby barred from erecting buildings inconsistent with these conditions. Morier v. Brownlie & Watson, Nov. 1, 1895, p. 67.

Bond and Disposition in Security—Limitation of heir's liability for ancestor's debts—Transmission to heir of personal obligation in heritable bond over heritage—Conveyancing and Land Transfer Act, 1874, *secs.* 12 *and* 47.

7. A, who was personally liable under bonds affecting his heritable estate for payment of the sums thereby secured, died leaving a disposition and settlement, whereby he disponed his whole estate, real and personal, to B, whom he appointed his executor and universal legatee. *Held* that under secs. 12 and 47 of the Conveyancing (Scotland) Act, 1874, the personal obligation contained in the bonds transmitted against B, but that his liability for the debts of the deceased (including the bonds) was limited to the value of the estate to which he succeeded. Welch's Executors v. Edinburgh Life Assurance Co., May 29, 1896, p. 772.

See *Loan*, 1—*Stamp*, 2.

RIVER. See *Lease*, 2.

ROAD. *Action to negative alleged right of way—Sist to give County Council opportunity to intervene—Local Government Act*, 1894, *sec.* 42.

1. The proprietor of an estate brought an action against R., concluding for declarator that he held the estate free of any public right of way over a certain part of it, and for interdict against the defender entering upon it. R., who had used a path over the part of the estate in question for sixteen years, lodged defences. The Lord Ordinary allowed a proof. Shortly before the diet fixed for proof the defender moved the Lord Ordinary to sist the action, upon the ground that, his funds being exhausted, he was unable to make the necessary preparations for the proof, and that the case was being considered by the County Council, who were entitled under the Local Government Act, 1894, to take steps to vindicate rights of way. The Lord Ordinary refused the motion, and the defender having failed to appear at the proof the Lord Ordinary granted decree as against R. as concluded for. On a reclaiming note the Court *recalled* the interlocutor of the Lord Ordinary, and *sisted* the action *hoc statu* upon an undertaking by the defender not to use the path during the sist. Alston v. Ross, Dec. 12, 1895, p. 273.

Road Debt.

2. Sale of Road Debt—Roads and Bridges (Scotland) Act, 1878—Transfer of Assets and Liabilities to New Road Authorities—Funds held for special purposes. Grahame v. Magistrates of Glasgow, Dec. 21, 1895, p. 358.

Power of road trustees to use steam crushing machine in quarry—General Turnpike Act, 1831, *sec.* 80—*Roads and Bridges (Scotland) Act*, 1878, *Schedule C.*

3. *Held* that the power given to road trustees by the General Turnpike Act, 1831, section 80, "to search for, dig, and carry away materials for making or repairing" roads out of the enclosed land of any person

ROAD—*Continued.*

does not entitle them to bring upon the ground machinery for crushing stones into road metal. Henderson's Trustees v. Dunfermline District Committee of Fife County Council, May 14, 1896, p. 727.

Railway—Level Crossing.

4. Doubling lines at level crossing—Lapse of railway company's powers as to construction of level crossing—Statute—Incorporation of special Act with general Act—Railway Clauses Consolidation (Scotland) Act, 1845, sec. 16. Western District Committee of the County Council of Stirling v. North British Railway Co., July 2, 1896, p. 929.

SALE. *Sale—Improbative offer for sale of heritage—Rei interventus.*

1. In an action to enforce implement of an improbative offer for the sale of heritage, which had been accepted, the pursuer averred that before accepting the offer he had in the knowledge of the offerer incurred considerable expense and trouble in investigating the value of the heritage, and in endeavouring to form a syndicate for its purchase. He pleaded that the offer was validated *rei interventu*. *Held* that the averments were irrelevant. Mowat v. Caledonian Banking Co., Limited, Dec. 11, 1895, p. 270.

Sale of heritage—Sale by auction—Essential error—Implement in knowledge of ground of challenge—Personal objection—Private knowledge of prior right.

2. Two contiguous properties within a burgh belonging to Morison's trustees, held under different titles, were exposed for sale by public roup as lot No. 1 and lot No. 2. The articles of roup described the lots by their respective descriptions in the titles, but as Morison's trustees intended to sell as part of lot No. 1 certain back buildings which were within the description in the titles of lot No. 2, but were occupied in connection with lot No. 1, the following marginal addition was made to the description of lot No. 1 in the articles, "as the said subjects are presently occupied and possessed by" the persons then in occupation of lot No. 1 and of the back buildings. This marginal addition was not referred to in the testing-clause, and no corresponding addition was made to the description of lot No. 2 in the articles. At the roup lot No. 1 was knocked down first—to Lawrie—but one of the instrumentary witnesses never signed the minute of enactment in his favour. Lot No. 2 was knocked down to Moncrieff, in whose favour a minute of enactment was duly executed. Moncrieff, after the sale, claimed a conveyance including the back ground and buildings, as falling within the description of the subjects sold to him. Morison's trustees at first objected, but subsequently granted a conveyance in his favour of lot No. 2 as described in the articles, without any qualification. This conveyance was delivered and recorded before the conveyance to Lawrie of lot No. 1, which was described in that conveyance as in the articles with the marginal addition. Lawrie having entered into possession of the back ground and buildings, Moncrieff brought an action against him for declarator of property and for removing. Morison's trustees having been sisted as defenders along with Lawrie, the defenders maintained that they ought to be assoilzied on the ground that Morison's trustees were, to the knowledge of the pursuer, at the time of the sale under essential error as to the extent of the subjects sold as lot No. 2; and the defender Lawrie further maintained that he ought to be assoilzied on the ground that a sale of the back subjects to him had, to the knowledge of the pursuer, been completed prior to the sale of lot No. 2. The Lord Ordinary after a proof *granted* decree in favour of the pursuer, holding (1) that it was not open, either to Morison's trustees or to Lawrie, to plead essential error on the part of Morison's trustees after Morison's trustees had granted

SALE—*Continued.*

an unqualified conveyance to the pursuer in the knowledge that he claimed the back subjects; and (2) that the special defence maintained by Lawrie was ill founded, no prior contract of sale having been completed, owing to the absence of the signature of the instrumentary witness to the minute. On a reclaiming note the Court *adhered*, but on the ground that, as the titles stood, the buildings in question must be held to belong to the pursuer and not to Lawrie. Moncrieff v. Lawrie, March 6, 1896, p. 577.

Sale of heritage—Urban tenement—Objection to title—Restrictions—Failure of seller to disclose restrictions.

3. A seller, who acted through an agent, exchanged missives of sale of an urban property with a purchaser who had not the advice of an agent. After the completion of the sale the purchaser sent the titles to his agent, who informed him that the property was subject to restrictions whereby dwelling-houses only could be built on the site, windows in the back wall of the upper storey were forbidden, and a passage must be left for access to premises at the back. The purchaser then intimated to the seller that he renounced the sale. *Held* that as the restrictions were not disclosed to the purchaser at the time of the sale, he was entitled, when they came to his knowledge, to renounce. Smith v. Soeder, Nov. 1, 1895, p. 60.

Sale of heritage—Sale by owner of burdened house—Right of bondholder to enforce sale.

4. *Opinion* (*per* Lord Young) that a bondholder cannot enforce implement of a sale made by the owner of the burdened subjects. Smith v. Soeder, Nov. 1, 1895, p. 60.

Sale of moveables—Constitution—Cautioner.

5. B, a builder, in the course of erecting certain houses became unable to get building materials on his own credit and applied to S. S carried on the work, employing B as a servant and paying him wages, and also paying for materials which B ordered. S informed C & Co. of the arrangement and promised to see them paid for any materials supplied to B's order. *Held* that C & Co. had a claim against S as buyer of the goods. Stevenson's Trustee v. Campbell & Sons, March 20, 1896, p. 711.

Sale of moveables—Construction—Trade Discount—Executory Contract—Notice—Invoice.

6. A brewer entered into a verbal agreement with a retail dealer to supply him with beer, and allow him 35 per cent discount when he paid an account. No arrangement was made as to the length of credit to be allowed, but with each consignment of beer an invoice was sent, on which was a printed notice which stated that accounts not paid within three months were not subject to discount. The attention of the dealer was not specially called to the terms of the invoices, and on more than one occasion during a course of dealing extending over two years, the dealer was allowed the usual discount upon accounts not paid within three months. In an action by the brewer for payment of the full amount of an account not paid within three months, *held* that by the original contract between the parties the price of the beer was fixed at 65 per cent of the nominal price; that this contract was not qualified by the terms of the invoices, and therefore that the defender was only liable for the amount of the account after deduction of 35 per cent. Buchanan & Co. v. Macdonald, Dec. 10, 1895, p. 264.

Sale of moveables—Warranty—Sale of goods for specific purpose—Implied condition of fitness for purpose not superseded by express warranty.

7. Where goods are sold for a specific purpose, the implied condition that the goods must be fit for that purpose is not superseded by an express

SALE—*Continued.*

warranty which is not inconsistent with it. Douglas & Co. v. Milne, Nov. 21, 1895, p. 163.

Sale of moveables—Warranty—Proof of warranty—Horse—Sale of Goods Act, 1893, *sec.* 14.

8. Circumstances in which *held* that an oral statement, by a dealer in horses to a purchaser, who said that he wished to buy a horse quiet to ride and drive, that a horse was quiet to ride and drive did not imply a warranty. Wilson v. Turnbull & Co., May 12, 1896, p. 714.

Sale of moveables—Warranty—Horse.

9. The purchaser of a horse the second day after he received it rejected it on the ground that it had been warranted quiet to ride and drive, and that it was disconform to warranty. It appeared that on the day after it had been put in the purchaser's stable it had been tried in the saddle by the purchaser and had given satisfaction, that on the following day the purchaser drove it in a dogcart along a road new to it, and that on coming near a bridge over a railway it was scared by the steam of a train which it could not see; that it then reared and turned round and refused to proceed. *Opinion, per cur.*, that even if the warranty were proved the conduct of the horse in the exceptional circumstances in which it was placed did not shew that it was not quiet to drive, and that the purchaser was not entitled to reject it without further trial. Wilson v. Turnbull & Co., May 12, 1896, p. 714.

Sale of moveables—Sale of second-hand machinery—Disconformity to description—Sale of Goods Act, 1893, *sec.* 11, *subsec.* 2, *and sec.* 13.

10. A firm of machinery merchants sold a second-hand four-horse power nominal gas-engine, described as in "excellent order," "running up to about a week ago," and "a great bargain at this price"—£47, 10s. Evidence on a consideration of which it was *held* that the engine was disconform to description, and that the buyer was entitled to reject it. Roberts & Co. v. Yule, June 24, 1896, p. 855.

Sale of medical practice, including book debts—Construction—Specialia derogant generalibus.

11. A firm of medical practitioners was dissolved by the death of one of the partners on 15th April 1894. On 21st July 1894 his widow and executrix agreed to sell to the assistant of the late firm "the deceased's whole right and interest in the practice carried on" by the firm, "consisting of (first) the deceased's share, right, and interest in the horses, harness, machines, and others"; (second) his share in the medical and surgical instruments and books; and (third) "the deceased's share, right, and interest in the book debts, including the goodwill of the business belonging to the firm," for £485, the purchaser undertaking to free and relieve the seller and the representatives of the deceased "of all debts and obligations due by the said firm . . . in any manner of way whatsoever." *Held* that the sale embraced the deceased's whole interest in the assets of the firm, including not merely the book debts outstanding at the date of the agreement, but all fees received by the firm since the last division of profits on 31st January 1894. Alexander v. Alexander, May 13, 1896, p. 724.

See *Expenses*, 4—*Stamp*, 1.

SCHOOL. *School Board—Nomination by board of person to fill vacancy in board—Whether person nominated may decline office—Education (Scotland) Act*, 1878, *sec.* 15.

1. A person nominated by a school board, under section 15 of the Education (Scotland) Act, 1878, to fill a vacancy caused by the resignation of a member of the board is entitled to decline office, and if he declines he never becomes a member of the board, and does not require to resign. School Board of Cabrach v. Macdonald, Feb. 27, 1896, p. 541.

RIFF—*Continued.*
tion dated 1st September, requiring the defender to lodge a notice of appearance "within forty-eight hours after the date of this my citation"; the execution returned upon the petition bore that it was served upon the 31st August; and the Sheriff pronounced decree in absence on 3d September. In a reduction of the execution, *held* that in the absence of other contradictory evidence than the service copy of the petition, with the citation thereon, the date of the execution fell to be taken as the date of service, and that the *inducia* fell to be reckoned therefrom. Gibson v. Clark, Dec. 13, 1895, p. 294.
eduction of Sheriff Court Decree—Competency—Court of Session Act, 1868, *secs.* 64-67—*Act of Sederunt, March* 10, 1870, *sec.* 3, *subsec.* 5.
Held (by Lord Kincairney and *acquiesced* in) (1) that the provisions of the Court of Session Act, 1868, had not rendered an action for reduction of an extracted Sheriff Court decree incompetent; and (2) that it was not incompetent to include in such action of reduction conclusions additional to those contained in the Sheriff Court process for the purpose of more clearly elucidating the rights of parties. Taylor's Trustees v. M'Gavigan, July 3, 1896, p. 945.
ppeal from Sheriff Court. See *Process*, 35, 36, 38, 39, 40.

Mortgage over ship—Agreement for repayments out of profits—Specific appropriation—Breach of trust.
A offered to advance to a shipping company £15,000 on a mortgage over a steam vessel, "on condition that all profits earned by the steamer to be paid to us towards reducing the loan till the loan shall have been reduced to £10,000." The managing committee of the company agreed to accept the offer, subject to the modification "that instead of all the profits being paid to A till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then." A agreed to the modification, and the arrangement was approved by the company. Subsequently the advance was made, and the mortgage granted. The company went into liquidation. *Held* that the agreement imported merely a personal obligation by the company to pay to A £2000 per annum from profits, and that A had no preference over the profits. Graham & Co. v. Raeburn & Verel, Nov. 7, 1895, p. 84.
ill of Lading—Short delivery—Proof—Onus.
In an action by a shipowner for payment of freight the defenders claimed to retain the value of twelve bales of jute short delivered of the quantity specified in the bills of lading. The pursuer in reply stated that he had delivered the whole quantity received on board the vessel, and denied further liability. Held, *after a proof* (rev. *judgment of Second Division*), *that having regard to the way in which the delivery of the goods had been checked by the ship's officers, and the receipt acknowledged in the bill of lading, the evidence led by the shipowner was not sufficient to shew that the twelve bales had not been put on board the vessel, and that he was responsible for the quantity specified in the bills of lading.* Smith & Co. v. Bedouin Steam Navigation Co., Limited, Nov. 26, 1895, H. L., p. 1.
harter-party—Delay in providing cargo.
A charter-party provided that the s.s. "River Ettrick" should proceed to Bo'ness and receive a cargo, to be brought alongside within sixty running hours, and that demurrage should be paid at a specified rate, "lay-days to count from the time the master has got ship reported berthed and ready to receive or deliver cargo, and given notice of the same in writing to charterers or their agents during business hours." On 17th October the shipowner wrote to the charterers that the "River Ettrick" had left for Bo'ness, and asked them to supply a cargo for the 19th. The

SHERIFF—*Continued.*

under sec. 6 of the Railway Clauses Consolidation (Scotland) Act, 1845, falls to be determined by the Sheriff under sec. 114 of the Lands Clauses Consolidation (Scotland) Act, 1845—and not by arbitration—whether the claim is on account of lands injuriously affected or is on account of lands taken. Glasgow District Subway Co. v. Albin & Son, Nov. 6, 1895, p. 81.

Jurisdiction—Sheriff—Interdict—Patent.

2. A paint manufacturer in Aberdeen brought an action in the Sheriff Court at Aberdeen against a paint merchant there, to have him interdicted from making, using, and selling a paint which the pursuer alleged was an infringement of a patent which he had taken out. After the action was raised a paint manufacturer in Birmingham craved to be sisted as a defender, on the ground that he was the manufacturer of the paint sold by the defender, and thus had the real interest in defending the action. The Birmingham manufacturer was sisted accordingly. Thereafter the original defender withdrew from the action, interdict being pronounced against him, of consent and with the concurrence of the Birmingham manufacturer, and a record was made up between the pursuers and the Birmingham manufacturer, in which the latter raised the question of the validity of the pursuers' patent. After a proof, the Sheriff affirmed the validity of the patent, and granted interdict against the Birmingham manufacturer. In an appeal, *held* that the Sheriff had jurisdiction to pronounce this interlocutor. Gill v. Cutler, Dec. 21, 1895, p. 371.

Jurisdiction—Judicial Factor—Desertion of farm—Appointment of manager.

3. Where a tenant has deserted a farm without making proper provision for its management, it is competent for the Sheriff, on the petition of the landlord, to appoint an interim manager. Gibson v. Clark, Dec. 13, 1895, p. 294.

Process—Denial that interlocutor bearing to proceed upon consent of party had been consented to—Power of Court to order inquiry.

4. A decree by a Sheriff-substitute appointing a petitioner executor-dative proceeded on the statement that the respondent had withdrawn her opposition. In an appeal by the respondent, the appellant stated that the Sheriff-substitute was mistaken in supposing that she had withdrawn her opposition, and asked for a proof on that point. The Court proposed in the first instance to remit to the Sheriff-substitute for a report, and the appellant having objected to this course, *refused* the appeal. Whyte v. Whyte, Dec. 17, 1895, p. 320.

Process—Citation—Edictal Citation—Sheriff Court Act, 1876, *sec.* 9.

5. The Sheriff Court Act, 1876, sec. 9, enacts that "the Sheriff Clerk shall, in all warrants to cite or charge persons furth of Scotland, insert a warrant to cite or charge edictally." A landlord presented a petition in the Sheriff Court for the appointment of a manager upon a farm, alleging that the tenant had deserted the farm and gone to America. The warrant of citation contained no warrant to cite the respondent edictally, and the petition was served by leaving a copy at the farm-house, where his family continued to reside. No appearance having been entered for the tenant, the petition was granted. The tenant, who returned to this country within a month, brought an action of reduction of the appointment of the manager on the ground, *inter alia*, that there had been no edictal citation. In the action he averred that he had been only temporarily absent from the farm. The Court *repelled* the plea, on the ground that if the defender's absence was temporary edictal citation was not necessary. Gibson v. Clark, Dec. 13, 1895, p. 294.

Process—Citation—Execution of Citation.

6. In a Sheriff Court petition the service copy of the petition bore a cita-

SHERIFF—*Continued.*

tion dated 1st September, requiring the defender to lodge a notice of appearance "within forty-eight hours after the date of this my citation"; the execution returned upon the petition bore that it was served upon the 31st August; and the Sheriff pronounced decree in absence on 3d September. In a reduction of the execution, *held* that in the absence of other contradictory evidence than the service copy of the petition, with the citation thereon, the date of the execution fell to be taken as the date of service, and that the *inducia* fell to be reckoned therefrom. Gibson v. Clark, Dec. 13, 1895, p. 294.

Reduction of Sheriff Court Decree—Competency—Court of Session Act, 1868, *secs.* 64-67—*Act of Sederunt, March* 10, 1870, *sec.* 3, *subsec.* 5.

7. *Held* (by Lord Kincairney and *acquiescod* in) (1) that the provisions of the Court of Session Act, 1868, had not rendered an action for reduction of an extracted Sheriff Court decree incompetent; and (2) that it was not incompetent to include in such action of reduction conclusions additional to those contained in the Sheriff Court process for the purpose of more clearly elucidating the rights of parties. Taylor's Trustees v. M'Gavigan, July 3, 1896, p. 945.

Appeal from Sheriff Court. See *Process*, 35, 36, 38, 39, 40.

SHIP. *Mortgage over ship—Agreement for repayments out of profits—Specific appropriation—Breach of trust.*

1. A offered to advance to a shipping company £15,000 on a mortgage over a steam vessel, "on condition that all profits earned by the steamer to be paid to us towards reducing the loan till the loan shall have been reduced to £10,000." The managing committee of the company agreed to accept the offer, subject to the modification "that instead of all the profits being paid to A till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then." A agreed to the modification, and the arrangement was approved by the company. Subsequently the advance was made, and the mortgage granted. The company went into liquidation. *Held* that the agreement imported merely a personal obligation by the company to pay to A £2000 per annum from profits, and that A had no preference over the profits. Graham & Co. v. Raeburn & Verel, Nov. 7, 1895, p. 84.

Bill of Lading—Short delivery—Proof—Onus.

2. *In an action by a shipowner for payment of freight the defenders claimed to retain the value of twelve bales of jute short delivered of the quantity specified in the bills of lading. The pursuer in reply stated that he had delivered the whole quantity received on board the vessel, and denied further liability.* Held, *after a proof* (rev. *judgment of Second Division*), *that having regard to the way in which the delivery of the goods had been checked by the ship's officers, and the receipt acknowledged in the bill of lading, the evidence led by the shipowner was not sufficient to shew that the twelve bales had not been put on board the vessel, and that he was responsible for the quantity specified in the bills of lading.* Smith & Co. v. Bedouin Steam Navigation Co., Limited, Nov. 26, 1895, H. L., p. 1.

Charter-party—Delay in providing cargo.

3. *A charter-party provided that the s.s. "River Ettrick" should proceed to Bo'ness and receive a cargo, to be brought alongside within sixty running hours, and that demurrage should be paid at a specified rate, "lay-days to count from the time the master has got ship reported berthed and ready to receive or deliver cargo, and given notice of the same in writing to charterers or their agents during business hours." On 17th October the shipowner wrote to the charterers that the "River Ettrick" had left for Bo'ness, and asked them to supply a cargo for the 19th. The*

SHIP—*Continued.*

"River Ettrick" arrived in Bo'ness roads on the 19th, but in consequence of the crowded state of the dock she was not allowed to enter. On the 21st October a loading berth became vacant, as cargoes were not ready for certain vessels which had arrived before the "River Ettrick." If a cargo had been ready for the "River Ettrick," she would have been allowed to enter the dock and would have got this berth, but as no cargo was ready she was not allowed to enter the dock. She was docked on the 26th, berthed for loading on the 27th, and sailed on the 28th October. The shipowners sued the charterers for demurrage or damages, alleging that a delay of ninety-four hours had been caused by the fault of the defenders, in not having a cargo ready on 21st October. The Second Division assoilzied the defenders, finding that the vessel arrived in Bo'ness Roads on 19th October, but was not able, and was not allowed, to enter the dock on account of the crowded state of the dock until the 26th October . . . that the "River Ettrick" did not arrive at her charter port of shipment, and that the lay-days did not begin to run, until the said 26th October, when the "River Ettrick" got into dock, and that the defenders were not liable in demurrage. There was no finding in fact that there was a berth vacant on 21st October, and that the vessel would have been allowed to enter the dock on that day if a cargo had been ready, but it was mentioned in the opinion of the Court in delivering judgment. In an appeal brought by the pursuer he contended that as the Court had not in their findings given all the facts proved material to his claim for damages, there should be a remit to have the defect supplied. Held, *without determining whether the findings in fact excluded a remit, that there was no rule of law requiring a shipper in every port and in all circumstances to have a cargo ready to meet the unexpected contingency of a berth being open to a vessel out of its regular turn, and therefore that the fact founded on was not material, and judgment affirmed.* Little v. Stevenson & Co., March 19, 1896, H. L., p. 12.

Charter-party—Agreement by owner to insure—Risk—Owner and charterer—Collision—Relief—Maritime lien.

4. A steam-trawler was hired out by her owner under a time charter, whereby the charterer was to find crew, stores, &c., and the owner was "to pay insurance only." The owner, *inter alia*, insured against loss from having to pay damages for injury which might be caused by the trawler to other vessels with the exception of one-fifth of three-fourths of such loss. The trawler, through the fault of the charterer's crew, caused damage to another vessel, and the owner of the trawler, without notice to the charterer, settled the claim, and was reimbursed by the insurance company to the extent of his insurance. In an action raised by the owner against the charterer for the balance of loss, *held* that as the pursuer had settled the claim without notice to the defender, he had no right of relief against him on the ground that it had been caused by his fault. Clarke v. Scott, Jan. 30, 1896, p. 442.

See *Agent and Principal*, 2—*Reparation*, 6, 7—*Statute*, 7.

SLAUGHTER-HOUSE. See *Public Health*, 3.

STAMP. *Conveyance on Sale—Transfer of assets of private partnership to public company—Identity of partners and shareholders—Consideration—Company—Stamp Act*, 1891, *secs.* 54 *and* 55—*First Schedule.*

1. Where a private partnership conveyed its whole assets to a joint stock company limited by shares, consisting exclusively of the same partners, in consideration of each partner getting shares in the new company equal in value to his holding in the old partnership, *held* that the conveyance was a conveyance on sale within the meaning of the Stamp Act, 1891, and that the disposition was chargeable with *ad valorem*

STATUTES—*Continued.*

6 *Geo. IV. cap.* 120 (*Judicature Act*, 1825). See *Process*, 11, 39, 40.
9 *Geo. IV. cap.* 58 (*Home Drummond Act*, 1828). See *Public-House*, 2, 3.
1 *and* 2 *Will. IV. cap.* 43 (*General Turnpike Act*, 1831). See *Road*, 3.
7 *Will. IV. and* 1 *Vict. cap.* 36 (*Post Offices Offences Acts Consolidation Act*, 1837). See *Justiciary Cases*, 18.
5 *and* 6 *Vict. cap.* 35 (*Income-Tax Act*, 1842). See *Revenue*, 1, 2, 3.
8 *and* 9 *Vict. cap.* 19 (*Lands Clauses Consolidation* (*Scotland*) *Act*, 1845). See *Railway*, 1, 2, 3, 6.
8 *and* 9 *Vict. cap.* 33 (*Railway Clauses Consolidation* (*Scotland*) *Act*, 1845). See *Railway*, 3, 7.
13 *and* 14 *Vict. cap.* 36 (*Court of Session Act*, 1850). See *Process*, 16.
13 *and* 14 *Vict. cap.* 92 (*Prevention of Cruelty to Animals Act*, 1850). See *Justiciary Cases*, 19.
16 *and* 17 *Vict. cap.* 34 (*Income-Tax Act*, 1853). See *Revenue*, 3.
16 *and* 17 *Vict. cap.* 80 (*Sheriff Court Act*, 1853). See *Process*, 36.
17 *and* 18 *Vict. cap.* 91 (*Valuation of Lands* (*Scotland*) *Act*, 1854). See *Valuation Acts.*
18 *and* 19 *Vict. cap.* 23 (*Intestate Moveable Succession* (*Scotland*) *Act*, 1855). See *Succession*, 3.
19 *and* 20 *Vict. cap.* 60 (*Mercantile Law Amendment Act*, 1856). See *Cautioner*, 1.
19 *and* 20 *Vict. cap.* 79 (*Bankruptcy* (*Scotland*) *Act*, 1856). See *Bankruptcy.*
20 *and* 21 *Vict. cap.* 26 (*Registration of Leases* (*Scotland*) *Act*, 1857). See *Right in Security*, 3.
24 *and* 25 *Vict. cap.* 86 (*Conjugal Rights* (*Scotland*) *Amendment Act*, 1861). See *Husband and Wife*, 4—*Marriage-Contract*, 5.
24 *and* 25 *Vict. cap.* 107 (*Burgh Schoolmasters* (*Scotland*) *Act*, 1861). See *School*, 3.
25 *and* 26 *Vict. cap.* 35 (*Public-Houses Acts Amendment* (*Scotland*) *Act*, 1862). See *Public-House.*
25 *and* 26 *Vict. cap.* 89 (*Companies Act*, 1862). See *Company.*
26 *and* 27 *Vict. cap.* 108 (*Vaccination* (*Scotland*) *Act*, 1863). See *Justiciary Cases*, 20.
27 *and* 28 *Vict. cap.* 53 (*Summary Procedure* (*Scotland*) *Act*, 1864). See *Justiciary Cases*, 21—*Public-House*, 2.
29 *and* 30 *Vict. cap.* 71 (*Glebe Lands* (*Scotland*) *Act*, 1866). See *Church*, 2.
29 *and* 30 *Vict. cap. cclxxiii.* (*Glasgow Police Act*, 1866). See *Police*, 6, 7.
30 *and* 31 *Vict. cap.* 96 (*Debts Recovery* (*Scotland*) *Act*, 1867). See *Process*, 35.
30 *and* 31 *Vict. cap.* 97 (*Trusts* (*Scotland*) *Act*, 1867). See *Trust*, 13.
30 *and* 31 *Vict. cap.* 101 (*Public Health* (*Scotland*) *Act*, 1867). See *Public Health*, 1, 2.
31 *and* 32 *Vict. cap.* 100 (*Court of Session Act*, 1868). See *Process.*
31 *and* 32 *Vict. cap.* 101 (*Titles to Land Consolidation* (*Scotland*) *Act*, 1868). See *Accountant of Court.*
31 *and* 32 *Vict. cap.* 121 (*Pharmacy Act*, 1868). See *Justiciary Cases*, 5, 6.
31 *and* 32 *Vict. cap.* 125 (*Parliamentary Elections Act*, 1868). See *Election Law*, 11.
32 *and* 33 *Vict. cap.* 14 (*Customs and Inland Revenue Act*, 1869). See *Revenue*, 4.
34 *and* 35 *Vict. cap.* 112 (*Prevention of Crimes Act*, 1871). See *Justiciary Cases*, 2.
35 *and* 36 *Vict. cap.* 33 (*Ballot Act*, 1872). See *Election Law*, 4.

STATUTES—*Continued.*
35 *and* 36 *Vict. cap.* 62 (*Education (Scotland) Act*, 1872). See *School*, 4, 5.
37 *and* 38 *Vict. cap.* 94 (*Conveyancing and Land Transfer (Scotland) Act*, 1874). *See Right in Security*, 7.
38 *and* 39 *Vict. cap.* 60 (*Friendly Societies Act*, 1875). See *Process*, 38.
38 *and* 39 *Vict. cap.* 62 (*Summary Prosecutions Appeals (Scotland) Act*, 1875). See *Justiciary Cases*, 22.
39 *and* 40 *Vict. cap.* 70 (*Sheriff Courts (Scotland) Act*, 1876). See *Process*, 1, 2.
40 *and* 41 *Vict. cap.* 26 (*Companies Act*, 1877). See *Company*, 10, 11.
41 *and* 42 *Vict. cap.* 51 (*Roads and Bridges (Scotland) Act*, 1878). See *Burgh*, 2—*Road*, 2, 3.
41 *and* 42 *Vict. cap.* 78 (*Education (Scotland) Act*, 1878). See *School*, 1, 2, 4.
42 *and* 43 *Vict. cap. lxxxviii.* (*Aberdeen Harbour Act*, 1879). See *Statute*, 7.
43 *and* 44 *Vict. cap.* 26 (*Married Women's Policies of Assurance (Scotland) Act*, 1880). See *Insurance*, 1.
43 *and* 44 *Vict. cap.* 42 (*Employers Liability Act*, 1880). See *Reparation*, 1 *to* 5.
45 *and* 46 *Vict. cap.* 59 (*Educational Endowments (Scotland) Act*, 1882). See *Process*, 23—*Charitable and Educational Bequests and Trusts*, 5, 6.
45 *and* 46 *Vict. cap.* 61 (*Bills of Exchange Act*, 1882). See *Bill of Exchange*, 2, 3.
46 *and* 47 *Vict. cap.* 51 (*Corrupt and Illegal Practices Act*, 1883). See *Election Law*, 5 *to* 12.
46 *and* 47 *Vict. cap.* 62 (*Agricultural Holdings (Scotland) Act*, 1883). See *Lease*, 11.
47 *and* 48 *Vict. cap. ccxli.* (*Edinburgh Northern Tramways Act*, 1884). See *Company*, 2, 3.
48 *Vict. cap.* 16 (*Registration Amendment (Scotland) Act*, 1885). See *Election Law*, 1.
49 *and* 50 *Vict. cap.* 27 (*Guardianship of Infants Act*, 1886). See *Minor and Pupil*, 2.
49 *and* 50 *Vict. cap.* 29 (*Crofters Holdings Act*, 1886). *See Crofters Holdings Act.*
50 *and* 51 *Vict. cap.* 35 (*Criminal Procedure Act* 1887). See *Justiciary Cases*, 7.
52 *and* 53 *Vict. cap.* 23 (*Herring Fishery (Scotland) Act*, 1889). See *Justiciary Cases*, 8, 9.
52 *and* 53 *Vict. cap.* 39 (*Judicial Factors (Scotland) Act*, 1889). See *Trust*, 4.
52 *and* 53 *Vict. cap.* 50 (*Local Government Act*, 1889). See *Police*, 3, 4—*Poor*, 1, 2—*Statute*, 6.
52 *and* 53 *Vict. cap.* 55 (*Universities (Scotland) Act*, 1889). See *University.*
53 *and* 54 *Vict. cap.* 20 (*Public Health Amendment (Scotland) Act*, 1890). See *Public Health*, 2.
53 *and* 54 *Vict. cap.* 39 (*Partnership Act*, 1890). See *Partnership*, 1.
53 *and* 54 *Vict. cap.* 62 (*Companies (Memorandum of Association) Act*, 1890). See *Company*, 5, 6.
53 *and* 54 *Vict. cap. ccxxi.* (*Glasgow Police Amendment Act*, 1890). See *Police*, 6.
54 *and* 55 *Vict. cap.* 39 (*Stamp Act*, 1891). See *Stamp.*
54 *and* 55 *Vict. cap.* 44 (*Trusts (Scotland) Amendment Act*, 1891). See *Trust*, 14.

STATUTES—*Continued.*
54 and 55 Vict. cap. 49 (Returning Officers (Scotland) Act, 1891). See *Election Law*, 3.
54 and 55 Vict. cap. cci. (Lanarkshire and Dumbartonshire Railway Act, 1891). See *Arbitration*, 1.
55 and 56 Vict. cap. 55 (Burgh Police Act, 1892). See *Police*, 1, 2, 8, 10—*Public-House*, 2.
55 and 56 Vict. cap. ccxxxix. (Glasgow Building Regulations Act, 1892). See *Police*, 7.
56 and 57 Vict. cap. 7 (Customs and Inland Revenue Act, 1893). See *Revenue*, 1.
56 and 57 Vict. cap. 71 (Sale of Goods Act, 1893). See *Sale*, 8, 10.
57 and 58 Vict. cap. 58 (Local Government (Scotland) Act, 1894). See *Process*, 10—*Poor*, 1, 2—*Police*, 3, 4.
58 and 59 Vict. cap. 19 (Court of Session Consignations (Scotland) Act, 1895). See *Accountant of Court.*
58 and 59 Vict. cap. 41 (Land Valuation (Scotland) Amendment Act, 1895). See *Valuation Acts*, 1, 2.
58 and 59 Vict. cap. 42 (Sea Fisheries Regulation (Scotland) Act, 1895). See *Justiciary Cases*, 8, 9.
58 and 59 Vict. cap. cxxxvi. (Aberdeen Harbour Act, 1895). See *Statute*, 7.

STIPEND. See *Church*, 1.

STREET. See *Police*, 7 *to* 10.

SUBMISSION. See *Arbitration.*

SUBSCRIPTION. See *Writ.*

SUCCESSION. *Heir's liability—Limitation of liability for ancestor's debts—Transmission to heir of personal obligation in heritable bond over heritage—Conveyancing and Land Transfer Act*, 1874, *secs.* 12 *and* 47.
1. A, who was personally liable under bonds affecting his heritable estate for payment of the sums thereby secured, died leaving a disposition and settlement, whereby he disponed his whole estate, real and personal, to B, whom he appointed his executor and universal legatee. *Held* that under the Conveyancing (Scotland) Act, 1874, secs. 12 and 47, the personal obligation contained in the bonds transmitted against B, but that his liability for the debts of the deceased (including the bonds) was limited to the value of the estate to which he succeeded. Welch's Executors v. Edinburgh Life Assurance Co., May 29, 1896, p. 772.

Heir's liability—Passive Title—Lease excluding assignees.
2. A nineteen years' lease of an urban subject was granted to a tenant and his heirs, but excluding assignees and subtenants without the consent of the lessor. On the death of the tenant, his heir took up the lease. *Held* that the heir did not incur passive representation for the debts of his predecessor, in respect that he took the lease, not as representing his ancestor, but in his own right under the lease. Bain v. Mackenzie, Feb. 25, 1896, p. 528.

Collation—Intestate Moveable Succession (Scotland) Act, 1855, *sec.* 2.
3. An intestate, leaving heritable and moveable estate, was survived by an aunt, his sole next of kin, and was predeceased by his uncle, who, had he survived, would have been his heir in heritage and one of his next of kin. *Held* that the only child of the uncle being heir in heritage of the intestate, was entitled under sec. 2 of the Intestate Moveable Succession Act, 1855, to call upon the next of kin to collate, although in consequence of the proviso in sec. 1 of that Act she would not have been entitled under that section to a share of the moveable estate. Jamieson v. Walker, March 4, 1896, p. 547.

SUCCESSION—*Continued.*

Implied direction to accumulate—Thellusson Act—Heritable and Moveable—Conversion—Intestacy.

4. A testator directed his trustees upon the death of the last of certain annuitants to "realise and convert into cash" his whole estate, and "divide" the residue among certain persons who until that event were to have no vested right. The surplus revenue was accumulated in the hands of the trustees. At the expiry of twenty-one years from the testator's death two of the annuitants still survived. *Held* (1) (*foll. Lord* v. *Colvin*, Dec. 7, 1860, 23 D. 111) that there was an implied direction to the trustees to accumulate the surplus income; (2) that further accumulations being prohibited by the Thellusson Act, and no one having a vested right to residue, the surplus income as it accrued fell to the testator's heirs *ab intestato;* (3) (*foll. Thomas* v. *Tennent's Trustees*, Nov. 17, 1868, 7 Macph. 114, and *Cowan* v. *Cowan*, March 19, 1887, 14 R. 670), that the direction to "realise" when the date of division arrived did not operate conversion of the heritage prior to that date; (4) (*foll. Campbell's Trustees* v. *Campbell*, June 30, 1891, 18 R. 992, *diss.* Lord Adam), that the rents of each term as they accrued fell to the person holding at that time the character of heir-at-law of the testator; and (5) that the rents accumulated in the hands of the trustees before the expiry of the twenty-one years being moveable estate, the surplus income derived therefrom fell to the heirs *in mobilibus* of the testator as at the date of his death. Logan's Trustees v. Logan, June 24, 1896, p. 848.

Heritable and Moveable—Collation between heir and executor—Thellusson Act, cap. 98.

5. Where by the operation of the Thellusson Act the rents of a testator's heritage fell as they accrued to his heir-at-law at the time, and the income of his moveable estate to his next of kin, and where the heir-at-law was one of the next of kin, *held* that the heir-at-law was entitled to a share of the income of the moveable estate without collating. Logan's Trustees v. Logan, June 24, 1896, p. 848.

Heritable and Moveable—Deed of Acknowledgment—Jus relictæ—Act 1661, *c.* 32.

6. An acknowledgment for a sum of money was granted in the following terms:—"Received from Mr Michael Dawson . . . the sum of £5000 stg. as a deposit for mission purposes, to bear interest at the rate of 4 per cent per annum, payable half-yearly at Martinmas and Whitsunday, and to be repaid on three months' notice." After Mr Dawson's death, *held* in a question between his widow and his testamentary trustees that the sum of £5000 was heritable as regarded *jus relictæ*. Dawson's Trustees v. Dawson, July 9, 1896, p. 1006.

Legitim—Heritable Bond.

7. *Held* that when a man leaves a widow and children, and part of his estate consists of a bond which is heritable *quoad jus relictæ*, and moveable *quoad* legitim, the children are entitled to one-half of the fund as legitim. Dawson's Trustees v. Dawson, July 9, 1896, p. 1006.

Legitim—Provision to children and issue of children—Clause of forfeiture—Revocation of provision in favour of one of children—Claim for and receipt of legitim by that child—Effect on provision for issue of child.

8. A testator directed his trustees to hold and convey one-fourth of the residue of his estate for behoof of his son John in liferent, and John's children in fee, and made similar provisions in favour of his sons Thomas and George, and their children, and provided the remaining one-fourth part to the children of his deceased son James. The settlement contained this declaration,—"Declaring that in the event of any

SUCCESSION—*Continued.*

of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect in whole or in part, then such sons, as well as their descendants, shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of, which right and interest shall in that event accresce and belong to such of my sons, the said John, Thomas, and George, and their descendants, and the descendants of my son James, as shall abide by this settlement and accept of the provisions herein contained." By codicil the testator revoked the liferent provision of one-fourth share in favour of his son John, and instead directed his trustees to hold and apply the said share for behoof of John's children, "and with this alteration I confirm the said trust-disposition and settlement in every respect." John claimed and received payment of legitim. In competition between John's children and the surviving descendants of the testator other than John and his children, *held* that the right to the portion of the trust-estate bequeathed to John's children by the trust-disposition and codicil had not been forfeited by John having claimed and received payment of his legitim. Urie's Trustees v. Urie, June 24, 1896, p. 865.

Legitim—Interest.

9. Where a son raised an action for payment of legitim thirteen years after his father's death, and election could not, owing to the son's minority, have been made at an earlier date, the Court *held* that the father's executrix was only liable in interest on the son's legitim at the rate which the money would have earned under prudent administration, and found her liable in interest at the rate of 4 per cent, that being the rate which the estate was admitted to have earned. Ross v. Ross, June 16, 1896, p. 802.

Testament—Construction—"Heirs-female."

10. *A truster, "in order to make and secure additional provision for" his second son and the other heirs of entail succeeding him in the lands and estates of Cromartie . . . to enable them to support the dignity and title of Earl of Cromartie," conveyed to trustees certain securities, and directed them, after his death, to pay the free proceeds thereof to his second son and the heirs-male of his body, whom failing to certain substitutes, "whom failing to the heirs-female of the body" of the said second son. The second son, the Earl of Cromartie, died leaving only two daughters, of whom the elder succeeded her father in the title and estates of Cromartie.* Held (rev. *judgment of Second Division*) *that the direction to the trustees to pay the income to the "heirs-female" of the body of the second son being unambiguous, must receive effect, and that, as the two daughters were heirs-portioners, each was entitled to one-half of the income of the trust funds.* Mackenzie v. Duke of Devonshire, May 15, 1896, H. L., p. 32.

Testament—Construction—Words importing gift of heritage.

11. A testator left the estate of N to his nephew, and after various legacies he provided as follows:—"I leave as my residuary legatee my niece Annie Amelia Wallace, who will pay my funeral expenses and any debts I may justly owe." The nephew died six months before the testator, who was aware of his death, but made no alteration on his will. *Held* that the estate of N was carried by the residuary clause. Wallace's Executors v. Wallace, Nov. 21, 1895, p. 142.

Fee and Liferent—Destination to spouses in conjunct fee and to the survivor in fee.

12. A lease for ninety-nine years was assigned to spouses "in conjunct fee and to the survivor of them in fee." *Held* that the fee vested in the spouses jointly, with the benefit of survivorship. Walker v. Galbraith, Dec. 21, 1895, p. 347.

SUCCESSION—*Continued.*

Special Destination—General Settlement.

13. A long lease of heritage was assigned to D. D. and M. D., his wife, "in conjunct fee, and to the survivor of them in fee, and at the death of the survivor to the heirs of the said D. D. and M. D., equally between them." The spouses subsequently executed a mutual settlement, by which they conveyed to the survivor of them in liferent for his or her liferent use only, and at the death of the survivor to two sons of the wife by a former marriage, their whole heritable and moveable estate. At the date of the mutual settlement the spouses had no other property than the lease carried by the assignation. *Held* that the destination in the assignation to the heirs of the spouses was evacuated by the mutual settlement. Walker v. Galbraith, Dec. 21, 1895, p. 347.

Destination over to issue of deceasing child—Whether clause postponing payment in case of child applicable to child's issue.

14. *Held* that a clause in a trust-settlement postponing payment of provisions to the truster's children until they respectively attained majority did not apply to a destination over in favour of a child's issue. White's Trustees v. White, June 20, 1896, p. 836.

Faculties and Powers—Power to select articles of furniture—Testamentary exercise of power.

15. A testator directed his trustees to deliver to M., his widow, "such articles of jewellery, linen, silver-plate, books, and other household furniture belonging to me as she may choose to select for her own absolute use," and to allow her and his daughter and the longest liver of them the liferent use of his mansion-house of Easter Livelands, "and also such articles of household furniture, plate, . . . and plenishing of every description which shall be found at the time of my death remaining after the said M. shall have made her selection as aforesaid, or the whole in case of no such selection being made." After the testator's death his widow and daughter lived together at Easter Livelands for a number of years, in joint possession of his plate, jewellery, and furniture. The widow did not during her life exercise the power of selection given her by the testator, but she left a settlement whereby she bequeathed to different legatees certain of the articles to which the power applied. *Held* (1) upon the construction of the husband's settlement, that the power of selection given to the widow was a power to be exercised within a reasonable time after the testator's death; and (2) that the power had not been exercised within due time, and had lapsed. Macdonald's Trustees v. Bain's Trustees, July 2, 1896, p. 913.

Vesting—Direction to divide among children of daughter in event of daughter "leaving issue."

16. A testator directed his trustees to pay the interest of a sum of £36,000 equally amongst his three daughters, and continued—"On the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide amongst the issue of each of my said daughters," one-third of the foresaid sum of £36,000. A, one of the daughters, who survived the testator, died leaving two children, and predeceased by two other children, who had survived the testator, but had died childless. *Held* that the gift to the issue of the daughters did not vest until the death of the daughters respectively, and consequently that the representatives of the predeceasing issue of A took nothing. Garland's Trustees v. Macaulay's Executors, March 12, 1896, p. 598.

Vesting—Repugnancy—Power to trustees to postpone payment—Conditional institution of children of beneficiary dying before payment.

17. A testator, by the fifth purpose of his settlement, directed his trustees to divide the residue of his estate in certain proportions among his children. Terms of a later clause which were *held* not to be repugnant to the gift in clause fifth, but were to be read as effectually qualifying

SUCCESSION—*Continued.*

that gift, so that portions of capital retained by the trustees from the share of a son in the exercise of the power conferred on them by the later clause, and in their hands at the death of the son, leaving issue, did not vest in such son. White's Trustees v. White, June 20, 1896, p. 836.

Vesting—Direction to trustees to pay at postponed period—Whether "children" includes "grandchildren."

18. A testator directed his trustees to pay the free income of the trust-estate to his widow, and after her death or second marriage to "pay to or apply for behoof of my children until the youngest attain the age of twenty-one years complete the free income of my said estates." The testator further directed his trustees,—"So soon as convenient after my youngest child attains the age of twenty-one years complete, and after the interest of my said spouse has ceased by her decease or having entered into another marriage, my said trustees shall either convey or pay over the whole of the free residue of my estates to my children equally, the issue of any child who may have predeceased leaving issue coming in place of and taking the share which would have been taken by the predeceasing parent if in life." In a special case presented after the widow's death, *held* (1) that vesting of the residue was postponed until the youngest child attained twenty-one years of age; and (2) that from the date of the widow's death till the time when the youngest child attained twenty-one years of age the income fell to be divided among the testator's surviving children, and that the issue of children who had died were not entitled to participate therein. Adam's Trustees v. Carrick, June 18, 1896, p. 828.

Vesting—Vesting subject to defeasance—Liferent and fee.

19. A testatrix directed her trustees to invest the sum of £1300, and divide the annual interest therefrom equally between her nieces Jane and Isabella during their joint lives, and on the death of either without lawful issue, to pay the whole annual interest to the survivor; but in case either should die leaving lawful issue, then such issue should be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum should be paid to the lawful issue of each of Jane and Isabella; "but declaring always, that if either or both of the said Jane and Isabella shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall, on the death of the survivor, be paid by the said trustees to my brother, the said Robert Cumming." The testator was survived by the two nieces, who were not married, and by Robert Cumming. *Held* that the fee of the sum of £1300 vested at the death of the testatrix in Robert Cumming, subject to defeasance to the extent of one-half in the event of Isabella leaving issue, and to the extent of the other half in the event of Jane leaving issue. Cumming's Trustees v. Anderson, Nov. 15, 1895, p. 94.

Vesting—Declaration as to term of vesting—Destination to survivors—Conditional institution of issue of predeceasers—Conditio si sine liberis.

20. A testator directed his trustees to pay the liferent of the residue of his estate to his daughter and her husband, and at the first term of Whitsunday or Martinmas after the death of the survivor, to divide and pay the whole residue, equally, share and share alike, among their children, and the survivors and survivor of them, declaring that payment should not be made to any grandchild till the first term of Whitsunday or Martinmas after reaching majority. "Further, in the event of its happening that all of my said grandchildren predeceased the terms of payment of their respective provisions, without leaving lawful issue, and all of which provisions it is hereby declared shall vest at the said terms of payment so fixed by me, then and in that case, but in that case only,

SUCCESSION—*Continued.*

I direct my trustees . . . to divide, pay, and make over my estate, hereinbefore settled on my said grandchildren, equally, share and share alike," among certain nephews and nieces. The testator was survived by his daughter and her husband. The latter outlived his wife, and died on 21st March 1895, predeceased by four children who had survived their grandfather, the testator, and survived by two children, of whom one, Mrs N., died on 17th April 1895, leaving issue. *Held* (1) that no share of the residue vested in Mrs N., in respect that she predeceased the term of Whitsunday 1895, which was the term of payment; and (2) that her issue were entitled, in virtue of an implied conditional institution in the trust-settlement, to succeed to the half of the residue which would have fallen to their mother, had she survived the term of payment. Neville v. Shepherd, Dec. 21, 1895, p. 351.

Vesting—Fee and Liferent—Liferent allenarly, with fee to issue.

21. A testator directed his trustees to convey his whole estate to his children "equally among them, share and share alike," the conveyance "to be made at the periods and subject to the conditions following . . . and if a daughter or daughters, upon her or their severally attaining majority, but my said trustees are in this last case hereby directed and required to reinvest the share or shares of my estate coming to her or them . . . taking the conveyances or securities thereof in favour of my said daughter or daughters in liferent for their liferent use allenarly, and to their child or children to be lawfully procreated of their bodies in fee." The trustees conveyed to trustees nominated by a daughter, who had reached majority, her share for her liferent use allenarly, and to her children in fee. She died without issue, leaving a will, which disposed of her share. *Held* that the daughter's share had vested in her, and was carried by her will. Stewart's Trustees v. Stewart, Jan. 22, 1896, p. 416.

Vesting—Long Lease—Destination—Conditio si institutus sine liberis decesserit.

22. Certain subjects were leased for 950 years to A. P., "and his heirs as after mentioned," and failing him "then the whole subjects to and in liferent only to the present wife of the said A. P. . . . and after the death of the said spouses . . . then to the children of their marriage equally between them, share and share alike, in fee." A. P. was survived by his wife. Three children of their marriage were alive at the date of the lease, of whom two survived their father. *Held* in a competition as to the right to the lease on the death of the widow, that the right to the lease, subject to the widow's liferent, had vested on the death of the father in the two children then alive to the extent of one half each, and that a daughter of the third child who had predeceased that date had no right, as the *conditio si sine liberis* did not apply, the lease having been granted by a stranger to the family, and not as a parental provision. Marquis v. Prentice, March 12, 1896, p. 595.

Satisfaction—Debitor non præsumitur donare—Proof—Extrinsic Evidence.

23. *In an antenuptial marriage-settlement between S. and C., his intended wife, J., a stranger covenanted to pay, at his death, to the marriage-contract trustees* £4000 *free of duty, with interest at* 4 *per cent from that date till payment, to be held for C. and her husband, or survivor, in liferent, and their children in fee, and failing children, to be held for J. absolutely. By the marriage-contract C. was bound to assign* acquirenda *to her marriage-contract trustees to be held in trust for behoof of herself and her children, and failing children, her executors. By his trust-disposition and settlement J. directed his trustees to pay "a legacy" of* £4000 *to C., providing that she should be allowed* 5 *per*

SUCCESSION—*Continued.*

cent interest so long as she should allow it to remain "as part of the share of the Indigo Concern." Held (1) (aff. *judgment of Second Division*) *that this legacy was not in satisfaction of the marriage-contract provision, and that J.'s trustees were bound to pay both sums; and* (2) *that J.'s trustees were not entitled to lead evidence to shew that J. used the word "legacy" as meaning "provision."* Johnstone v. Haviland, Feb. 17, 1896, H. L., p. 6.

Election—Equitable Compensation.

24. By a universal settlement a testator conveyed his heritable estate to his widow in trust, for behoof of herself in liferent and of his son in fee. He conveyed his whole moveable estate to his widow absolutely. The son having claimed legitim, the widow raised an action against him for declarator that the heritable estate belonged to her in fee-simple. The Court appointed the son to state in a minute whether he averred that the value of his interest in the heritable estate, subject to the pursuer's liferent, exceeded the value of his legitim with the interest accrued thereon, and the son having lodged a minute stating that he did not make this averment, the Court *held* that the pursuer was entitled to the lands in fee-simple to compensate her *pro tanto* for the loss which she had sustained in consequence of the defender's election. Ross v. Ross, July 15, 1896, p. 1024.

Election.

25. *Observations* (*per* Lord Kinnear) on the circumstances in which a widow, who has expressly accepted the provisions made for her in her husband's settlement, might still be entitled to recall her election and to claim *jus relictæ*. Dawson's Trustees v. Dawson, July 9, 1896, p. 1006.

Mutual Settlement.

26. Mutual settlement between spouses—Power to revoke—Reasonable provision for wife—Conjugal Rights Amendment Act, 1861, sec. 16. Mudie v. Clough, July 17, 1896, p. 1074.

Annuity—Contribution of separate estates to common burden.

27. Where two heritable estates, which were both subject to the common burden of an annuity, passed into the possession of separate proprietors, *held*, in a question between these proprietors, that each estate was bound to contribute to the annuity from year to year, in proportion to the amount of its free rental after deduction of the interest on prior burdens. Ferrier v. Cowan, March 20, 1896, p. 703.

See *Charitable and Educational Bequests and Trusts—Donation—Entail—Insanity—Marriage-Contract—Trust.*

SUPERIOR AND VASSAL. *Bond and Disposition in Security of a Superiority—Maills and Duties.*

1. *Held* that the creditor in a bond and disposition in security of a superiority, with an assignation to feu-duties and casualties, has no title to sue an action of maills and duties against the vassal of his debtor for recovery of the feu-duties. Nelson's Trustees v. Tod, July 9, 1896, p. 1000.

Reservation in feu-charter—Power to "search for and work out" coal—"Shank or open the ground"—"Close or garden."

2. A feu-charter, dated in 1728, contained a reservation in the granter's favour of the coal under the subjects feued, with power "to search for, work out, and dispose of the said coal, . . . and provided that, in searching for or working said coal we doe not shank or open the ground within the house, office-houses, closs, or gardens to be built or made upon the said lands." In 1895 a successor of the granter commenced boring operations at a spot which was within thirteen yards of one of the main entrances of the mansion-house built upon the feu, and which was situated in an artificially made and enclosed piece of ground laid

out partly in grass and partly in flower beds. The bore was sunk in the part laid out in grass. In a note of suspension and interdict presented by the feuar to have the boring operations interdicted, *held* (1) that "boring" was covered by the expression "opening the ground"; and (2) that the place where the operations were being carried on was a "closs or garden" in the sense of the charter, and was therefore within the prohibited area. Macdonald v. Welsh, July 9, 1896, p. 995.

Reservation of freestone with right to feuar to dig freestone for building on feu—Whether railway bridges and other works within right.

3. A feu-charter, which reserved the freestone to the superior, gave power to the feuar, notwithstanding the reservation, to dig or work the freestone for erecting "houses and offices, or walls or other buildings" upon the feu, or for making or repairing the roads thereon. A railway company having taken over the feu by compulsory purchase, *held* that it was within the powers of the feuar to dig freestone for the construction of bridges and other railway works on the feu. Davidson's Trustees v. Caledonian Railway Co., Oct. 29, 1895, p. 45.

Reservation of minerals—Lease of minerals—Damage caused to feu by working of minerals—Action by feuar against granter—"All parties not called."

4. A granted a feu of certain subjects, reserving the minerals, and afterwards leased the minerals. Injury having subsequently been occasioned to the surface of the feu by the workings of the mineral tenants, the feuar raised an action of damages against A. The defender, averring that the injury was due solely to the fault of the mineral tenants, pleaded, "All parties not called." *Held* that the pursuer was entitled to proceed with his action without calling the mineral tenants. Highgate & Co. v. Magistrates of Paisley, July 9, 1896, p. 992.

Reduction by vassal of the feu-contract in favour of his predecessor on the ground that it was ultra vires of the granter.

5. A feu granted by trustees in 1867 was sold by the vassal in 1888 to A, who recorded the disposition in his favour in the Register of Sasines, and thereby obtained an implied entry. In 1895 A raised an action against the trustees for reduction of the feu-charter, on the ground that it was *ultra vires* of the trustees. *Held* that the ground of reduction stated was not relevant, in respect (1) that the pursuer, if prejudiced, was not prejudiced by the feu-charter, but by the contract he had made with the original vassal, to which the trustees were not parties; (2) that the pursuer, being an entered vassal, was not entitled to reduce the feu-contract without clearing the record of the disposition in his favour. Tayport Land Co., Limited, v. Dougall's Trustees, Dec. 13, 1895, p. 287.

Ultra vires—Prescription.

6. *Question*, whether a feu-charter granted by trustees in 1867, and bearing to be granted in the exercise of powers conferred by a private Act of Parliament (which was mentioned), and only in so far as consistent with the Act, could be validated by prescriptive possession, so as to exclude the plea that it was *ultra vires* of the trustees in respect that the conditions of the Act had not been complied with. Tayport Land Co., Limited, v. Dougall's Trustees, Dec. 13, 1895, p. 287.

Building restrictions—Personal objection—Servitude—Real burden.

7. In 1871 Harper, the proprietor of an area of unbuilt-on ground in Glasgow granted a bond and disposition in security over the ground, reserving power to feu the same, it being declared that the superiority of the lands feued should be subject to the security. Thereafter Harper feued out part of the ground under building restrictions, and bound himself to take the feuars in the unfeued plots bound to conform to

SUPERIOR AND VASSAL—*Continued.*

these restrictions, which were declared to be essential qualifications of the feu-contract and real liens and burdens upon the plots thereby disponed, and in so far as declared in favour of the vassal, a real lien and burden on the remainder of the ground. Buildings were erected on the plots feued in conformity with the feu-contracts. Subsequently the superiorities of the plots feued were sold with the consent of the bondholder, and the security was restricted to the unfeued ground. In 1894 the bondholder, under the powers in his bond, sold the unfeued ground, and the purchasers having proposed to erect on the ground houses which were disconform to the restrictions, the proprietors of the feus granted by Harper brought an action against the purchasers of the unfeued ground to have it declared that the ground was subject to the building restrictions and conditions contained in Harper's feu-contracts. The Court *assoilzied* the defenders, holding (1) that as the defenders had not acquired the superiorities of the feus granted by Harper they were not liable in the personal obligations undertaken by him to the feuars; (2) that the personal obligations undertaken by Harper to the feuars after he had granted the bond with power of sale could not affect the right of the bondholder or of his successors in the unfeued ground; (3) that the restrictions had not validly been made real burdens on the unfeued ground, as they did not enter the titles thereof; (4) that the feu-contracts granted by Harper could not create a servitude *altius non tollendi* over the unfeued ground, in respect that there was no separate and distinct condition as to height, although a limitation as to height might be inferred from the conditions of the feu-contracts as a whole; (5) that assuming the defenders to have been in the knowledge of the conditions in Harper's feu-contracts, they were not thereby barred from erecting buildings inconsistent with these conditions. Morier v. Brownlie & Watson, Nov. 1, 1895, p. 67.

Building Restrictions—"Villa."

8. A feu-charter provided that the vassal should not be entitled to erect on the feu "buildings other than villas." He proposed to erect thereon a row of contiguous self-contained houses of two storeys, with separate gardens, before and behind. The superior objected. *Held* that the proposed buildings were not "villas." Millar v. Trustees for Endowment Committee of Church of Scotland, March 4, 1896, p. 557.

Building restrictions—Feu-disposition—Plan annexed to disposition.

9. A proprietor who had prepared a general feuing-plan of his estate sold part of it and bound himself in the disposition granted by him "to adhere to the general feuing-plan of our said lands, and to erect on the lands houses of the character and style indicated thereupon . . . a reduced copy whereof is hereto annexed, and signed as relative hereto, and to give effect to this condition in all feu-contracts, dispositions, and other conveyances of the plots of ground shewn on the said feuing-plan, and which declaration is also hereby declared to be a real lien and burden upon our said lands." The plan was merely a ground-plan shewing the building line of the streets. On the line of the building were written the words "for self-contained lodgings and corner tenements." In an action by the disponer against the disponees for declarator that the restriction was not binding, *held* that the clause imported no more than it expressed, viz., an obligation on the disponer to build houses of a certain description, and that, as it was not contended that anyone could compel the disponer to build, the clause had no effect. Assets Co., Limited, v. Lamb & Gibson, March 6, 1896, p. 569.

Obligation to make road—Feu-contract—Jus quæsitum tertio.

10. By feu-contract, dated in 1871, B's trustees, the first party, disponed two plots of ground, part of the lands of Blochairn, to C D, the second party, their heirs and assignees, "declaring, as it is hereby

SUPERIOR AND VASSAL—*Continued.*

expressly provided and declared, that a street" of 60 feet in breadth should be made along the south of the plots of ground disponed, and that it should be formed upon such levels as the first party (B's trustees) or "their successors in the said lands and estate, including any parties who have feued or who may feu or purchase the ground on the opposite side of the said street," and the second party or their foresaids might think fit, "having regard to the continuation of the same eastward, so as conveniently to accommodate the portion of the first party's remaining lands lying . . . to the east of the ground hereby feued." It was further provided that the second party and their foresaids should be bound, whenever required "by the first party or their foresaids, including as aforesaid," to make the one-half of the roadway situated next to the plots of ground thereby disponed. It was further declared that the first party and their foresaids should be entitled to give a power to use the said street, and any others that might be formed by the second party and their foresaids in the ground disponed, to their feuars in the remaining parts of their lands of Blochairn, and that the second party and their foresaids should have power to use any streets which should be formed by the first party or their feuars in the remaining portions of the lands of Blochairn, and the first party bound themselves to insert clauses sufficient to secure those subjects in all future conveyances of the lands of Blochairn or parts thereof. In 1877 B's trustees sold and disponed parts of the lands of Blochairn, lying to the east of the ground feued in 1871, to E F, with their "whole rights, title, and interest, present and future therein." The disposition imposed no obligation to construct any road upon the disponees, and contained no reference to the obligation imposed upon C D by the feu-contract of 1871. In an action by E F to compel a successor of C D to implement their obligation in the feu-contract of 1871 to make the sixty feet road, *held* that the pursuers had no title to sue in respect that (1) the disposition in their favour did not contain any assignation of the rights of B's trustees under the feu-contract of 1871; (2) they were not successors of B's trustees in the lands of Blochairn, or feuars upon the south side of the proposed sixty feet street; and (3) there existed no mutuality of rights and obligations between them and the vassals under the feu-contract of 1871. Stevenson v. Steel Co. of Scotland, Limited, July 17, 1896, p. 1079.

Personal obligation in feu-contract.

11. *After argument, counsel for the appellants consented to the appeal being dismissed.* Callander and Trossachs Hydropathic Co., Limited, v. Marshall, May 8, 1896, H. L., p. 55.

See *Property*, 2, 3.

SUSPENSION. See *Diligence.*

THELLUSSON ACT. See *Succession*, 4, 5.

TITLE, OBJECTIONS TO. See *Sale*, 2, 3—*Expenses*, 4.

TITLE TO HERITAGE. See *Property*, 1, 2, 3, 4.

TITLE TO SUE. See *Charitable and Educational Bequests and Trusts*, 2.

TRADE NAME. *Hotel—Hotel Sign—"Golden Lion"—Interdict.*

In January 1896 the proprietors of the Golden Lion Hotel, Stirling, raised an action against Lennox, the tenant of that hotel, and proprietor and occupant of the Station Hotel, Stirling, to interdict him "from using in any way upon or in connection with the Station Hotel a gilt figure or trade sign of a lion, or any painted or printed copy or facsimile thereof which has been used in connection with and recog-

TRADE NAME—*Continued.*
nised as the trade sign of the Golden Lion Hotel, Stirling." *Held* that, having regard to the fact that the words "Station Hotel" were conspicuous on that hotel, the use of a gilt lion on the roof implied no representation that the business of the Golden Lion Hotel had been transferred to it, and did not tend to mislead the public, and that as the pursuer did not aver that any members of the public had in fact been misled, he was not entitled to prove that such was the fact. Crawford's Trustees v. Lennox, May 22, 1896, p. 747.

TRAMWAY. *Burgh—Street—Obstruction of street—Nuisance—Interdict.*
A tramway company which had a statutory right to use certain streets in a town for their traffic were in the practice, when a snowstorm occurred, of removing the snow from their tramway lines to the sides of the streets by the use of a snow-plough, and of afterwards scattering salt upon the lines. The town-council, which was the Local Authority, approved of these operations. In a suspension and interdict brought by an inhabitant to have the tramway company interdicted from continuing this practice, *held* that as the Local Authority were entrusted with the duty of seeing that the streets were cleared in such emergencies as a heavy snowstorm, and as they approved of the methods employed by the tramway company, the note of suspension and interdict fell to be refused. Ogston v. Aberdeen Tramway Co., Dec. 20, 1895, p. 340.

TRUST. *Constitution—Implied trust—Mortgage over ship—Agreement for repayments out of profits—Specific appropriation—Breach of trust.*
1. A offered to advance to a shipping company £15,000 on a mortgage over a steam vessel, on "condition that all profits earned by the steamer to be paid to us towards reducing the loan till the loan shall have been reduced to £10,000." The managing committee of the company agreed to accept the offer, subject to the modification "that instead of all the profits being paid to A till the mortgage was reduced to £10,000, they should be paid at the rate of £2000 per annum until then." A agreed to the modification, and the arrangement was approved by the company. Subsequently the advance was made, and the mortgage granted. The company went into liquidation. *Held* that the agreement imported merely a personal obligation by the company to pay to A £2000 per annum from profits, and that A had no preference over the profits. Graham & Co. v. Raeburn & Verel, Nov. 7, 1895, p. 84.

Constitution—Inter vivos disposition—Right to revoke.
2. By trust-disposition and assignation S assigned and disponed certain heritage described in the deed, and the whole remainder of her estate, heritable and moveable, to trustees, first, for behoof of herself in liferent, exclusive of the *jus mariti* and right of administration of any husband she might marry; and second, for behoof of her two sisters and their respective heirs in fee. In the third place, she provided that, notwithstanding the above provision of liferent and fee, it should be within the power of her trustees, at any time, in their sole discretion, to advance to her the whole or such part of the capital as they might think fit. She further declared that the deed should be held as an alimentary provision for behoof of herself, and should not be affectable or attachable by her debts or deeds, or the diligence of her creditors. The deed was delivered to the trustees, who accepted office, and was thereafter recorded in the Register of Sasines. *Held* that the deed was not revocable by S. Shedden v. Shedden's Trustees, Nov. 29, 1895, p. 228.

Constitution—Universal trust-disposition—Power to revoke.
3. A trust-disposition was executed in the following terms:—"I . .

TRUST—*Continued.*

appoint" A and B, "my trustees and managers of my affairs, and that absolutely, and for that purpose I assign, dispone, and make over to them . . . my whole heritable and moveable property . . . And I direct my trustees as follows:—(First) My said trustees shall take possession of my estates foresaid, as I hereby authorise them to do, for the purposes after mentioned; (Second) My said trustees will give me the free income of my estate during my lifetime, and I undertake not to interfere with them in any manner of way; (Third) At my death I direct my said trustees to dispose of my estates after making payment of the legacies after mentioned." Directions then followed as to the disposal of the truster's estate at her death, and the payment of legacies, and the deed concluded with a clause recalling and cancelling all prior settlements executed by the truster. *Held* that the deed was to be construed as creating a trust for administration only, that it did not divest the granter of her right to the estate conveyed, and that it was revocable. Byres' Trustees v. Gemmell, Dec. 20, 1895, p. 332.

Administration—Application for directions of Court—Judicial Factors (Scotland) Act, 1889, *sec.* 18.

4. *Held* that it was not competent for the Court, upon a report by the Accountant under section 18 of the Judicial Factors Act, 1889, to give directions as to whether trustees should or should not delay to sell heritable estate, which the testator had directed them to sell at such time as they thought advantageous or expedient, that not being a question which related to the investment or to the distribution of the estate. Earl of Stair's Trustees, July 17, 1896, p. 1070.

Administration—Appropriation of investments to particular legacies—Incidence of loss on such investments.

5. Circumstances in which it was *held* that an appropriation of deposit-receipts by trustees to particular legacies was *ultra vires*, and that loss which had accrued on these deposit-receipts fell upon residue. Scott's Trustees v. Scott, Nov. 1, 1895, p. 52.

Administration—Power to retain securities on which funds invested at truster's death—Liability of trustees—Deposit-receipt—Term of payment—Guarantee of Indemnity.

6. A testator empowered his trustees to retain securities upon which his estate might be invested at his death. The trustees accordingly retained certain deposit-receipts with a foreign bank which were not yet payable, under a guarantee from two of their number to indemnify them from all loss which they or the trust-estate might incur by continuing to hold the said deposit-receipts. Before the deposit-receipts matured the bank suspended payment. *Held* that neither the trustees nor the guarantors were liable to make good the loss sustained by the bank suspending payment, as it did not appear that the deposit-receipts could have been realised before they matured. Scott's Trustees v. Scott, Nov. 1, 1895, p. 52.

Administration—Personal liability of trustees—Failure to fulfil trust directions as to audit of factor's accounts.

7. *A truster empowered his trustees to appoint a factor, who might be one of their own number, and directed them "annually, within one month after the 31st day of December in each year during their administration, to cause their factor to make up an account of the intromissions had by him in virtue hereof in the course of the year ending on that date, and to lay the same, with the whole vouchers thereof, before them, to be by them examined and audited." The trustees did not obey the truster's direction as to an annual account and audit, but the factor's accounts were occasionally rendered and examined. The factor's account for the period from 1st March* 1888 *to 1st June* 1890, *which was correct, and was examined by the trustees, shewed that the trust-estate was due to the*

[RUST—*Continued.*

factor a balance of £61, *and that one and a-half year's interest, amounting to* £130, *was due to heritable creditors. There was no subsequent examination of the factor's accounts by the trustees. In December* 1891 *the factor absconded and became bankrupt, leaving unaccounted for a balance of* £382 *of trust funds, of which* £165 *had come into his hands between June and December* 1890, *and the remainder in* 1891. *In an action brought by a beneficiary under the trust to have the trustees ordained to replace the balance due by the factor, on the ground of contravention of the trust-deed, and* separatim, *of "gross breach of trust and neglect of duty, whereby a portion of the trust-estate had been lost," it was proved that if the trustees had in January* 1891 *called for the factor's account it would have shewn that he had in hand* £165 *of trust funds, subject to his own claim for* £61, *and to claims by heritable creditors for* £130 *of arrears of interest. It was proved that prior to December* 1891 *the trustees had no cause to doubt the honesty or solvency of the factor.* Held (rev. *judgment of Second Division*) (1) *that there was* culpa lata *on the part of the trustees in failing to call for the factor's account in January* 1891; (2) *that the* onus *lay upon the trustees to shew that if they had called for the account in January* 1891 *the balance of* £104 *then in the hands of the trustee would have been lost notwithstanding, and that the trustees having failed to discharge the onus, they were liable for said sum;* (3) *that the trustees were not in fault in regard to sums received by the factor after* 31*st December* 1890, *and were not liable therefor.* Carruthers v. Carruthers, July 13, 1896, 33 L., p. 51.

inistration—Ultra Vires—Reduction by vassal of the feu-contract in vour of his predecessor on the ground that it was ultra vires of the stees who had granted it.

eu granted by trustees in 1867 was sold by the vassal in 1888 to A, recorded the disposition in his favour in the Register of Sasines, thereby obtained an implied entry. In 1895 A raised an action nst the trustees for reduction of the feu-charter, on the ground that as *ultra vires* of the trustees. *Held* that the ground of reduction d was not relevant, in respect (1) that the pursuer, if prejudiced, not prejudiced by the feu-charter, but by the contract he had made the original vassal, to which the trustees were not parties; (2) the pursuer, being an entered vassal, was not entitled to reduce u-contract without clearing the record of the disposition in his . Tayport Land Co., Limited, v. Dougall's Trustees, Dec. 13, p. 287.

ration—Ultra vires—Prescription.

, whether a feu-charter granted by trustees in 1867, and bear- e granted in the exercise of powers conferred by a private Act ament (which was mentioned), and only in so far as consistent e Act, could be validated by prescriptive possession, so as to the plea that it was *ultra vires* of the trustees in respect that itions of the Act had not been complied with. Tayport Land ited, v. Dougall's Trustees, Dec. 13, 1895, p. 287.

tion—Power to make advances out of capital—Discretionary trustees—Judicial Factor—Special Powers.

conveyed to certain persons named and to such other persons be assumed in terms of law to act in the trust, as trustees for the trust, his heritable and moveable estates. He directed s, *inter alia*, to retain and invest £4000 for behoof of his ferent allenarly and of his issue in fee, and on the death of issue to pay the sum to the testator's other sons, subject to n that "in case at any time my trustees may in the exer- judgment and discretion think it prudent and advisable to

pay over" to D "the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted full power, authority, and liberty to do so, . . . it being my intention to give to my trustees the same full powers and discretion in giving the said principal sum" to D, "which I myself now possess." A judicial factor who had been appointed in room of the trustees, who had resigned, presented a petition, bearing to be at D's request, for power to invest a portion of the £4000 in the purchase of an annuity in favour of D and his wife, and the survivor of them. The Lord Ordinary refused the petition, on the ground that the trust-deed did not authorise any payment for behoof of D's wife. The judicial factor having reclaimed, and lodged a minute stating that in his opinion the proposed application of the portion of the trust-estate was prudent and advisable, the Court, holding that the proposed investment, being at D's request, was virtually a payment to D himself, *granted* the prayer of the petition. Howden v. Simson, Nov. 16, 1895, p. 113.

Administration—Power to withhold payment—Exercise of power.

11. A truster, after directing his trustees to divide the residue of his estate amongst his sons on their attaining majority, provided that the capital of one-half of their shares should not be payable to them until the age of twenty-five; "declaring, nevertheless, that my trustees shall have power to pay to any of my sons the capital of the said half, in whole or in part, as soon after he shall have attained majority as they shall deem advisable, and that, on the other hand, my said trustees, if they shall consider it for the interest of any of my sons, shall have power to withhold payment of the capital of such half . . . even after he shall have attained the age of twenty-five, . . . and that either during the remainder of his life or for such shorter period or periods as my said trustees shall from time to time determine," meantime paying him the interest. One of the sons survived his father, and died two years after attaining the age of twenty-five, without having received payment of the whole of his one-half share of the residue. The trustees had not recorded any minute determining to exercise their power to withhold payment, but they had in point of fact not paid, without protest on the part of the son. *Held* that in retaining the portion of the one-half share the trustees were to be presumed to have acted in the exercise of the power conferred on them, and there being no evidence to the contrary, that there had been a valid exercise of the power. White's Trustees v. White, June 20, 1896, p. 836.

Administration—Loan—Proof—Writ—Writ of executor and trustee—Writ of beneficiaries—Res inter alios.

12. In an action of multiplepoinding brought by a testamentary trustee, a claim was lodged by A, who averred that "from time to time she made loans of money" to the truster amounting in all to £390. In support of her claim A referred to a minute of agreement entered into between the truster's widow, since deceased, who was at the time his executrix and sole trustee, and his eldest son, under which the son took over at a valuation a crop and stocking on certain farms of which the truster had been tenant. There was appended to the minute, which was tested, a state of the trust funds, and among the "outstanding debts" was entered "sum on debt due to" A "£390." The state was signed by the widow and eldest son, and appended to it was a docquet signed by the truster's other children who, with the widow and eldest son, were the beneficiaries under his will, approving of the minute of agreement, and also "approving of and holding as correct, and duly vouched" the state of trust funds. A, to whom the document had not been delivered or exhibited at any time, maintained that the debt of £390

was proved by it, or alternatively that it raised a *prima facie* case of loan which she was entitled to supplement by parole proof. *Held* (1) that the docquet was not a writ binding on the beneficiaries as in a question with A, but was merely an admission or discharge by them in favour of the truster's widow; (2) that the entry of the sum of £390 was ineffectual to prove a debt due by the trust-estate, in respect (*a*) that the writ in which it occurred was not delivered to A as an acknowledgment by the trustee that the debt was due, and (*b*) that such an acknowledgment, if delivered to A, would not have been binding on the trust-estate; and (3) that the writs being themselves insufficient to prove the constitution of a loan there was no room for parole proof to any effect. Dunn's Trustee v. Hardy, March 12, 1896, p. 621.

Resignation of trustee—Revocation—Trusts (Scotland) Act, 1867, *sec.* 10, *Schedule A.*

13. *Held* that a minute of resignation by a trustee, in the form of the Trusts Act, 1867, sec. 10, Schedule A, could not be revoked after intimation to the co-trustees, although it did not take effect in terms of the statute till a subsequent date. Fullerton's Trustees v. James, Nov. 16, 1895, p. 105.

Removal of Trustee—Non-gratuitous Trustee—Petition—Inner-House—Nobile officium—Trusts (Scotland) Amendment Act, 1891, *secs.* 2 *and* 8.

14. In a petition to the Inner-House for the removal of a trustee on the ground of incapacity, which was presented at common law, and made no reference to the Trusts Act of 1891, *held* that the Court, having jurisdiction to deal with the question of removal, was not entitled to treat the application as an appeal to its discretion for the exercise of its *nobile officium*, but was bound to apply the provisions of section 8 of the Trusts Act, 1891, and to remove the trustee on proof of his incapacity. Tod v. Marshall, Oct. 23, 1895, p. 36.

Removal of trustee—Sequestration and adverse interest of trustee.

15. A petition at the instance of one of two testamentary trustees and executors, who were also tutors to the truster's pupil children, for the removal of the other trustee from these offices on the ground that his estates had been sequestrated, and that the trust had a claim against his estate, *granted.* Whittle v. Carruthers, June 2, 1896, p. 775.

Denuding—Demand for payment by one of several fiars with consent of liferenter.

16. A testator conveyed his heritable and moveable estates to trustees for payment of certain legacies and annuities, and for payment of the liferent of the remainder to his widow. He further directed his trustees after the death of the longest liver of himself and his wife to pay a provision of £18,000 to his son, and a provision of £8000 to each of his four daughters, and to hold the residue of his estate for behoof of his son. He declared that the children's provisions should vest at his decease. The testator was survived by his widow and by his five children. The son applied to the trustees for payment of his provision of £18,000. The widow consented to the application, and offered to discharge her liferent in regard to that sum. The funds in the hands of the trustees at the date of the application were amply sufficient to meet all the children's provisions. *Held* that the trustees were not bound to accede to the son's demand, in respect that the daughters were entitled to *pari passu* payment of their provisions along with the son, and that it was possible that when the date of payment arrived the estate might be insufficient to pay the provisions in full. Haldane's Trustees v. Haldane, Dec. 12, 1895, p. 276.

Denuding—Marriage-Contract—Annuity to wife—Power to discharge stante matrimonio—Purchase of annuity in lieu of that provided in marriage-contract.

17. *Held* that marriage-contract trustees were not entitled to denude of a

TRUST—*Continued.*

sum of £40,000 burdened with an annuity to the wife, which she had agreed to discharge, in respect that the annuity was a marriage-contract provision which the wife was not entitled *stante matrimonio* either to alienate or to discharge.

Held, further, that the trustees were not entitled to purchase with the trust funds an annuity in their names, payable to the wife, and, *quoad ultra*, to denude of the trust funds, in respect (1) that the security of the trust funds was greater than that of a purchased annuity, and (2) that a purchased annuity, not being protected by the marriage-contract trust, could be alienated by the wife. Ker's Trustees v. Ker, Dec. 13, 1895, p. 317.

See *Charitable and Educational Bequests and Trusts—Expenses*, 6, 9.

ULTRA VIRES. See *Burgh*, 3—*Company*, 8, 13—*Police*, 1, 5.

UNIVERSITY. *Affiliation of College—Affiliation and incorporation distinguished—Universities (Scotland) Act*, 1889, *secs.* 15, 16, *and* 21.

Held (1) *that the power to rescind an affiliation of a College to a University under section* 5 *of the Universities (Scotland) Act*, 1889, *was applicable only to cases of mere affiliation, and would not apply to the case of Dundee College, in the event of its being affiliated and made to form part of the University of St Andrews; and* (2) *that section* 21 *could not be construed as giving power to the University of St Andrews, after Dundee College had been incorporated with it, to revoke the ordinance making the incorporation.* Metcalfe v. Cox, July 27, 1896, H. L., p. 60.

VALUATION ACTS. *Subjects—Erections by lessee—Clayfield—"Minerals"—Lands Valuation (Scotland) Amendment Act*, 1895, *sec.* 4, *Exemption* 2.

1. A tenant who under his lease had right to dig and take clay to a considerable depth below the surface made certain erections upon the ground let to him, which he used exclusively for the purpose of working the clay. *Held* that "clay" was a "mineral" within the meaning of exemption 2 of section 4 of the Lands Valuation (Scotland) Act, 1895. Assessor for Portobello v. Mitchell & Sons, March 20, 1896, p. 686.

Subjects—Erections by lessee—Rent calculated by minerals treated in erections—Lands Valuation (Scotland) Amendment Act, 1895, *sec.* 4, *Exemption* 3.

2. A chemical company under agreement acquired right to recover the tar and ammonia from the gases of the adjoining blast-furnaces of an iron company at a royalty of one shilling per ton on the coal consumed in the furnaces of the latter. They erected buildings for the purpose of working the gas on a piece of ground adjoining the ironworks, which had been leased to them under the agreement. *Held* that as the lease was not a lease of minerals, exemption 3 of sec. 4 of the Lands Valuation (Scotland) Amendment Act did not apply. Furnace Gases Co., Limited, v. Assessor for Lanarkshire, March 20, 1896, p. 689.

Value—Houses let by railway company to employees—Fair Annual Value—Valuation of Lands (Scotland) Act, 1854, *sec.* 6.

3. The Caledonian Railway Company let houses by agreement to their employees at a rent fixed upon a general scale for their whole system, and having no relation to the values of similar houses in the locality. *Held* that the rent was not "conditioned as the fair annual value" of the houses, and that the assessor was justified in disregarding it and in fixing the valuation by comparison with the rent of similar houses in the locality. Caledonian Railway Co. v. Assessor for Lanarkshire, March 20, 1896, p. 691.

VALUATION ACTS—*Continued.*

Value—Subjects in occupation of owners—Co-operative store—Separate industries in same range of buildings—Whether to be taken as unum quid—Valuation by percentage upon cost of erection.

4. Premises belonging to a Co-operative Association consisting of a range of buildings which included a bakery, workshops, stables, and a refrigerator, were valued by the assessor as a *unum quid*, by taking a percentage on the cost of erection. There was no other building within the burgh of a similar construction and applied to similar purposes. The proprietors maintained that the several portions of the premises fell to be valued as separate subjects by comparison with the value of similar subjects in the burgh. *Held* that the Assessor was right in valuing the premises as a *unum quid* by taking a percentage of their cost. St Cuthbert's Co-operative Association v. Assessor for Edinburgh, March 20, 1896, p. 681.

Value—Subjects in occupation of owners—Disused factory—Vacant workmen's houses.

5. An Oil Company having ceased to do business, a range of houses which had been erected for the use of the employees became with a few exceptions unoccupied, and from their position it was improbable that they would be again fully let. *Held* that they fell to be valued by taking the actual rent received for the houses which were let, and adding a nominal sum of £1 per house for those which were unlet. Burntisland Oil Co., Limited, v. Assessor for Fife, March 20, 1896, p. 683.

Value—Consideration other than the rent—Goodwill—Public-House—Value of similar premises in same district.

6. A public-house was let for ten years at a rent of £24 per annum, and upon payment to the proprietor and previous occupant of £550 in name of goodwill. The Assessor, in fixing the valuation, took one-half of the £550 paid in name of goodwill as representing the goodwill attaching to the house as a heritable subject and spread it over the period of the lease at the rate of £27, 10s. a-year, making with the rent stipulated in the lease £51, 10s. as the annual value entered in the roll. In an appeal by the proprietor, *held* that, in fixing the valuation, there ought to be taken into consideration, not merely the amount paid for goodwill, but also the rents or valuations of similar licensed premises in the neighbourhood. Crawford v. Assessor for Haddington, March 20, 1896, p. 685.

WARRANTY. See *Sale*, 7, 8, 9.

WATER. See *Police*, 4, 5—*River*.

WRIT. *Testing Clause.*

1. Held *that words inserted in testing clause of a deed can have no effect in altering or adding to its provisions.* Blair v. Assets Co., May 15, 1896, H. L., p. 35.

Signature of witness.

2. One of the instrumentary witnesses never signed the minute of enactment in favour of the purchaser at a sale of heritage by auction. *Held* by Lord Kyllachy, Ordinary, that a valid contract of sale had not been completed. Moncrieff v. Lawrie, March 6, 1896, p. 577.

See *Loan*, 3, 4.

WRONGFUL USE OF DILIGENCE. See *Reparation*, 18.

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